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GOLD-PLATING IN EU CAPITAL MARKET LAW: REGULATORY PRACTICES IN SELECT JURISDICTIONS

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Foreword

When any parties decide to come to an agreement it usually represents a compromise between their interests. A compromise that is under given circumstances acceptable by both or all of them, but that is not ideal for any of them. After the agreement is signed and it is being executed each party usually tries to understand, interpret and execute it in the way that it is most favourable for its interest. Sometimes it is limited to actions falling under the letter of the agreement. Sometimes it may go beyond it.

When the 'agreement' establishes a separate entity which becomes in some sense superior to the parties and is able to establish regulations which are binding for the parties – it is obvious that not only the agreement itself represents a compromise, but also the decisions of this entity will also affect the interest of the parties and need to represent a compromise between them.

If the parties are separate, independent states – the aspect of national interest of the parties contrasted with the interest of the all the countries as a group becomes crucial. The parties, member states entered into the agreement because they believed it will be beneficial for each and every member state but would like to operate in conditions that are as favourable as possible for them compared to other participants/member states.

This is exactly the case for European Union, a supranational political and economic confederation of 27 countries established by treaties signed by its member states. The EU includes institutions empowered to issue laws and regulations which are binding on the Member states and on individuals, corporates and organisations within the territory of member states. By definition common rules and regulations must be largely the same for all Member states (with exceptions regarding proportionality and temporary exclusions). The Member states, their societies, their economies are however not the same in spite of widespread convergence between them. They have different financial infrastructure, different capital markets, banking and insurance sectors, different saving structure and often different national interests. Whatever the pan-European regulation would be it cannot favour all the Member states in the same way.

In 2015 the European Union established the concept of Capital Markets Union, a plan to create a single market for capital in the European Union: - to get money – investments and savings – flowing across the EU so that it can benefit consumers, investors and companies, regardless of where they are located. The concept mentions 3 objectives:

- supporting a green, inclusive and resilient economic recovery
- making the EU an even safer place to save and invest long-term
- integrating national capital markets into a genuine single market

Under this concept – European Union is supposed to have one common capital market offering participants from different member states access to capital and financial products from all European Union on pretty much the same rules and regulations on the basis of a free market.

It is generally aimed at benefiting investors and the European economy. However, the

parties involved in its creation and subsequent implementation of this concept are European Member States, whose most important priority is to take care of national economies and domestic investors. This generates a conflict of interest that may naturally support gold-plating.

Even countries with theoretically similar capital markets may have a different vision of this market in the future and different strategy for its development. Some would like to see an open market with new entrants both domestical and foreign. Some would like to have a concentrated market dominated by large local entities protected by relatively high entry barriers.

Another factor which supports gold-plating on national level is the concept of national regulator of capital market. Under both European and national legal systems, these institutions have a huge role in regulating national markets, issuing bylaws and para-regulations and issuing individual decisions regarding licensing, products, capital and other requirements, or even personal decisions concerning regulated institutions, their functioning and policies. These institutions have often a large influence on national capital market including capital market legislation (even if they do not have the power to shape the law directly) and in establishing national position on capital markets area at the EU forum. Like most institutions (and individuals), national regulatory authorities are not willing to give up their powers and authority – they are tempted to support gold-plating which most of the time safeguards their position.

What needs to be remembered is also a specific form of an agency conflict (which represent a conflict of interest between managing entity or managers of an institution and the owners or beneficiaries of that institution). Whereas the safety of the market maybe to some extent a common denominator for most participants and stakeholders of the capital market – the attitude to its development may be different. While companies are interested in growth of the market (assumed that they grow relative to the market or at least keep their position on the market), investors are interested in attractive rates of return at a given level of security (thus – product development) – the regulators and its managers may not always have a real incentive for enabling their national markets to grow, while they usually have a strong incentive to keep it safe and fraud-free. The agenda of the national government may differ from one country to the other, and from one government to the other. Some countries have capital markets based on their local investor based. Other serve as hubs hosting companies providing investment services mostly for foreign investors. The latter countries may be more interested in supporting the development of their capital market, even if this could have some negative consequences for its security, while the former could have a greater incentive to protect their investors/consumers first and foremost, which could have some negative effects on the development of the local capital market.

Another issue is the shape and the system of European law. Twenty-seven member states of the European Union have different legal traditions, history and jurisprudence, and quite often – a different legal system. While two major legal systems are quite distinctive from each other (being statutory law and common law), there are many smaller differences among legal system in different countries. That itself may cause a different interpretation and implementation of the same EU regulation. That is especially true in case of regulations of capital markets. These regulations were and still are under a strong influence of common law system resulting from a very strong and well-developed capital market of the United Kingdom, when UK was a member state of the EU. Interpreting and implementing to some extent a common law-based regulations in statutory law countries may produce difficulties and usually causes differences in its operation compared to a common law state.

Gold-plating when being implemented by member states is usually being justified by investor protection. While it is sometimes the case, such justification is generally a very convenient one to justify pretty any kind of gold-plating as long as it causes increased restrictions. Capital market is by definition a game of risk and return. While investors are looking for the highest return for a given risk profile or the lowest risk for a given return, governments and regulators are often focused on trying to reduce risk especially for retail investors. Even though nobody has ever created a capital market without risk and totally free from fraud – most national governments see it as a top priority and its responsibility. Pretty much any kind of additional restriction can thus be justified by these reasons, whether it really aims to make market safer or has got a different purpose. In some cases, one can even claim an adverse relation between growth of capital market and certain safeguards. A very restrictive market, that offers investors a very limited access to products, offered by large financial institutions under a heavy regulatory supervision is often considered safer for investors. It may however not grow as fast as more open markets, as investors may have a limited access to products and choose to stay within bank deposits. A more open market enabling investors (including retail investors) a wider access to products provided by a large number of financial institutions provides investors with more investment opportunities but may sometimes lead to misselling or facilitate other fraudulent practices. The optimal level of regulation to ensure market growth, attractive products for customers, and access to capital for companies on the one hand, and to ensure investor safety on the other has always been and will probably be the subject of discussion.

One source of actual gold-plating in many jurisdictions is the practice of a regulatory/market surveillance authority that may impose additional requirements for licensed entities based on certain general regulations or a process for supervising licensed entities. This may generate additional burdens that do not result directly from national legislation but have a very similar effect and business consequences as regular gold-plating. In some cases, capital market regulatory/supervisory authorities are operating with delays in various processes beyond (in some cases and jurisdictions significantly) the statutory deadlines, which may have a similar effect on market participants.

Industry lobbying may also be a factor favoring gold-plating. On some markets local regulations including gold-plating are generating entry barriers for foreign investment companies or even preventing foreign companies to enter the market. In such situation local players which are already at the market are beneficiaries of this gold-plating. If the market opens due to direct implementation of EU regulations, local companies may experience increased competition from international or global players.

The aforementioned circumstances are among the major reasons while gold-plating is (and probably will be in the future) present in national legislation among the EU countries. The level and the areas of this complex situation will however depend on both member states' willingness to give up their national powers to the EU institutions and on the EU legislator which may prevent gold-plating by issuing laws that make it more or less difficult for it to take place.

This report was created as a continuation of the REPORT ON GOLD-PLATING IN POLISH CAPITAL MARKET LAW prepared by CFA Society Poland in 2021, which was published in November 2021.

It includes Germany, Italy, Spain, Netherlands, Luxembourg, Malta, Finland and Ireland. Capital markets of these countries are important parts of European capital market and represent different types of financial environment. While Germany, Italy and Spain represent large markets based mainly on local/national client base. Luxembourg, Malta and Ireland represent

relatively small countries, but with relatively large capital markets based on hosting international institutions offering products to foreign investors. Netherlands and Finland (also Poland, included in a Report mentioned before (attached at Annex 3) are midsize markets focused mainly on local investors with relatively large investor base.

Germany, Spain and Italy are considered countries with a relatively high level of gold-plating, while Luxembourg is often seen as a no gold-plating country, adapting European regulations according 'one-to-one' rule. Malta is seen as low gold-plating country, although it has got many additional burdens that result from regulatory and supervisory practice rather than national regulations.

The following Report describes the legal and factual situation regarding gold-plating in above mentioned countries and provides examples of gold-plating at mentioned markets. It is not exclusive either in terms of number of countries (8+1 countries mentioned at the Report vs. 27 EU member states), or actual cases of overly strict implementation in these markets. However It should be treated as the beginning of a discussion on the phenomenon of gold-plating and the ways to prevent it during the creation of European Capital Market Union.

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Executive summary

1. Executive summary

Background

Gold-plating, i.e. imposing additional burdens whilst implementing EU regulations into national laws of EU Member States, is a widespread phenomenon occurring in all member states of the European Union. Instances of tightening EU regulations are evident in every country – it can only be debated which country's regulations are more or less significant in this respect.

Gold-plating is particularly relevant in the context of capital market law. This legal practice continues to present a significant impediment to the harmonization of the EU single market, detrimentally impacting both domestic enterprises and consumers while diminishing the Union's competitive standing on the global stage. Resolving this issue has been an overarching objective of the EU for years, as it endeavours to dismantle barriers within the single market and advance the realization of a cohesive Capital Markets Union.

Unfortunately, gold-plating is not often addressed at EU level and there are too few studies on this subject in the capital market context. Every year there are calls in the EU to combat and prevent this practice, but it is not easy to identify examples of gold-plating across different jurisdictions and, on that basis, to examine its impact on the local or European market.

This is partly because gold-plating is difficult to define and frame in multijurisdictional legal environment. There is no unified position on how to treat it at EU level or at the level of the jurisdiction concerned. It is a complex phenomenon that combines politics, business, law, integration, national interests and the further direction of the capital market within the European community.

However, when discussing the further development of the capital market in the EU and the further development of the EU in general, it is necessary to ask the question of gold-plating.

Purpose of the Report

This report analyses gold-plating in eight EU member states, i.e. the Netherlands, Italy, Spain, Malta, Luxembourg, Germany, Ireland and Finland, in order to compare the occurrence of gold-plating in different jurisdictions, identify the scale of its impact on the countries' legal framework, and examine each country's legal approach to gold-plating.

The report focuses on capital market law, mainly on the implementation of the UCITS, AIFMD and MIFID directives, as well as other related areas.

The report addresses the following issues on the subject in each jurisdiction:

- overview of gold-plating – legal situation and approach of member states;
- countermeasures and proposed actions to prevent gold-plating;
- examples of gold-plating.

In addition to the examples of gold-plating, the report highlights discrepancies in the licensing processes and timeframes for Investment Firms, AIF Managers, and UCITS Managers across analysed member states. While not explicitly categorized as gold-plating, these variations in licensing procedures and time limits effectively impede capital market integration by creating barriers to cross-border investment and market inefficiencies.

Essential observations of gold-plating – overview

- Both the level of gold-plating in the capital market law and its specifics varies considerably from jurisdiction to jurisdiction. The report shows that the Netherlands, Luxembourg and Ireland are jurisdictions known for their low levels of gold-plating, Spain, Malta and Finland also have relatively low levels of gold-plating although in these markets gold-plating includes some areas which might not be present at different markets, while Italy and Germany are known for notably gold-plating in the capital market area;
- The prohibition of gold-plating is rare and exceptionally applied in analysed member states (e.g. Italy, with notable exceptions to this rule). Usually there are no formal or legal regulations on this subject, but in most member states there are recommendations/guidelines or other public documents related to the lawmaking, aimed at not using gold-plating as a principal rule (e.g. the Netherlands);
- The scope of gold-plating may be defined differently, as analysed member states do not, in principle, introduce legal definitions of gold-plating in their national regime (exceptionally – some regulations in this regard in Italy). As a result, gold-plating may not always be dictated by a legal and factual issues, but rather by political changes and will;
- Gold-plating in analysed member states is restricted mainly for the following reasons: safeguarding of the international character of the financial market, protection of the competitive position of the domestic industry, reduction of bureaucratic burdens and restrictions, minimizing costs and regulatory constraints on the market;
- Gold-plating in analysed member states is believed to have been introduced mainly for the following reasons: protection of constitutional values, protection of the internal market and its reputation, protection of investors, in particular consumers (the aftermath of financial scandals, aggressive selling practices e.g. Spain);
- Gold-plating is often a matter of intentional or unintentional improper legislation (e.g. the use of incorrect definitions in the Netherlands) or remnants of old legislation (e.g. Malta).

Essential observations of gold-plating – countermeasures/proposed actions

- Initiatives to combat gold-plating are prevalent in the member states analysed. This is particularly evident in countries where gold-plating is a common practice. In Germany, for example, voices against gold-plating have grown louder in recent years, coming from the scientific literature, interest groups and politics;
- Not all countries have implemented formal or legal methods to reduce gold-plating (for instance, in Malta there are only soft-law initiatives), however some countries are showing a trend towards deregulation to avoid additional national laws (e.g. Finland);

- The most frequently mentioned ways to combat gold-plating are: government initiatives and support from local regulators throughout the legislative process, public advice on draft or desired legislations, public discussions and consultations, stakeholder engagement, lobbying, industry feedback, involvement of professional organizations; In particular, the actions and efforts of supervisory authorities to remove or minimise gold-plating are considered a necessary and effective practice in the fight against gold-plating;

- Among the strong initiatives taken to deregulate and eliminate already existing gold-plating, it is worth noting the example of the Green Book in Italy, which resulted in the creation of a new law – DDL Capitali;

- Initiatives to combat gold-plating are also expected at the EU level, as it is not sufficient to act only at national level. Some positive trends are emerging in this respect, such as regulations replacing EU directives, but further action is recommended. These include adhering to minimum harmonization principles, establishing clear guidelines, strengthening inter-agency coordination, promoting transparency and public participation, publishing transposition matrices, applying new approaches to implementation such as the ‚comply or explain' method;

- National preferences and interests have a huge impact on gold-plating; Therefore, it cannot be completely avoided, but it is possible and important to reduce gold-plating to the absolute minimum and minimise its impact at national and EU level.

Essential observations of gold-plating – examples

- Different examples of gold-plating can be found in the areas regulated by AIFMD, UCITS and MIFID in each member states. In some countries the influence of gold-plating is stronger in the AIFMD and UCITS area and less so in the MIFID area (e.g. Germany, Italy), while in other countries a higher level of MIFID gold-plating can be observed (e.g. Malta, the Netherlands);

- Gold-plating often occurs in the case of the same EU provisions e.g. Art. 43 of AIFMD, where member states opted for stricter EU regulations due to the claimed protection of retail/non-professional investors;

- Gold-plating is often based on broadening the scope of EU directives by extending certain rules to other entities or types of funds or providing tighter rules for specific type of investors, rather than adding new requirements to implemented EU regulations (e.g. Italy);

- The extension of supervisory powers is a common example of gold-plating in the member states analysed. These examples include obligation for entities to obtain regulatory approvals, obligations for entities to disclose more information, documents and records to regulators, tightening of notification obligations, greater scope of supervisory discretion. Gold-plating in this field is aimed at protecting investors and the reputation of the market, providing greater control over entities (e.g. Investment Firms, AIF Managers, UCITS Managers etc.). However, it often causes the increase in dependence of the market on regulators decisions and makes market more dependent on the regulators;

- Especially, in the countries surveyed, examples of gold-plating also occur in the context of increased powers of regulators during licensing/authorisation processes i.e. stricter marketing processes for foreign funds (e.g. Italy, Finland), additional rules for the authorization procedure for investment fund managers (e.g. Luxembourg). Typical examples of gold-plating also include the possibility of imposing higher sanctions by supervisory authorities (e.g. Malta, Germany);

- Organisational/systemic gold-plating is also a common practice in survey states, often used to align EU law with national laws already existing before the entry into force of EU directives (e.g. in Malta), to protect other areas of law (e.g. civil law, in the case of the Netherlands), or to strengthen corporate governance standards (e.g. Ireland);

- Many examples of gold-plating are of a soft nature, i.e. the tightening of obligations/imposition of additional criteria through the administrative practice of regulators, e.g. in Spain, where a large number of Q&As and technical guidelines are issued (which are not strictly legal requirements but must be followed in practice as they reflect the approach of the regulator), in Luxembourg, where the law is largely shaped by the regulator (imposing additional requirements in circulars and guidelines), or in Malta to ensure consistency of the legal regime (among others through the MFSA Conduct of Business Rulebook); Such obligations do not result from legal acts but have to be followed by market entities, which may otherwise not be granted requested approvals, licenses or face other negative consequences from the regulator (resulting e.g. in starting an inspection);

- Many examples of gold-plating in the member states analysed impose restrictions and limits on maximum fees and expenses (e.g. Spain), introduce additional investment services or financial instrument (e.g. Malta), tightens the requirements for depositaries under the AIFM and UCITS regime (e.g. Germany);

- Securities lending and loan funds' regulations are also frequently gold-plated e.g. Spain – where most of the investment funds cannot engage in securities lending, or Germany – where additional requirements and restrictions on AIFs have been imposed.

- Individual member states introduce many autonomous regulations for investment funds, e.g. in Germany, as can be seen in stricter capital requirements, additional due diligence, suitability assessment for key personnel, high transparency and reporting obligations, additional requirements for specific asset classes, or in Ireland where the individual accountability framework has been implemented;

- is lack of uniformity in licensing requirements and timeframes presents practical challenges that mirror the obstacles posed by gold-plating. Harmonizing licensing procedures and establishing consistent time limits is crucial to promoting market efficiency and advancing the common capital market agenda.

Recommendations

The phenomenon of gold-plating in capital market law represents a significant yet underexplored aspect of regulatory frameworks within the EU. Its pervasive influence on legal structures and its consequential impact on market dynamics necessitate urgent attention from policymakers, researchers, and industry stakeholders.

Accordingly, the following actions are proposed:

- Research Priority: Urgent research is needed to understand the extent and implications of gold-plating in EU capital market law. Collaborative interdisciplinary studies should be conducted to uncover its mechanisms and impact;
- EU Policy Focus: EU institutions must develop targeted policies to address excessive gold-plating, aiming for harmonization, regulatory efficiency, and transparency. This involves implementing more precise or directly binding regulations at the EU level, leaving less space for gold-plating and soft gold-plating by national legislators. Close collaboration with national regulators/legislators and industry stakeholders is crucial for achieving these goals;
- National Action: Member states should streamline their regulatory frameworks, eliminating redundant requirements and aligning with EU directives. Initiatives to raise awareness among market participants about gold-plating's implications are essential;
- Enhanced Competitiveness: Efforts to reduce regulatory burden and enhance regulatory coherence will improve the competitiveness of EU countries and the EU as a whole, fostering innovation, investment, and growth.

Addressing gold-plating in capital market law demands a comprehensive approach involving research, policy development, and collaborative action at both EU and national levels. Only if that comprehensive approach bears fruit will the dream of an EU Capital Markets Union become real.

2

Introduction

2. Introduction

What is gold-plating?

There is no official and uniform definition of the gold-plating. Due to the heterogeneous and international nature of it, different actors have developed different definitions to describe it. Undoubtedly, in order to fully understand the issues involved, it is necessary to familiarize oneself with the basics of the European Union's legislative system.

The main legal acts issued under EU legislation are Regulations and Directives. Under Article 288 of the Treaty on the Functioning of the European Union:

"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." – Member States no need to implement regulations into national legal system of each Member State.

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." – Member States are obliged to adopt legal acts aim to implement provisions of each directive.

Due to the aforementioned duality of the most relevant legal acts issued under EU legislation, Member States have a direct influence in shaping the legal act that extends the Directives into national law. If it is possible to describe in a single word, gold-plating is an over implementation of EU directives.

The main objective of the European Union in the field of capital markets is to create the capital markets union, which is a plan to create a single market for capital. As European Commission describe it: "The aim is to get money – investments and savings – flowing across the EU so that it can benefit consumers, investors and companies, regardless of where they are located[1]". Gold-plating, however defined, is a threat to this vision.

To give an overview of the problem of gold-plating and its fixed elements, it is worth quoting here some of the available definitions, together with an indication of their authors:

- **EUROPEAN COMMISSION:** „Gold-plating describes a process by which a Member State which has to transpose EU Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation"[2].
- **UNITED KINGDOM:** "Gold-plating is when implementation goes beyond the minimum necessary to comply with the requirements of European legislation by:

[1] European Commission, What is the capital markets union? (https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/what-capital-markets-union_en).

[2] European Commission, Better Regulation Guidelines, p. 88, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en.

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK 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[3].

- **NETHERLANDS:** "(Gold-plating is a situation when) Netherlands has correctly transposed an EU directive into national law and Dutch regulations go further than is strictly necessary in the light of the European Directive"[4].

- **POLAND:** "(Gold-plating is) implementing the provisions of European Union law to a greater extent than is minimally required"[5].

On the basis of the above examples of definitions of gold-plating, it should be acknowledged that different actors define the problem of gold-plating in a narrower or broader way, but in each case the gold-plating is the adoption by Member States of regulations that go beyond what is directly indicated in the implemented Directive.

Undoubtedly, it should be recognised that the perpetrators of gold-plating are the legislators of Member States who implement European law into national legal systems. In addition, with regard to soft gold-plating, which is also a widespread practice, regulators often impose practices that are more restrictive than those required by European or even national law."

Obviously, the problem of gold-plating is present in all sectors of socio-economic life within which European Union directives are implemented. In this report, attention will be paid to the occurrence of gold-plating in the most relevant capital market regulations, in particular the implementation of the UCITS Directive, the AIFMD and the MiFID II Directive.

UCITS Directive (Undertakings for Collective Investment in Transferable Securities) is a regulatory framework established by the European Union to harmonize the regulation of collective investment schemes within the EU member states. It sets out rules regarding the authorization, operation, and supervision of UCITS funds, which are investment funds that can be sold to retail investors across the EU.

AIFMD (Alternative Investment Fund Managers Directive) is a regulatory framework established by the European Union which aims to create a comprehensive and harmonized framework for the management and marketing of alternative investment funds within the EU. Alternative investment funds cover a wide range of investment vehicles, including hedge funds, private equity funds, real estate funds, and commodity funds, among others.

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[3] Transposition guidance: how to implement EU Directives into UK law effectively, https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law

[4] Nationale koppen op EG-regelgeving, Bulterman, M.K.; Cuyvers, A.; Slot, P.J.; Voermans, W.J.M.; Blockmans, S.F.; Romein, S.H.; Harst, M. van der p. 8.

[5] Ministerstwo Finansów, Strategia Rozwoju Rynku Kapitałowego (Capital Market Development Strategy), p.72, https://www.gov.pl/web/finanse/strategia-rozwoju-rynku-kapitalowego.

It is worth emphasizing that gold-plating may occur in various forms and may in fact be caused by various actions of Member State legislators. It may be considered gold-plating not only where a Member State when implementing a directive introduces additional rules, requirements or procedures that are not covered by that directive, but also where exceptions or relaxations provided for in the directive are waived. Based on this assumption that gold-plating is a heterogeneous phenomenon that can be induced by various means, a broad definition of gold-plating has been presented in the UK.

Why gold-plating is unwelcome?

Despite the lack of a uniform definition of the gold-plating, both EU authorities and Member States agree that it is an undesirable phenomenon and a threat to the development of the internal Member State's market as well as the European single market.

According to the European Commission Better Regulation Guidelines[6]: "EU intervention will deliver its full benefits only if the policy is implemented and applied appropriately. Moreover, excessive burdens may be placed on businesses as a result of Member States imposing obligations that go beyond what is envisaged in the legislation ('gold-plating') or implementing the legislation inefficiently."

One of the main premises of the EU as a supranational community is the existence of its European internal market, which forms the basis for the economic cohesion of the Member States. At the same time, each Member State has internal regulations corresponding to the structure of its institutions.

By leading to a situation where regulations, requirements or other matters arising from an EU directive are significantly more restrictive in one Member State than in other Member States, there is often indirect discrimination against entrepreneurs operating in a given national market.

As a result of additional requirements or the inability to take advantage of exceptions or reliefs under a particular directive, domestic entrepreneurs in the Member State applying gold-plating incur higher business costs, thereby reducing their competitiveness and impeding the pace of development of the relevant market. This often leads market participants to engage in regulatory arbitrage, moving their businesses to jurisdictions with fewer restrictions and less gold-plating, even though their actual business activities occur elsewhere

Gold-plating is therefore a phenomenon that adversely affects both the functioning of the EU single market and the national economies of the Member States.

The question then arises why, with this in mind, do Member States adopt the practice described in this Report? The motivation of national legislators in this regard may be the desire to regulate more precisely certain issues that go beyond the scope indicated in the implemented Directive but are in line with the domestic policy of the respective Member State. Furthermore, many instances of gold-plating are officially justified by the aim of protecting the interests of retail investors and consumers. While this is sometimes the case, countries often target protecting local companies against foreign competition, safeguarding the position of large or state-owned companies against smaller ones, or increasing the financial sector's dependence on regulatory and governmental decisions. As numerous examples show, such a practice often has the opposite effect, indirectly harming the citizens of gold-plating Member States.

[6] https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en.

Selected member states approach and activities against gold-plating

Member States, being aware of the direct and indirect negative impact of gold-plating on their economic position in the European Community, are critical of it and declare their intention to combat it. To this end, some Member States have taken specific measures to prevent or impede gold-plating, such as the enactment of internal legislation or legislative guides, on the correct implementation of European Union directives into such country's national law.

An example of a Member State actively combating the issues described in this Report was the UK, when it was still part of the EU. Using a document called Transposition Guidance. How to implement EU Directives effectively', containing, inter alia, the principle that the UK does not go beyond the minimum requirements of the measure which is being transposed. Gold-plating as set out in the Transposition Guidance could only be used in exceptional circumstances that justify it provided that they serve the UK's interests.

Another example of a Member State standing out in the fight against gold-plating is the Netherlands, which, on the basis of the Guidance for Lawmaking (Aanwijzingen voor de Regelgeving) document, has appropriate legislative procedures and techniques, the correct use of which prevents gold-plating, because according to the document: „When implementing, the implementation regulation will not include any other rules than required for implementation."

Another example of a country that has developed a form of anti-gold-plating is Sweden, where there is a forum consisting of both government representatives and market participants, and regulations adopted are reviewed on an ongoing basis[7].

Selected member states approach and activities against gold-plating

The main part of this Report is a presentation of the issue of gold-plating in terms of the law relating to the functioning of the capital market in selected Member States. The remainder of the Report provides information on the incidence of gold-plating with examples and jurisdictional characteristics of the issue.

Issues of gold-plating in every Member State being a substance of this Report are being discussed in terms of:

- Overview of gold-plating in various member states (including legal situation and general approach to gold-plating);
- Countermeasures and actions to prevent gold-plating in each member state;
- Examples of gold-plating, whereby every example includes:
  - reference to local law containing gold-plating,
  - reference to EU law, which is being transposed by local law,
  - rationale for gold-plating with legislator's view on gold-plating,implementing early, before the date given in the directive.
  - assessment of gold-plating and its impact on the local capital market.

[7] How to identify and avoid gold-plating EU regulations, Karolina Mickute, https://www.epicenternetwork.eu/wp-content/uploads/2024/01/How-to-identify-avoid-gold-plating.pdf

Capital market infrastructure in the above-mentioned markets differ from each other in terms of the competences of the related institutions. In all countries, national laws are established by the legislator through the legislative process. It includes parliaments, governments and heads of state (president or monarch). Regulations on capital markets are established by capital market regulators, while issuing administrative decisions, licensing, issuing permits and approvals as well as continuous supervision over the market are performed by capital market supervisors. In some countries those functions are realised by one institution, in others they are separated. In some cases most regulatory functions are performed by one institution (called 'regulator'), but some are left to the other institution, supervising the market (called supervisor). In this report names 'regulator' and 'supervisor' are often used interchangeably referring mostly to the area of gold-plating (regulation or supervision) rather than to the specific institution performing those activities as in most cases the supervisors exercise significant influence on the regulations on the capital market, either by participating in the legislative processes or setting standards and establishing market practice of interpreting the relevant regulations.

The information collected relates to the following Member States:

- **The Netherlands**
- **Italy,**
- **Spain,**
- **Malta,**
- **Luxembourg,**
- **Germany,**
- **Ireland,**
- **Finland.**

The report on Goldplating in Poland prepared by CFA Society Poland (Beata Chmielewska, Piotr Sieradzan) in 2021 is attached in Annex 3

3

Gold-plating in selected Member States

3.1. The Netherlands vs. gold-plating

Overview of gold-plating in the Dutch legal system

As a general principle, gold-plating is not aimed for in the Netherlands. This primarily follows from the Prime-Minister Circular dated 18 November 1992 on Guidance for Lawmaking (*Aanwijzingen voor de Regelgeving*), as amended. This Guidance sets out the instructions and guidance for (preparation of) rules and regulations by the legislator. Within scope are formal acts including those enacted further to regulations by the EU. The Guidance shall be adhered to at all times by the respective ministries that prepare new regulations and may be deviated from in exceptional circumstances only.

The Guidance includes chapter 9 on preparation, creation and implementation of binding EU law. Section 9.4 is the general provision on gold-plating and reads: „When implementing, the implementation regulation will not include any other rules than required for implementation." From this instruction it follows that gold-plating shall be prevented and EU law shall be followed closely. Self-evidently, this leaves the possibility of using member state options in EU law.

However, the government has indicated at various moment and occasions, including in debates in Dutch Parliament, that there can be situations where gold-plating should be considered in respect of financial regulation, for example in order to protect consumer rights. This can be done using member state options or by including additional provisions in the (implementation) acts after all.

Members of Dutch Parliament have from time to time indicated that the Netherlands should not (always) want to be ‚best in class' and maintain the strictest legislation of the EU in order not to unduly restrict the Dutch financial sector. This is also the general feeling of the financial sector. As a result, gold-plating is normally minimized.

In general, the Netherlands is known for limited gold-plating in the area of financial regulation. However, certain notable exceptions exist, most of which have been deliberately chosen and maintained (see below).

From time-to-time studies have been made into gold-plating. These studies have been made on the instruction of ministries (e.g., the Ministry of Economic Affairs and the Ministry of Finance) and the State Council (Raad van State), being the national body that advises Dutch Parliament on the legal aspects of draft legislation as part of the handling process of draft legislation. In general, these studies show that there is gold-plating in certain areas and that as a principle, gold-plating is undesirable but that exceptions to this rule exist.

Legal literature relating to financial law shows that in the area of financial law gold-plating remains to exist, whether intended or unintended by means of improper implementation of EU regulations (e.g., the use of incorrect definitions).

As a general concluding remark, we believe that gold-plating in financial regulation in the Netherlands is limited, which often also shows from compliance tables by the EU regulators evidencing that the

Netherlands and the Dutch authorities in generally apply and have implemented EU legislation. It is also our experience in cross-border matters that often the Netherlands is found to simply apply the EU rules and regulations, including member state options, without much local add-ons. Notable exceptions, such as Dutch rules on variable remuneration and inducements, however exists. Consequently, we believe that for doing business in the Dutch financial sector, following EU rules and regulations will normally suffice to also comply with the rules and regulations as implemented in the Netherlands. Our experience in licensing projects is that only a small number of changes or additions is normally required.

As follows from the above overview, the number of gold-plating examples in the Netherlands is relatively limited. The notable and most impactful ones are:

- Further restrictions on variable remuneration introduced to avoid excessive (short term) risk taking by employees to the detriment of the authorized entity and the financial sector as a whole. This was said to be caused by financial crisis starting with the Lehman bankruptcy in 2008 and reasoned by the idea of preventing similar events happening locally. It was felt that this was partly the result of excessive risk taking that could be combatted by restrictive rules on variable remuneration that go beyond the EU rules and regulations, such as those include in MiFID, AIFMD and UCITS.
- Strict rules on inducements in respect of consumer services by investment firms (basically a total ban). This follows from restrictions existing prior to MiFID came into force. The Netherlands has lobbied for stricter MiFID inducement provisions, failing which the Netherlands has maintained its stricter provisions going forward.
- Stricter requirement on local substance, put in place to ensure proper supervision by the Dutch regulatory authorities.
- Exemptive provisions for non-EU parties doing business in the Netherlands. This is due to the international outlook of the Dutch financial sector and to allow non-EU parties servicing Dutch professional clients on a cross-border basis without restrictions.

As shows from the above, the background of Dutch gold-plating is primarily based on consumer protection, avoidance excessive risks and due servicing of the Dutch financial sector on a cross-border basis. Therefore, in the retail market the focus is very much on consumer protection whereas the focus on professional market is primarily based on due functioning and access of the Dutch financial sector. The focus of the AFM is in line herewith.

It is our experience in cross-border matters that the Netherlands is generally seen as cooperative and not imposing undue burden on financial market parties, also in comparison to other jurisdictions. Other, reference is made to Germany and France that – apparently – have a stricter regime in general. Also, for example, English language is generally accepted due to the relatively high English proficiency of the Dutch populations. As a result hereof, our experience is that if international financial market parties comply with EU rules and regulations, there is only a limited number of aspects to focus on from a Dutch compliance perspective.

Countermeasures and actions to prevent gold-plating in the Netherlands

Further to the section with the overview of gold-plating in the Netherlands (see above), initiatives have been taken and are taken to limit gold-plating in the Netherlands.

First and foremost, the Guidance for Regulation discussed earlier indicates that gold-plating shall be avoided. This Guidance can be considered as the main legal method to combat gold-plating.

In addition, Dutch Parliament is known to address gold-plating during the handling process of draft legislation stressing that the Dutch industry should not fall behind in comparison to its foreign competitors and the Netherlands shall maintain a good location for business. As such, there is a general tendency that prevents gold-plating by the legislator. However, when particular rights come in play (e.g., consumer rights), the same Dutch Parliament may propose additional measures, sometimes even against the advice of the competent minister.

Important legal method to deal with gold-plating is vested with the Dutch courts when they are addressed and asked for an interpretation of Dutch law that follows from EU regulations. Dutch courts are known to follow the EU interpretation and when in doubt, defer the case to the European Court of Justice in Strasbourg. In case of prohibited gold-plating this method will normally result in inapplicability of the relevant Dutch provision. However, if the Dutch law is not in violation with EU regulations (e.g., when a member-state option applies), this method is not satisfactory.

Also, the Dutch financial regulators, the Dutch Central Bank (*De Nederlandsche Bank*) and the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*) are known to address gold-plating to the Dutch legislator when advising on draft legislation or desired legislation.

Finally, financial associations such as the banking association and the association of insurers, address gold-plating as part of the advisory process for draft legislation and their general lobbying efforts.

In our opinion gold-plating can most effectively be countered by replacing EU directives with EU regulations. This is something that has been recognized by the European Parliament and the European Council for already quite some time as we see an ever-continuing process of turning rules from (former) directives into (new) regulations that have immediate binding effect throughout the EU and consequently also in the Netherlands, without the need of these regulations to be transposed in national (Dutch) legislation.

We believe that because EU regulations do not cover all legal areas (e.g., main parts of civil law and criminal law) there will always remain areas of possible gold-plating of, or deviation from, EU regulations. For example, where Dutch civil law includes overriding principles that also apply to financial relations that are also covered by EU regulations, these Dutch principles may take preference and deviate from EU regulations. We believe that this is insurmountable and may basically only be prevented as soon as all applicable law will be subject to, and following from, EU regulations. Whether this will happen is a matter of politics.

An indirect thriving force against gold-plating is the financial sector itself. From time to time, it is argued that the Netherlands may fall behind due to gold-plating and the Netherlands may become a less favourable jurisdiction of domicile for foreign financial institutions.

On the other hand, it can be argued that there is and probably always will be a space for gold-plating, because of ‚gaps' or options in EU regulations and these can only be prevented at EU level rather than at national level.

Examples of gold-plating in the Netherlands

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
1	**Article 1:121 of the Act on Financial Supervision (*Wet op financieel toezicht*) („AFS"):** 1. The variable remuneration awarded a financial undertaking with seat in the Netherlands to an individual working under its responsibility, is no more than 20% of the fixed remuneration of that person on an annual basis. 2. [...] 3. [...] 4. [...] 5. [...] 6. [...] 7. 7. The first subsection does not apply to: a. alternative investment fund managers; b. management companies [of UCITS]; and c. [own account traders]. 8. – 9. [...]	Article 16, 23 and 24 MiFID and article 27 Commission Delegated Regulation (EU) 2017/565. Also, article 94 of the Capital Requirements Directive (2013/36/EU) („**CRR**") and article 32 of the Investment Firm Directive (2019/2034/EU) („**IFD**"). Article 13 AIFMD. Article 14bis UCITS.	During the legislative process, it was argued that certain changes to the standard limitation of variable remuneration were necessary. To avoid the associated risks taken by employees who are awarded excessive variable remuneration, it was decided in 2014 to limit variable remuneration to 20% of fixed remuneration instead of 100%, with a few exceptions only (e.g., for staff primarily working outside the Netherlands – in that case the EU maximum percentages of 100% and 200% apply). AIFMs and UCITS management companies are however excluded.	This is an example of gold-plating because the limits set by local regulations are stricter compared to the EU standards. In certain financial subsectors this restriction may be too restrictive. As a result, it is suspected that certain foreign financial undertakings opting to start business in the EU, will not opt for the Netherlands after all, and that existing financial undertakings may relocate to elsewhere in the EU. However, we see that this certainly does not apply in all situations as many foreign financial undertakings are still opting for the Netherlands as jurisdiction of domicile for their EU business and little financial undertakings have left the Netherlands.

[8] The wording included in this column is not always the full and literal wording in order to ease reading. Only the main article has been included. For example, sometimes an article in the AFS is elaborated upon in a decree. If the material rules as included in the decree, only the provision from the decree is included (e.g. number 2).

[9] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[10] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
2	Article 1:117 AFS: 1. [...] 2. [...] 3. [...] 4. [...] 5. [..] For the application of article 94, third subsection, under b, of the capital requirements directive and article 32, fourth subsection, under b of the investment firm directive, the maximum amount of annual variable remuneration of EUR 50,000 amounting to no more than 10% of the total annual remuneration of the staff member, shall apply.	Article 32(4) of IFD.	As part of the stricter Dutch rules on remuneration, during the legislation process it has been decided to limit the exception on the EU rules relating to payment in shares and deferral as included in article 4(1) under j. and l. to a maximum percentage of 10% instead of 25%.	This is an example of gold-plating because the limits set by local regulations are stricter compared to the limits of EU regulations. The Dutch restrictions, including this one, have impact on part of the financial sector. See the previous comment.
3	**Article 168a of the Decree on Market Conduct of financial undertakings AFS (*Besluit Gedragstoezicht financiële ondernemingen Wft*):** 1. An investment firm does not pay or receive, directly or indirectly, any commission with respect to providing an investment service to a non-professional investor.	Articles 24(7) and 24(8) MiFID.	The decision to restrict the inducements rules was being justified by the protection of Dutch retail investors. Inducements are basically prohibited in relation to investment services to non-professional investors.	This is an example of gold-plating because the local law restricts the inducements rules set by MiFID Directive.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	2. The first subsection does not apply to: a. commissions paid directly by the client of its representative; b. commission that are necessary for the provision of the services; c. commissions for the provision of investment services under e and f of the definition of providing investment services in article 1:1 of the act in case: - [...] d. d. commissions paid to or by tied agents; e. small, non-financial commissions provided the investor has been informed prior to the service being provided.			This restriction is merely a requirement to be considered when servicing retail clients and was already under scrutiny prior to enactment. It has resulted in a certain shift of inducement payments, now requiring clients to pay for services (e.g., advice) that where previously funded by means of inducements.
4	**Article 2:99a AFS:** 1. The Netherlands Authority for the Financial Markets provides authorization to investment firms with domicile in a non-member state that intends to provide investment services in	Article 39(1) MiFID	This member-state option empowering the supervisory authority has been said to be implemented for the protection of retail clients and the ability for the AFM to supervise (the branches of) these investment firms.	This is an example of gold-plating because there is a need for AMF authorisation not provided for in the MiFID Directive.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	the clients or professional clients as meant by Annex II, under II of MiFID in case the investment firm: a. establishes a branch in the Netherlands; b. - d. [...] 2. – 4. [...]			
5	**Article 4:84 AFS:** 1. The persons that perform the day-to-day management of an investment firm with statutory seat in the Netherlands, perform their activities from the Netherlands. 2. The persons that perform the day-to-day management of a branch office in the Netherlands of an investment firm with seat in a state that is not a member state, perform their activities from the Netherlands.	Article 5(4) MiFID	The claimed rationale behind this gold-plating example, as endorsed during the legislation process, was to ensure that adequate supervision by the Dutch regulator is possible.	This is an example of gold-plating as it gives the AMF enhanced supervisory powers that are not foreseen in MiFID. From time to time, it shows that this requirement is felt burdensome and more restrictive than in other jurisdictions, by parties applying for a license, also because the AFM is relatively strict in applying this principle.
6	**Article 4:90 AFS:** 1. An investment firm is acting honestly, fairly and professionally in the interest of its clients when providing investment services or ancillary services and refrains	Article 24(1) MiFID	Not an explicit gold-plating example but relates to case law and court judgements. Dutch courts have ruled that the duty of care following from Dutch civil law may have a wider scope than the regulatory duty of care following from MiFID and our AFS. As	This is an example of gold-plating as the Dutch civil law may have a wider scope than the regulatory following from MiFID and AFS (in relation to the duty of care).

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	from acting that is detrimental to the integrity of the market. 2.– 4. [...]		a result, investment firms may be held liable for non-compliance with the civil law duty of care even though it is held that they have complied with the regulatory duty of care. The rationale is that Dutch civil law includes overriding principles that are not set aside by EU regulations	In cases tried before the courts (e.g., on improper provision of investment services like execution of orders) this has been subject of debate. A debate on the subject is also included in legal literature. The impact on the Dutch financial market is that nowadays financial undertakings must take care of the Dutch civil law duty of care as they cannot hide behind the regulatory duty of care only. The main impact is damages to be paid in cases tried. As a result, further measures must be taken to avoid violation of this duty of care.
7	Article 10 of the Exemption regulation AFS (**Exemption Regulation**): 1. Investment firms from the United States of America, Australia and Switzerland are exempt from article 2:96 of the act if they solely provide investment services in the Netherlands to eligible counterparties or professional investors as meant by Annex II, part I of MiFID, or are acting on own account in the exercise of their business or profession, provided that there is supervision exercised by a regulator in the	Article 3(1) MiFID	The Netherlands has opted to exempt different categories of investment firms from non-EU jurisdictions, in order to allow these investment firms to provide investment services to professional clients in the Netherlands in the interest of the Dutch professional (buy side) sector.	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation. The impact on the Dutch financial market is considerable as this exemption allows non-EU investment firms to provide investment services to, and perform investment activities for, the Dutch professional sector (e.g., pension funds, banks, insurance undertakings) with a straightforward registration with the AFM. It is notably used by asset managers of pension

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	state of domicile and they have notified the AFM in advance by means of: a. a statement by the regulator; or b. a written reference to the website of the respective regulator where the information can be found. 2. For the purpose of section one, also self-regulating organizations appointed or recognized for the purpose of supervision of the provision of investment services, is also considered to be a regulator. 3. [...] 4. Subsection one does not apply to investment firms that are authorized to act from a branch in accordance with article 47(3) of MiFID. 5. [...]			funds. A limited number of ongoing requirements applies, including the filing of annual accounts with the AFM.
8	**Article 10a Exemption Regulation:** 1. Irrespective article 1:18 of the act and article 10 of this regulation, exempted from article 2:96 of	Article 3(1) MiFID	This exemption was introduced to exempt non-EU investment firms trading for own account in the Netherlands where they act with	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	the act are investment firms with a seat in a non-member state that only act for own account in the Netherlands with of by means of persons authorized to provide investment services in the Netherlands. 2. The first subsection does not apply to investment firms that are authorized to act from a branch office in a member-state or act on own account further to article 47 MiFIR.		an authorized investment firm or bank. This is basically an extra layer to the exemption from article 10 Exemption regulation (see item 12) also allowing investment firms (own account traders) that are not authorized in their home jurisdiction.	The impact on the Dutch financial market might be seen as considerable as this allows own account traders worldwide dealing on Dutch trading venues and with Dutch professional counterparties (e.g., pension funds).
9	**Article 10b Exemption Regulation**: Persons from Singapore and the United States of America that operate an organized trading facility or multilateral trading facility in the Netherlands are exempted from article 2:96 of the act provided that the trading is limited to derivatives and provided that these persons or trading venues operated are mentioned in the annex of the following European Commission decisions: a. Decision (EU) 2017/2238 [...] b. Decision (EU) 2019/541 [...]	Article 3(1) MiFID	This exemption is provided for further to the trading obligation for derivatives under article 28(1) MiFIR and the European Commission equivalence decisions further to article 28(4) MiFIR in relation to (certain) trading venue operators from the US and Singapore.	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation. The impact on the Dutch financial sector is likely limited, albeit that US and Singapore trading venues are (and remain) to be active in the Netherlands under this exemption.

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10	**Article 11 Exemption Regulation:** 1. The following persons are exempt from article 2:96 AFS: a. a. persons that are authorized under article 2:75 of the act for the advising on life insurances and mortgage credit; b. b. persons that are authorized under article 2:76 of the act to advise on life insurances or mortgage credit. 2. The exemption is limited to the following persons: a. providing investment services in the Netherlands as meant under a or d of the definition of providing an investment service in article 1:1 of the act, with respect to units in an AIF or UCITS; b. [...] 3.– 4. [...]	Article 3(1) MiFID	This exemption provides for the so-called ‚national regime' that exempts certain investment firms from authorization and subjects them to local requirements that are also included in the Exemption Regulation. Article 35 thereof provides that certain provisions implemented further to MiFID do not apply to these investment firms, including certain sound business operations requirements, number of board members, and separation of client assets (as they are not authorized to hold assets).	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation. The impact on the Dutch financial sector might be seen as considerable as this national regime allows investment firms that provides these services to be partly out of scope of MiFID and therefore subject to a light-touch regime that fits their business better.
11	**Article 13 Exemption Regulation:** Investment firms that act as private venture capital company and provide investment services with respect to shares in their own issued capital are exempted from article 2:96 of the act.	Article 3(1) MiFID	This exemption allows venture capital companies to provide services to their investors. It follows from an existing exemption that pre-dated MiFID. Certain ongoing requirements to apply to these venture capital firms but exclude for example suitability	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
			and appropriateness testing of clients, provision of information to clients and the maintenance of client files.	
12	**Article 14 Exemption Regulation:** Exempted from article 2:96 of the act are: a. portfolio managers who only service blood relatives; b. [...]	Article 3(1) MiFID	This exemption allows so-called family offices to manage the portfolios of family members without authorization. No continuing requirements apply.	This is an example of gold-plating as Dutch law introduces exceptions that go beyond the regulations provided by EU legislation. Some family offices in the Netherlands that are exempt on this basis.
13	**Article 2:66a AFS:** 1. Article 2:65 does not apply to a Dutch AIFM: a. that manages, directly or indirectly through associated entities, assets of: 1. no more than €100,000,000; or 2. no more than €500,000,000 in case the AIFs do not use leverage and are closed-end for a minimum of five years; and b. in case the interests are: 1. offered to less than 150 persons; 2. can only be acquired for at least €100,000; or 3. having a nominal value of at least €100,000.	Article 3(3) AIFMD	This article provides for the Dutch 'light-regime' for AIFMs that are exempted from authorization. Rationale is the desire to impose less strict requirements on smaller AIFMs. Notable gold-plating requirement concerns the mandatory warning to be used by AIFMs when marketing AIFs under this regime to retail investors. This warning (often called the ,wild west sign') must be placed on all marketing materials and must be in the format as prescribed by the AFM (a picture of a certain size with a warning on there being no supervision exercised).	This is an example of gold-plating because the local law introduces an additional requirement for a mandatory warning to be used by AIFMs when marketing AIFs. The impact of this requirement might not be substantial. It requires AIFMs to include the mandatory warning in their marketing materials; otherwise, the requirements do not deviate from the AIFMD provision.

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	2. The first subsection under b does not apply to offerings to professional investors. 3. The Dutch AIFM to which section 1 or 2 applies: a. notifies the AFM of the same while providing information on the AIFM and the AIFs; b. reports periodically to the AFM on the financial instruments traded and associated risks. 4. [...] 5. [...] 6. When offering by an AIFM as meant in subsection 1 and in marketing materials, in case of offering to non-professional investors, it is mentioned that the AIFM does not need to be authorized and that no supervision under the AFS is exercised. The AFM decides on the format of the notification. [...]. 8. This article also applies to foreign AIFMs in case interests are offered to professional investors.			

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
14	**Article 1:13b AFS:** 1. This act is, notwithstanding subsection 2, not applicable to the offering or the managing of AIFs in the Netherlands by AIFMs that domiciled in jurisdictions so designated by Our Minister or in jurisdictions that are not designated if: a. interests are offered only to professional investors; b. the jurisdiction of domicile of the AIFM is not on the list of non-cooperative nations provided by the FATF; and c. the AFM and the home state regulator have entered into a cooperation agreement that provides for exchange of information and allows the AFM to exercise its supervisory tasks in accordance with this act. 2. [...] 3. The articles 3:74c, 4:37l up to and including 4:37o, 4:37q up to and including 4:37z, 5:3 and 5:25c also apply to the offering or managing of AIFs in the Netherlands	Article 36(1) / 42(1) AIFMD	The Netherlands has implemented this member state option to grant a (temporary) local regime for third country AIFMs. The rationale being the already existing regime for certain designated jurisdictions that is hereby continued until the AIFMD would start to prohibit the same. The information requirements under article 26 of the AIFMD to be met by the AIFMs are new and extra in comparison to the former regime.	This is an example of gold-plating as the Netherlands applies its own national regime to certain jurisdictions, which differs from the AIFMD regime. The AIFMs are faced with slightly increased information requirements but this may not have a material impact on the offering by such AIFMs.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	by AIFMs that domiciled in jurisdictions so designated by Our Minister or in jurisdictions that are not designated. 4. This act is not applicable to authorized AIFMs of AIFs in another member state that offer AIFs domiciled in a non-member state or feeder AIFs domiciled in a member state with a non-EU master AIF or an EU master-AIF that is not managed by an authorized EU AIFM if: a. interests are offered only to professional investors; b. the jurisdiction of domicile of the AIFM is not on the list of non-cooperative nations provided by the FATF; and c. the regulator of the member state where the AIFM is domiciled and the regulator of state where the AIF is domiciled have entered into a cooperation agreement between the AFM and the home state regulator have entered into a cooperation agreement that provides for			

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	exchange of information and allows the member state regulator to exercise its supervisory tasks; d. the authorized AIFM has notified the AFM prior to the offering that it intends to make the offer, with simultaneous submission of a statement of the member state regulator that the AIFM is authorized to offer or manage the respective AIFM. 5. [...]			
15	**Article 2:66 AFS:** 1. Article 2:65 does not apply to the offering of interests in an AIF of the managing of a Dutch AIF by an AIFM domiciled in a state to be designated by Our Minister in case article 2:73 is met. In the state to be designated by Our Minister supervision is exercised on AIFMs that sufficiently safeguards the interests this act aims to protect. By decree further rules can be set in relation to the designation of states. [...] 2. – 3 [...]	Article 36(1) / 42(1) AIFMD	The Netherlands has implemented this member state option to grant a (temporary) local regime for third country AIFMs. See previous item.	This is an example of gold-plating as the Netherlands applies its own national regime to certain jurisdictions, which differs from the AIFMD regime. See previous item.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
16	**Article 4:62n AFS:** An AIFM or management company appoints as depositary: a. [...] b. [...] c. [...] d. another depositary that is exempted from article 23g, first subsection of the act.	Article 21(3) AIFMD	The Netherlands has implemented this member state option to enable for alternative depositaries for AIFs holding specific assets (e.g., real estate, private equity) in order not to unduly restrict AIFMs managing AIFs investing in these assets	This is an example of gold-plating as the Netherlands applies its own national regime enabling for alternative depositaries for AIFs holding specific assets, which differs from the AIFMD regime standards. There is no material impact on the Dutch financial market as this continues to allow the respective AIFMs to use alternative depositaries that do not have to meet the authorization requirements for (ordinary) depositaries.
17	**Article 4:37p AFS:** 1. By decree additional rules will be laid down with respect to the business operations, the information to investors, the information to regulators, authorization of regulators and adequate treatment of investors. These additional rules apply to AIFMs offering AIFs in the Netherlands to non-professional investors unless: a. the interests can only be acquired for a minimum of €100,00 per investor; or	Article 43 AIFMD	The Netherlands has implemented this member state option for additional rules for offering of AIFs to retail investors, in order to protect the interests of such retail investors and to also continue the former regime that applied to the offering of AIFs to retail investors.	This is an example of gold-plating because the Dutch law introduces additional rules for offering AIFs to retail investors.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	b. the nominal value per interest is at least €100,00. 2. [...]			
18	**Article 4:40 AFS:** The persons that perform the day-to-day management of a management company or investment company with statutory seat in the Netherlands, perform their activities from the Netherlands.	Article 7(1) UCITS	This instance of gold-plating was rationalized in the legislative process by "ensuring adequate supervision by the Dutch regulator".	This is an example of gold-plating as it gives the AMF enhanced supervisory powers that are not foreseen in MiFID. From time to time, it shows that this requirement is felt burdensome and more restrictive than in other jurisdictions, by parties applying for a license, also because the AFM is relatively strict in applying this principle.
19	**Article 4:62f AFS:** 1. A disappearing UCITS asks an accountant to do an audit into the correctness of the following information: a. the criteria for valuation of the assets and, if applicable, the liabilities and the exchange ratio: b. the intrinsic value of the interests; c. the calculation method for the exchange ratio; d. the actual exchange ratio.	Article 42 UCITS	The Netherlands has opted for an accountant rather than the depositary to do the audit on the information in case of a merger of UCITS.	This is an example of gold-plating because the Dutch law provides for different standards than EU regulations. There is probably no material impact on the Dutch financial market as this audit is anyhow required and it was already commonplace to involve an accountant rather than the depositary.

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
	2. The accountant issues a report based on the audit of the information. 3. A copy of the audit report is issued by the management company of the disappearing UCITS or the acquiring UCITS to the investors of the merging UCITS, the AFM and regulators involved, without charge.			
20	**Article 4:62n AFS:** An AIFM or management company of a UCITS appoints as a depositary: a. a legal entity with a license on the basis of article 2:3g b. a bank domiciled in a member state with a license as meant in article 8 of the Capital Requirements Directive c. an investment firm domiciled in a member state with a license as meant in article 5 of MiFID and complies with article 2:3g, subsection 2, under b d. a depositary exempted under a ministerial decree further to article 2:3g, subsection one.	Article 23 UCITS	Alignment of depositaries served as the rationale for this instance of gold-plating during the legislative process.	This is an example of gold-plating as the Netherlands applies its own rules enabling alignment of depositaries, which does not apply under EU law. The option to appoint entities as depositary as provided by UCITS has been used but it has been decided not to opt for the ECB to act as depositary. Also, it was decided to allow UCITS depositaries to act as AIFMD depositaries. Both options provide some flexibility to the fund management sector and are likely to have considerable impact (a specific example illustrating a different approach from the EU).

No.	Reference to local law containing gold-plating[8]	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[9]	Assessment of gold-plating and its impact on the local capital market[10]
21	Article 11 Act on prevention of money laundering and financing of terrorism: 1. In case the client, settlor or a trust, trustee of a trust, partner of a partnership or person authorized to manage a partnership, is a natural person, its identity is verified based on documents, data and information from a reliable and independent source. By decree documents, data and information may be designated that meet this requirement. 2. – 4 [...]	Article 13 Anti-money laundering and counter terrorist financing directive 205/849	The rationale behind this regulation, as endorsed during the legislation process, was to 'ensure that documents that may be relied on as part of client due diligence are reliable'.	This is an example of gold-plating as the requirements for client due diligence documentation are stricter than the EU AML rules. This article limits the documents that can be used for client due diligence by parties including investment firms, AIFMs and management companies. Documents include (copies of) passports, identity cards and driver's licenses but do not include documents that may be used in other jurisdictions, for example utility bills.

Licensing process and time periods in financial regulations

In the area of capital market law, the licensing process for entities such as Investment Firms, UCITS management companies and AIF managers is legally complex and, in principle, subject to a certain regulatory timeframe. Entities in the Netherlands apply for authorisation from regulators, i.e. the Dutch Financial Markets Authority (AFM) and De Nederlandsche Bank (DNB). While there are statutory time limits for regulators, practical considerations often extend the duration of the process significantly, making it important for applicants to understand the timeframes when choosing the appropriate jurisdiction.

The formal time periods stipulated by the AFM and DNB stand at 13 weeks and 62 business days, respectively. However, these time frames are frequently extended due to factors such as incomplete information or queries from the regulators. As a result, applicants are advised to anticipate a broader window ranging from 6 to 12 months from the date of application submission.

The licensing process and associated timeframes are a good example of the nuanced regulatory landscape in which financial entities operate. The importance of understanding these timeframes and procedures cannot be overstated, especially given the issue of gold-plating. While not strictly constituting gold-plating, these licensing processes illustrate the intricacies of capital market regulations. In practice, the application of different terms in licensing processes can have the same effect as gold-plating.

3.2. Italy vs. gold-plating

Overview of gold-plating in the Italian legal system

The gold-plating practice, namely "the practice of national bodies going beyond what is required in EU legislation when transposing or implementing it at Member State level"[11], in Italy is prohibited when implementing European laws pursuant to article 15, paragraph 2, letter b), of Italian law no. 183 of November 12, 2011, which introduced article 14, paragraphs 24-bis, three and four in the Italian law no. 246 of November 28, 2005 ("Regulatory simplification and reorganization for the year 2005" – the "2005 Law"). In particular, such provisions set forth the principle pursuant to which any acts implementing European directives may not provide for the introduction or maintenance of "higher levels of regulation" than the minimum levels required by such directives (paragraph 24-bis of article 14 of the 2005 Law), except under exceptional circumstances, assessed in the regulatory impact analysis, where it is necessary to go beyond the minimum level of European regulation (paragraph 24-quater of article 14 of 2005 Law). The 2005 Law also provides for a definition of "higher levels of regulation" (paragraph 24-ter of article 14 of 2005 Law) setting forth that the following actions are deemed beyond the minimum levels required by European directives:

- the introduction or maintenance of requirements, standards, obligations, and burdens that are not strictly necessary for the implementation of the European directives;
- the extension of the subjective or objective scope of application of the rules compared to what is provided for in the European directives, where this entails a greater administrative burden for the addressees; and
- the introduction or maintenance of sanctions, procedures, or operational mechanisms that are more burdensome or complex than those strictly necessary for the implementation of the European directives.
- tional outlook of the Dutch financial sector and to allow non-EU parties servicing Dutch professional clients on a cross-border basis without restrictions.

The same principle has been established also with respect to any act adopted by the Italian Government when delegated by the Italian Parliament to the implementation of transposition or implementation of acts of the EU, pursuant to article 34 of Italian law no. 234 of December 24, 2012.

With respect to capital market law, Italian provisions implementing the UCITS Directive, AIFMD, and MiFID II are mainly included in the Italian legislative decree no. 58 of February 24, 1998 (the Italian Consolidated Law on Finance, the "TUF Law") and the regulations adopted by the Bank of Italy and the National Commission for Companies and the Stock Exchange (CONSOB), which are the competent authorities with

[11] As defined by the Italian Constitutional Court in Judgment no. 100 of May 5, 2020, by recalling the definition given to "gold-plating" by the European Commission in its communication dated October 8, 2010, "Smart regulation in the European Union" (see note no. 15 of the communication). See also Chapter II of this Report for a more comprehensive definition of "gold-plating".

supervisory powers to issue laws of secondary nature, soft laws, regulations of the TUF Law and official interpretation rules. In this respect, article 6, letter (c) of the TUF Law sets forth that *"In the exercise of its regulatory powers, the Bank of Italy and CONSOB shall observe the following principles: c) recognition of the international character of the financial market and safeguarding of the competitive position of Italian industry"*, which has to be read as an instruction to Bank of Italy and CONSOB to avoid, inter alia, gold-plating measures while exercising their powers and carrying out their role.

However, the gold-plating prohibition does not apply where the Italian constitutional values are affected by the implementation of the European laws, so that the implementing rules are allowed to be burdensome and/or beyond the scope of the relevant European laws – by practicing, as a result, gold-plating – where the Italian legislator deems it necessary in order to protect constitutional values. Such interpretation principle was laid down by the judges of the Italian Constitutional Court[12], who clarified that the gold-plating prohibition (*a*) needs to find a necessary counterbalance in the protection of preeminent constitutional values, and (*b*) must take into account the concrete needs and critical aspects of the Italian domestic system.

Generally, gold-plating in Italy has occurred in several areas, notably in the fields of administrative[13] and capital market laws.

With respect to capital market, the Italian Government started a review of the Italian capital market laws in order to increase the competitiveness of Italian financial markets, which process included the discovery of several gold-plating cases that the Italian legislator intends to remove. In particular, the Italian Minister of Economy and Finance (MEF) commissioned the OECD to conduct research which was concluded in January 2020 by the publishment of the report *"OECD Capital Market Review of Italy for 2020: Creating Growth Opportunities for Italian Companies and Savers"*[14]. Subsequently, MEF (*a*) published the *"Green Book on the competitiveness of Italian Financial Markets to Support Grow"*[15] (the "Green Book"), and (*b*) established a public consultation on the Green Book aimed at identifying possible areas for simplification and rationalization in capital market laws. On February 27, 2024, the Italian Parliament approved the final version of the law project "DDL Capitali", which modifies several provisions of capital market laws (such as the TUF Law) to address key areas identified as gold-plating in the Green Book and related public consultations. Additionally, the DDL Capital grants authority to the Italian Government for a future comprehensive reform of capital market laws, specifically the TUF Law, and other provisions applicable also to issuers within the Italian civil code.

As of today, we await the entry into force of the DDL Capitali, which is expected to occur shortly upon its publication in the Italian Official Journal. Among the gold-plating cases highlighted in the process, several cases concern gold-plating with respect to the implementation of (i) the directive on company law (Directive (EU) 2017/1132), (ii) the market abuse regulation (Regulation no. 596/2014), (iii) the shareholder

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12 Constitutional Court Judgment no. 100 of May 5, 2020.

13 See, for example, with respect to public contracts law (Italian legislative decree no. 50/2016), which has been the focus of a long-standing debate in relation to certain provisions allegedly in breach of gold-plating (see for example Judgment no. 357, section III of Council State (Consiglio di Stato), January 19, 2018, or Judgment no. 886 of Regional Administrative Court (TAR), November 15, 2018).

14 The OECD report is available at the following link: https://web-archive.oecd.org/2020-01-31/544313-OECD-Capital-Market-Review-Italy.pdf

15 The Green Book is available at the following link: https://www.dt.mef.gov.it/export/sites/sitodt/modules/dipartimento/consultazioni_pubbliche/LibroVerde-04.pdf

rights directive (Directive 2007/36/EC), (iv) the takeover directive (Directive 2004/25/EC), and (v) the prospectus regulation (Regulation (EU) 2017/1129).

The implementation of the Relevant Directives is not devoid of gold-plating cases, notwithstanding several interventions of the Italian legislator, CONSOB and the Bank of Italy aimed at removing them in recent years. A comprehensive review of the rules implementing such directives reveals that gold-plating is exercised mostly in the form of an extension of the scope of the Relevant Directives. Indeed, in several areas, CONSOB and the Bank of Italy have broadened their supervisory powers, resulting in more complex and bureaucratic authorization processes or market access for both foreign and Italian funds. While there are not many cases where additional requirements are provided for by the laws implementing the Relevant Directives, the Italian legislator frequently exceeds their scope, by extending certain rules to other operators or types of funds not contemplated by European laws, or providing tighter rules for the marketing, offer, and investment advice to retail investors, as well as to certain categories of non-professional investors which - in other European systems - have easier access to certain investments or financial products.

Countermeasures and actions to prevent gold-plating in Italy

The most significant countermeasure adopted by the Italian Government in order to prevent gold-plating cases in the implementation of European directives is the prohibition of gold-plating set forth by the 2005 Law. In particular, any court identifying an Italian law provision that gold-plates European directives may choose to disapply such provision and raise a question of constitutionality.

With respect to the countermeasures adopted by Italian authorities, during the last few years, the commitment of CONSOB and the Bank of Italy to identifying and removing gold-plating cases has been clear. Regulations and/or amendments to regulations implementing European directives are generally preceded by public consultations, where participants are involved in making suggestions and highlighting provisions that may breach the gold-plating prohibition set forth by the 2005 Law.

Furthermore, in its 2023 regulation plan[16], CONSOB stated that "In 2023, the review of CONSOB's soft law acts will continue with the aim of removing any profiles of gold-plating. In this context, CONSOB will continue the review of guidelines relevant to the implementation of MiFID II, with particular attention to the distribution of financial instruments. In this respect, it is noted that in 2022, following an initial review of the aforementioned acts, CONSOB revoked certain communications regarding the distribution of illiquid and complex financial products (cf. Consob Notice of February 3, 2022). That being said, the activity will also continue in 2023 due to the high number of documents to be revised".

For example, recently, CONSOB formally revoked[17] two communications issued respectively (a) in 2009[18], with respect to the intermediary's duty to behave with fairness and transparency when distributing illiquid financial products and (b) in 2014[19], with respect to the distribution of complex financial products to retail customers, to the extent they were adding duties on the intermediaries that were not provided and/or were differently governed by MiFID II.

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16 The "Piano delle Attività di Regolazione" was published on April 2023. The statement is included in paragraph 5.

17 Consob Notice of 3 February 2022 "Avviso in merito alla revoca delle comunicazioni n. 9019104 del 2 marzo 2009 e n. 0097996 del 22 dicembre 2014".

18 Communication no. 9019104 of March 2, 2009.

19 Communication no. 0097996 of December 22, 2014.

Nonetheless, it is worth mentioning that, thanks to the Green Book initiative – which in turn was accompanied by the involvement of many other capital market operators – a new law, currently known as "DDL Capitali", is likely to come into force in the near future, and as a result of this law a good portion of the existing cases of gold-plating have been identified as a result of such process

We believe that the Green Book initiative is the right way to address the issue of gold-plating in Italy. In particular, in order to effectively combat gold-plating, it is crucial to conduct public consultations and engage stakeholders, to the extent that they ensure transparency, foster dialogue, and allow for a comprehensive understanding of the complexities of our domestic law compared to European law and/or other systems in the European Union. The involvement of operators in the regulatory process allows the authorities to obtain valuable insights and explore best practices from both domestic and international perspectives.

Furthermore, we believe that such public consultations should be promoted and open to operators from other European Union countries. This allows for comparative work with their domestic systems and implementation of European directives, enabling suggestions to streamline regulatory processes that are misaligned with European market standards, harmonize regulations and reduce unnecessary burdens.

Examples of gold-plating in Italy

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[20]	Assessment of gold-plating and its impact on the local capital market[21]
1	Article 28-bis, paragraphs 2-bis and 2-sexies, of the Issuers' Regulation "Marketing in Italy of units or shares of AIFs by SGRs, SICAVs, and SICAFs" 2-bis. "In the event that the pre-marketing of EU AIFs is intended for the investor categories identified by the ministerial regulation, the letter of notice shall also contain the information on the local facilities for investors provided for by Article 44 of the TUF Law that made available in Italy by the asset management companies to perform the following task [...]." 2-sexies. "The provisions of sections 2-bis, 2-ter, 2-quater and 2-quinquies shall also apply to the offers of AIFs that fall within the cases of the exemption provided for by Article 34-ter, except for the offers addressed exclusively to professional investors." Article 34-ter refers to the offers to semi-professional investors, namely,	Article 43a of AIFMD "Facilities available to retail investors" "Without prejudice to Article 26 of Regulation (EU) 2015/760, Member States shall ensure that an AIFM makes available, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks [...]."	In the context of the legislative action to align national regulations with the innovations brought by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings (the "Directive 2019/1160"), which extended the provisions regarding local facilities (i.e., measures to facilitate the subscription and reimbursement of fund units as well as the dissemination of information for the benefit of investors) to the case of marketing AIFs to retail investors on a cross-border basis (article 2(6) of Directive 2019/1160), CONSOB deemed appropriate to extend the requirement of "local facilities" to the category of Semi-Professional Investors in the context of marketing shares or units of reserved EU AIFs	This is an example of gold-plating because Italian AIFMs managing reserved EU AIFs are required to provide local facilities for both retail and semi-professional investors. Article 43a of AIMFD provides that the AIFM makes available local facilities in each Member State where it intends to market units or shares of an AIF to retail investors. Pursuant to article 28-bis of the Issuers' Regulation, Italian AIFMs managing reserved EU AIFs have to make available local facilities to both retail investors and Semi-Professional Investors, making marketing in Italy more burdensome for Italian AIFMs managing reserved EU AIFs.

[20] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[21] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[19]	Assessment of gold-plating and its impact on the local capital market[21]
	(a) non-professional investors who, within an investment advisory service, purchase units for an initial amount of not less than Euro 500,000.00, and (c) individual portfolio managers purchasing units on behalf of non-professional investors for an initial amount not lower than Euro 100,000.00 ("Semi-Professional Investors").		by Italian managers and of reserved Italian and EU AIFs managed by the EU AIFM.	
2	Article 28-bis, paragraphs 11, of the Issuers' Regulation "Marketing in Italy of units or shares of AIFs by SGRs, SICAVs, and SICAFs" 11. "The provisions of this article [note: which includes paragraph 2-bis mentioned in example no. 1 above] shall not apply to the management companies indicated by Article 35-undecies of the TUF Law, except for the obligation to make available the structures for investors disciplined by sections 2-bis, 2-ter, 2-quater, 2-quinquies and 2-sexies of this article."	Article 3(2) of AIFMD "Exemptions" "Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs: (a) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or	In line with European law, CONSOB has exempted sub-threshold funds from pre-marketing and marketing rules. Article 43a of AIMFD is not applicable to sub-threshold AIFMs set out in article 3(2) of AIFMD. However, it has indicated the suitability of extending the use of "local facilities" to Semi-Professional Investors for marketing shares or units of reserved EU AIFs by Italian managers and reserved Italian and EU AIFs managed by EU AIFMs, even if such AIFMs fall under the category of sub-threshold funds.	This is an example of gold-plating as under article 28-bis of the Issuers' Regulation, subthreshold Italian AIFMs managing reserved EU AIFs have to make available local facilities to both retail investors and Semi-Professional Investors. This duty makes marketing in Italy more difficult for Sub-threshold AIFMs.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[19]	Assessment of gold-plating and its impact on the local capital market[21]
	Article 35-undecies of TUF Law refers to sub-threshold AIFMs, namely, AIFMS that manage reserved Italian AIFs whose total value of assets under management does not exceed 100 million euros or 500 million if the managed UCITS do not use financial leverage and do not allow investors to exercise the right of redemption for 5 years after the initial investment ("Sub-threshold AIFMs").	(b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF. " Article 43a of AIFM "Facilities available to retail investors" "Without prejudice to Article 26 of Regulation (EU) 2015/760, Member States shall ensure that an AIFM makes available, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks [...]."		
3	Article 28-quater, paragraphs 1 and 1-quinquies, of the Issuers' Regulation "Marketing in Italy of units or shares of AIFs by SGRs, SICAVs, and SICAFs"	Article 43a of AIFM "Facilities available to retail investors"	In the context of the legislative action to align national regulations with the innovations brought by Directive 2019/1160, which extended the provisions regarding local facilities	As above, this is an example of gold-plating because local regulations extend the requirements of "local facilities".

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[19]	Assessment of gold-plating and its impact on the local capital market[21]
	1. "The marketing in Italy of units or shares of reserved Italian AIF and EU AIF managed by an EU AIFMs, is preceded by the forwarding to CONSOB, by the competent authority of the Home Member State of the AIF [...] which includes: [...] h-ter) if the marketing is intended for the investor categories identified by the ministerial regulation, the information on the structures for investors provided for by article 44 of the TUF Law that the EU AIFM makes available in Italy to perform the following tasks [...]." 1-quinquies. "The provisions of section 1, letter h-ter, 1-bis, 1-ter and 1-quater shall also apply to the offers of AIFs that fall within the cases of exemption provided for by Article 34-ter, except for the offers addressed exclusively to professional investors."	"Without prejudice to Article 26 of Regulation (EU) 2015/760, Member States shall ensure that an AIFM makes available, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks [...]."	(i.e., measures to facilitate the subscription and reimbursement of fund units as well as the dissemination of information for the benefit of investors) to the case of marketing AIFs to retail investors on a cross-border basis (article 2(6) of Directive 2019/1160), CONSOB deemed appropriate to extend the requirement of "local facilities" to the category of Semi-Professional Investors in the context of marketing shares or units of reserved EU AIFs by Italian managers and of reserved Italian and EU AIFs managed by the EU AIFM.	Article 43a of AIMFD provides that the AIFM makes available local facilities in each Member State where it intends to market units or shares of an AIF to retail investors. Pursuant to article 28-quater of the Issuers' Regulation, EU AIFMs managing Italian and EU AIFs have to make available local facilities to both retail investors and Semi-Professional Investors, making marketing in Italy more burdensome for EU AIFMs managing Italian or EU AIFs.
4	Title II, Chapter I Section I, paragraph 1, of the "Regulations on Collective Asset Management" of the Bank of Italy of January 19, 2015 "These provisions also govern the granting of authorisation to SGRs falling within the scope of Article 35-undecies the TUF Law (so-called sub-threshold AIFMs)."	Recital no. 17 of AIFMD "This Directive further provides for a lighter regime for AIFMs where the cumulative AIFs under management fall below a threshold of EUR 100 million and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights	The identification of this as gold-plating is based on the additional power of supervisory authorities.	This is an example of gold-plating as it increases supervisory powers that are not foreseen in the AIFMD (authorization process).

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	Title II, Chapter I Section I, paragraph 1, of the "Regulations on Collective Asset Management" of the Bank of Italy of January 19, 2015 "These provisions also govern the granting of authorisation to SGRs falling within the scope of Article 35-undecies the TUF Law (so-called sub-threshold AIFMs)."	during a period of 5 years where the cumulative AIFs under management fall below a threshold of EUR 500 million. [...]." Article 3(2) of AIFMD "Exemptions" "Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs: a. AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or b. AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage	The authorization by the Bank of Italy for the establishment of sub-threshold funds aims to ensure regulatory compliance, protect investors, promote financial stability, and enable adequate monitoring and supervision of fund activity. Its introduction was inspired by the intention to strengthen an organization and processes for all AIFMs.	Article 3(2), as well as recital 17 of AIFMD, clarify that sub-threshold AIFMs should only be subject to registration and not to an authorization process. On the contrary, "Regulations on Collective Asset Management" of the Bank of Italy sets forth that also Sub-threshold AIFMs are subject to an authorization process.

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		portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF."		
5	Article 38, paragraph 1, of the TUF Law "SICAVs and SICAFs which appoint an external manager" "The Bank of Italy, having consulted Consob, authorizes the establishment of SICAVs and SICAFs that designate an external manager to manage their assets (...)."	No legal basis in EU legislation.	Article 38 of the TUF Law, by requiring authorization for the establishment of SICAVs and SICAFs, aims to anticipate the assessment of the requirements of such entities for operating in the market.	This is an example of gold-plating because article 38 of the TUF Law sets forth that the establishment of externally managed SICAVs and SICAFs requires authorization by the Bank of Italy, whilst no similar provision is provided for under the Relevant Directive or for other forms of UCITS.
6	Article 38, paragraph 1, of the TUF Law "SICAVs and SICAFs which appoint an external manager" 1. "The Bank of Italy, having consulted Consob, authorizes the establishment of SICAVs and SICAFs that designate an external manager to manage their assets when the following conditions are met: [...]	Article 7 of UCITS Directive "Without prejudice to other conditions of general application laid down by national law, the competent authorities shall not grant authorisation to a management company unless the following conditions are met: [...]	Compliance with good standing requirements - for both AIFMs and AIFs with respect to significant shareholders and individuals performing administrative, management and control functions - aims to uphold the integrity of the financial system and protect investors from dishonest or unethical behaviour, reducing the risk of fraud or mismanagement of funds, thereby safeguarding investors' interests.	This is an example of gold-plating because the Italian law goes beyond the standards foreseen in the EU legislation.

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6	d. the persons performing administrative, management and control functions are qualified in accordance with Article 13 e. the holders of the shareholdings referred to in Article 15 meet the requirements of good repute and satisfy the criteria established pursuant to Article 14 and do not meet the conditions for the adoption of the prohibition laid down in Article 15(2)."	(b) the persons who effectively conduct the business of a management company are of sufficiently good repute and are sufficiently experienced also in relation to the type of UCITS managed by the management company [...]." Article 8 of AIFMD "Conditions for granting authorisation" 1. "The competent authorities of the home Member State of the AIFM shall not grant authorisation unless: the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIFs managed by the AIFM"	Compliance with good standing requirements - for both AIFMs and AIFs with respect to significant shareholders and individuals performing administrative, management and control functions - aims to uphold the integrity of the financial system and protect investors from dishonest or unethical behaviour, reducing the risk of fraud or mismanagement of funds, thereby safeguarding investors' interests.	Article 7 of UCITS Directive and article 8 of AIFMD specify that the authorization of management companies by competent authorities is subject to the good repute requirements for persons "who effectively conduct the business of a management company", whilst the TUF Law requires that good repute requirements are not only met with respect to the AIFMs / management companies, but also by persons performing administrative, management and control functions in the managed UCITS / AIF.
7	Article 60 of the Issuers' Regulation "Foreign UCITS" 1. "For the purpose of admission to market of units or shares of EU UCITS, offerors shall publish, in accordance with Article 20, the KID or KIID, the prospectus and a listing document drawn up in accordance with scheme 2 set out in Schedule 1B. The KID or KIID,	Article 94 of UCITS Directive "Where a UCITS markets its units in a UCITS host Member State, it shall provide to investors within the territory of such Member State all information and documents which it is required pursuant to Chapter IX to provide to investors in its home Member State."	Article 113-bis of the TUF Law was introduced by article 4 of Italian legislative decree no. 51/2007, implementing Directive 2003/71/EC ("Prospectus Directive") in Italy. In order to align the regulatory framework with the new EU provisions and the related internal implementation rules, CONSOB Resolution no. 16840 of March 19,	This is an example of gold-plating because the Italian law goes beyond the standards foreseen in the EU legislation. The drafting and preparation of a listing document to be submitted and commented by CONSOB, when an EU UCITS intends to market its unit, has no grounds in the European laws and, in particular, in the UCITS Directive.

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	the prospectus and the listing document shall be published ten business days after the date of receipt of such documents by Consob. Within this period, Consob may request the offeror to make amendments and additions to the listing document. The KID or KIID, the prospectus and the listing document are also published on the website of the regulated market where admission to trading is sought." Article 113-bis of the Issuers' Regulation "Admission to trading of open-end UCITS units or shares" 3. "The prospectus approved by the competent authority of another EU member state shall be recognised by CONSOB, under the terms and conditions established in paragraph 2 of the regulation, as a prospectus for admission to trading on a regulated market. Under paragraph 2 of the regulation, CONSOB may request the publication of a document for the listing."	Among the documents provided under chapter IX of UCITS, there is no mention of a "listing document".	2009, introduced the listing document as part of the documentation required for admission of UCITS shares to regulated market (which actually was not provided for by the Prospectus Directive). This additional document allows CONSOB to have greater visibility of the financial instruments subject to listing and to have the ability to question the issuer, thus ensuring greater transparency in the listing process.	The submission and publication of the listing document also result in more complex admission processes, which necessitate ten working days from the date of receipt of the prospectus and the listing document by CONSOB for the authority to request the issuer to make changes and additions to the listing document. Such deadline must be followed by CONSOB. If CONSOB has any comments, such comments are to be integrated by the issuers and the timing for the publishment of the listing documents may differ on a case-by-case and depending on the materiality of the requests made by CONSOB in connection with such documents.

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8	Article 14, paragraph 2, of Ministerial Decree of March 5, 2015, No. 30, implementing article 39 of the TUF Law "Reserved Italian AIF" 2. "The regulation or statute of the reserved Italian AIF may also provide for the participation of the following entities: a) non-professional investors who subscribe to or purchase units or shares of the AIF for a total amount not less than Euro 500 thousand. This minimum initial participation is not divisible; b) non-professional investors who, as part of the investment advisory service, subscribe to or purchase units or shares of the AIF for an initial amount not less than Euro 100k thousand provided that, as a result of the subscription or purchase, the total amount of investments in reserved AIFs does not exceed 10% of their financial portfolio. The minimum initial participation is not divisible; and c) entities authorized to provide portfolio management services that, as part of the provision of such service, subscribe to or purchase units or shares of the AIF for an initial amount not less than Euro 100 thousand on behalf of non-professional investors."	Article 43 of AIMFD "Marketing of AIFs by AIFMs to retail investors" 1. "Without prejudice to other instruments of Union law, Member States may allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with this Directive, irrespective of whether such AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs."	Investments in reserved AIFs are characterized by a higher risk profile, therefore, the Italian legislator deemed it appropriate to restrict the non-professional persons that are allowed to invest in reserved AIFs. The Italian legislator introduced limitations that make marketing of reserved AIFs to retail investors more complicated and expensive than it could have been. In this regard, it would be sufficient to delete the reference to the investment advisory services as a requirement for retail investors to access investments in reserved AIFs.	In this example, gold-plating is not arising from the provision of a minimum investment threshold for the retail investors - a circumstance also foreseen in other Member States (e.g., the „well-informed investors" in the Luxembourg fund market, where similarly the investment threshold is Euro 100k) - but rather from the fact that - in the Italian market - a retail investor investing a significant amount such as Euro 100k can invest in reserved AIFs only within the context of investment advisory services. Such limitation - in practice - means that the AIFM is required to use a placement agent for the distribution of Reserved AIFs to non-professional investors, incurring additional costs that do not make it sufficiently attractive for Reserved AIFs to target retail clients. Article 14 has recently been amended with decree no. 19 of January 13, 2022, issued by the MEF, giving a broader definition of "semi-professional investors", which previously were only non-professional investors investing, directly or through portfolio management, a total amount,

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				indivisible, of not less than Euro 500k. The amended provision extends the possibility of investing in reserved Italian AIFs also to non-professional investors investing at least Euro 100k, within investment advisory services, to the extent that such investment does not exceed 10% of their portfolio. However, it would have been preferable for the entry thresholds of non-professional investors to be lowered regardless of the fact that the investment is made within the investment advisory services.
9	Article 66-bis of the TUF Law "Conditions for listing of certain companies" 2. "CONSOB establishes with its own regulation: a. the criteria of accountancy transparency and the adequacy of the organisational structure and the system of the internal audit that subsidiary companies, incorporated and regulated by the law of states not belonging to the European Union, must comply with so that the shares of the parent	No legal basis in EU legislation.	Article 66-bis of the TUF Law predates the harmonization carried out by MIFID II and has not yet been amended and/or updated in light of the changed regulatory landscape.	This is an example of gold-plating because Article 66-bis of the TUF Law sets forth that CONSOB establishes additional requirements for foreign non-EU subsidiaries of controlling companies seeking to list their shares on an Italian regulated market, as well as for financial holdings. However, this provision contradicts the harmonization of the minimum requirements for admission to a regulated market provided for under the MiFID II, which, furthermore, grants individual market operators the discretion to introduce additional and more stringent admission requirements.

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	company can be listed in an Italian regulated market. The definition of control referred to in article 93 is applied; b. [...]; c. the criteria of transparency and the limits for admission to the listing on the Italian financial company stock market, the assets of which consist exclusively of stakes."			The Italian legislator will remove such provision with the DDL Capitali, the entry into force of which, as mentioned, is still pending.
10	Article 66-ter, paragraphs 4 and 5 of the TUF Law "Provisions for the admission, suspension and exclusion of financial instruments from the listing and the trading adopted by the operator of the trading venues" 4. "In the case of regulated markets, the execution of the decisions of admission to the listing of ordinary shares, debentures and of other financial instruments issued by parties other than member states of the European Union, by EU EU banks and companies with shares quoted in a regulated market,	No legal basis in EU legislation.	The rationale behind article 66-ter, paragraphs 4 and 5, is to raise the level of protection for operators through scrutiny by CONSOB.	This is an example of gold-plating as it increases supervisory powers that are not foreseen in the EU legislation. The power of CONSOB to prohibit the admission to listing of financial instruments entails a five-day suspension period from the communication to CONSOB of the decision by the market operator to list such instruments, in order to allow CONSOB to take the relevant decisions. For the purposes of the exercise of such powers, CONSOB is entitled to "request the operator of the regulated market to provide all the information that it considers useful for the purposes referred to in letter".

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	as well as the decisions to exclude shares from trading, is suspended until the term indicated in paragraph 6 has elapsed." 5. "The suspension indicated in paragraph 4 does not apply in the case of admission to the listing of financial instruments under the system of exemption from the obligation to publish the prospectus or based on a prospectus for which Italy is a host member state as well as for the admission of supplementary batches of shares already admitted to the trading." 6. "CONSOB: a. may prohibit the enforcement of decisions for admission to the listing and exclusion from the trading referred to in paragraph 4, or order the revocation of decision to suspend the financial instruments from trading, within five open market days from the receipt of the communication referred to			The process is very burdensome and not provided for by the European legislation. The Italian legislator claims it will remove such provision with the DDL Capitali, the entry into force of which, as mentioned, is still pending.

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	in paragraph 3 if, based on the information different from that assessed, pursuant to the regulation of the market, by the market managing the course of its discovery, considers the decision contrary to the purpose referred to in article 62, paragraph 1; b. may request the operator of the regulated market to provide all the information that it considers useful for the purposes referred to in letter a)."			
11	Article 25-bis of the TUF Law "Structured deposits and financial products, other than financial instruments, issued by banks" 1. "Articles 21, 23 and 24-bis are applied to the offer and the consultancy regarding structured deposits and financial products, other than financial instruments, issued by banks. This is without prejudice to what is established pursuant to article 3 of legislative decree no. 30 dated February 15th 2016".	Article 1(4) of MiFID II "Scope" "The following provisions shall also apply to investment firms and to credit institutions authorised under Directive 2013/36/EU when selling or advising clients in relation to structured deposits: a. Article 9(3), Article 14, and Article 16(2), (3) and (6);	The objective of article 25-bis of the TUF Law is to extend the protections provided for bank products – other than financial instruments – which retail investors may perceive as fungible with other financial products.	This is an example of gold-plating as the Italian law extends the scope of MiFID regulations and gives the CONSOB enhanced supervisory powers. When implementing article 1, paragraph 4 of MIFID II, the Italian legislator extended to financial products issued by banks (other than financial instruments) the MiFID II rules on the offer and advisory services of financial products, granting CONSOB regulatory and supervisory authority

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	2. "In relation to the products referred to in paragraph 1 and in the pursuit of the purpose referred to in article 5, paragraph 3, CONSOB exercises overqualified parties and over banks not authorised to provide investment services or activities, without prejudice to the powers of the competent authorities of the member states of origin, the powers referred to in article 6, paras. 2, 2-bis and 2-quater; article 6-bis, paras. 4, 5, 6, 7, 8, 9 and 10; article 6-ter, paras. 1, 2, 3 and 4; article 7, except for paras. 2, 2-bis and 3; article 7-bis, without prejudice to the powers of the Bank of Italy provided for by the same article. The powers envisaged in article 6, para. b), letter 2) do not apply to structured deposits."	b. Articles 23 to 26, Article 28 and Article 29, excluding the second subparagraph of paragraph 2 thereof, and Article 30; and c. Articles 67 to 75."		in this regard, whilst article 1(4) of MiFID II requires the extension of such rules only to structured deposits.
12	Legislative decree of March 4, 2014, no. 44 implementing AIFMD The legislative decree of March 4, 2014, no. 44 implementing AIFMD did not provide for a national private placement regime ("NPRR").	Article 36 of AIFMD "Conditions for the marketing in Member States without a passport of non-EU AIFs managed by an EU AIFM" "Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to	Article 41-quater of the TUF Law regulates the authorization procedure for non-EU AIFMs, but its application is currently not feasible. This is due to the transitional authorization regime introduced by the legislative decree of March 4, 2014, no. 44 implementing AIFMD.	This is an example of gold-plating as Italy applies its own national regime regarding marketing rules, which differs from the AIFMD regime. The Italian legal framework lacks a NPPR, the mechanism allowing non-EU AIFMs and non-EU AIFs managed by EU AIFMs to market in Europe

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		professional investors, in their territory only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1), provided that: [...] b. appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive [...]." Article 42 of AIFMD "Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM"	This regime for non-EU AIFMs is temporarily suspended until the enactment of the "passporting procedure" provided for in articles 35 and 37 to 41 of AIFMD, through the delegated act of the European Commission establishing the "Third Country Marketing Passport" pursuant to article 67(6) of AIFMD. During the transposition of the AIFMD into national law, Italy, anticipating the new authorization procedure under article 41-quater of the TUF Law, revoked its NPPR. The NPPR previously allowed the marketing of non-EU AIFMs and non-EU AIFs managed by EU AIFMs to Italian investors, subject to authorization by the Bank of Italy.	without relying on the AIFMD passport (articles 35 and 37 to 41 of the AIFMD). Therefore, these entities are required to establish and authorize a subsidiary in Italy to operate within the country.

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		"Without prejudice to Articles 37, 39 and 40, Member States may allow non-EU AIFMs to market to professional investors, in their territory only, units or shares of AIFs they manage subject at least to the following conditions: [...] b. appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive[...]."		

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13	Article 63 of the Issuers' Regulation "Communication to the Consob and publication of the prospectus" 1. "With the request for approval aimed at the publication of the admission prospectus under Article 52, it can be communicated to Consob that there is an intention to carry out a public offering related to the securities subject to admission to trading also pursuant to Article 4. In this case, Article 52, paragraphs 1 and 2, apply." Article 52 of the Issuers' Regulation "Provisions concerning the admission to trading of securities" "For the purpose of publishing the admission prospectus for securities trading, the issuer or the entity applying for admission shall submit to Consob, pursuant to Article 113, paragraph 1, of TUF, the approval request as provided in Article 94, paragraph 3, of the TUF, signed by the applicant; it shall be prepared in searchable electronic format in accordance with the model published on Consob's website, and transmitted using the computer methods specified by Consob with specific instructions.	Article 42, paragraph 2, letter c) of Regulation Delegated (EU) 2019/980 "Submission of the application for approval of the draft prospectus or deposit of the universal registration document or its amendments" 2. "The following information shall also be submitted to the competent authority through electronic means, in a format that allows for research, including: [...] c) the information included in the prospectus by reference, in accordance with Article 19 of Regulation (EU) 2017/1129, unless such information has already been approved or filed with the same competent authority in a format that allows for research." Article 19 of Regulation (EU) 2017/1129 "Inclusion of information by reference" "Information may be included in the prospectus by reference if it has been previously or simultaneously published electronically, is in a language consistent with the requirements of Article 27 and is contained in one of the following	In the case of a prospectus related to units or shares of closed-end collective investment schemes (OICRs), CONSOB requires the submission of the fund management regulations and the articles of association of the SICAF, even if these documents are already acquired by the fund managers - as entities supervised by CONSOB - in accordance with the "Handbook of information obligations for supervised entities" adopted by CONSOB (Deliberation no. 17297 of April 28, 2010, and updated with Deliberation no. 19548 of March 17, 2016, and Deliberation n. 20197 of November 22, 2017) (the "Handbook"). The rationale is that such documents are deemed essential by CONSOB for evaluating the coherence of the prospectus to be approved.	This is an example of gold-plating as the Italian law gives the CONSOB enhanced supervisory powers. CONSOB recently, by resolution no. 23016 "Amendments to the Issuers' Regulation concerning the prospectus regime" entered into force on February 29, 2024, simplified the regulatory framework applicable to prospectus approval applications for securities and introduced standardized models for such applications in an electronic format to facilitate their completion and subsequent scrutiny. In particular, in line with European regulations that exempt funds from submitting information pursuant to article 42, paragraph 2, letter c) of Regulation Delegated (EU) 2019/980 if "such information has already been approved or deposited with the same competent authority in an electronic format allowing for internal search", CONSOB eliminated the obligation for closed-end UCITs to provide almost all the information's set out in article 19 of Regulation (EU) 2017/1129, which are already acquired by CONSOB from fund managers according to the Handbook.

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	It shall be accompanied by the prospectus itself and the information and documents indicated in the model and in Article 42 of Delegated Regulation (EU) 2019/980." According to the model published on CONSOB's website, in the case of a prospectus related to units or shares of closed-end collective investment schemes (UCITs), CONSOB requires the submission of the fund management regulations or the articles of association of the SICAF.	documents: [...] (k) charters and bylaws."		However, as mentioned under the first column, the submission to CONSOB of the fund management regulations or the articles of association of the SICAF is still required, even if such documents are already acquired by CONSOB from fund managers according to the Handbook.
14	Article 192-bis of the TUF Law "Fines regarding disclosures on corporate governance and policy on remuneration and fees paid" 1. 1. "Unless the fact is a criminal offence, companies listed on regulated markets which do not make the disclosures prescribed by Article 123-bis, paragraph 2, letter a), will be subjected to one of the following administrative sanctions:	Article 28 of Directive 2004/109/EC of the European Parliament and of the Council of December 15, 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC "Administrative measures and sanctions" 1. "Without prejudice to the powers of competent authorities in accordance with Article 24 and the right of Member States to provide for and impose	The Italian legislator provided for severe sanctions for the violation of rules related to the disclosure of corporate governance and policy on remuneration and fees paid, transactions with related parties, corporate disclosures and the duties of auditors, statutory auditors and auditing firms, in order to seriously discourage the violation of such disclosure duties.	This is an example of gold-plating as Italy has tightened the sanctions rules compared to EU regulations. The sanctions prescribed by the Italian legislator for the breach of certain disclosure obligations provided for by the TUF Law (namely, in connection with certain corporate governance matters, policies on remuneration and fees, transactions with related parties, corporate disclosures and the duties of auditors, statutory auditors and auditing firms, in order to significantly discourage such breaches) should be "effective, proportionate and

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	a. a public statement indicating the legal person responsible for the breach and the nature of the same when it is characterized by a low offense or danger and the disputed infringement has ceased; b. an order to eliminate the infringements charged, with possible indication of the measures to be adopted and of the term for compliance, and to refrain from repeating the offence, when the said infringements feature scarce offensiveness or danger; c. a financial administrative sanction from Euro ten thousand to Euro ten million, or up to five per cent of sales volume when that amount is more than Euro ten million and sales volume can be determined pursuant to Article 195, paragraph 1-bis." 1.1 "Unless the fact constitutes an offense, a fine from ten thousand euros to ten million euros or the sanctions envisaged by paragraph 1,	criminal sanctions, Member States shall lay down rules on administrative measures and sanctions applicable to breaches of the national provisions adopted in transposition of this Directive and shall take all measures necessary to ensure that they are implemented. Those administrative measures and sanctions shall be effective, proportionate and dissuasive."		dissuasive", whereas they seem to lack proportionality with respect to the specific cases of violation and to grant excessive discretion to CONSOB. This is an example of gold-plating as Italy has tightened the sanctions rules compared to EU regulations.

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	letters a) and b) shall be applied against companies listed on regulated markets that violate the provisions of article 123-ter and the related implementing provision. [...] or failing to provide for the disclosures indicated under paragraph 1, in the cases contemplated by Article 190-bis, paragraph 1, letter a), unless the fact is a criminal offence, subjects which perform functions of administration, management or control, and personnel, if their behaviour has contributed to determining the omission of the disclosures on the part of the company or entity, will be subjected to one of the following administrative sanctions: a. a public statement indicating the legal person responsible for the infringement and the nature of the same, when it is characterised by low-level offence or danger and the infringement noted has ceased; b. an order to eliminate the infringements charged, with possible indication of			

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	the measures to be adopted and of the term for compliance, and to refrain from repeating the offence, when the said infringements feature scarce offensiveness or danger; c. a financial administrative sanction from Euro ten thousand to Euro two million." Article 192-quinquies of the TUF Law "Fines regarding transactions with related parties" 1. "A fine from ten thousand euros to ten million euros shall be applied to companies listed on regulated markets that violate article 2391-bis of the Civil Code and the related implementing provisions adopted by CONSOB pursuant to the same article." 2. "Unless the fact constitutes an offence, for the violations indicated in paragraph 1, a fine from five thousand euros to one million and five hundred thousand euros shall be applied to subjects who perform administration and management functions in the cases provided for by article 190-bis, paragraph 1, letter a)."			

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	Article 193 of the TUF Law "Fines regarding corporate disclosures and the duties of auditors, statutory auditors and auditing firms" 1. "Unless the fact is an offence against companies, entities or associations held to make the disclosures contemplated by Articles 114 paragraphs 5, 7 and 9, 114-bis, 115, 116, paragraph 1-bis, 154-bis, 154-ter and 154-quater for non-compliance with the provisions of the said articles or the relative implementation provisions, one the following administrative sanctions are applied: a. a public statement indicating the legal person responsible for the breach and the nature of the same, when it is characterised by low-level offence or danger and the infringement noted has ceased; b. an order to eliminate the infringements charged, with possible indication of the measures to be adopted and of the term for compliance, and to refrain from repeating the offence,			

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	when the said infringements feature scarce offensiveness or danger; c. a financial administrative sanction from Euro five thousand to Euro ten million, or up to five per cent of sales volume when that amount is more than Euro ten million and sales volume can be determined pursuant to Article 195, paragraph 1-bis."			
15	Article 106, section 3, letter b), of the TUF Law "Global takeover bid" 3. "By regulation, CONSOB shall regulate situations in which: b. the offer obligation follows acquisitions higher than 5% or the increase in voting rights of more than five percent of the same, on the part of those who already hold the stake indicated in sections 1 and 1-ter without holding the majority of voting rights in the ordinary shareholders' meeting."	No legal basis in EU legislation.	The Italian legislator intended to offer an additional protection to minority shareholders of listed companies, namely the possibility to exit and liquidate their investment in a listed company even when a shareholder that is already above the relevant threshold for a mandatory takeover bid (25% or 30%) but below the majority of the share capital, makes purchases on the open market in such listed company in excess of 5% of the share capital (so-called "consolidation takeover bid").	This is an example of gold-plating because article 106, section 3, letter b) of the TUF Law sets forth an additional case of mandatory takeover bid, which might discourage an investor which does not wish to launch a takeover bid from consolidating its stake in a listed company.

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	Article 106, section 1 and 1-ter, of the TUF Law "Global takeover bid" 1. "Anyone who, following acquisitions or increased voting rights, holds a stake greater than the thirty percent threshold or holds more than thirty percent of the voting rights of the same, promotes a takeover bid addressed to all security holders for the totality of the securities admitted for trading on a regulated market in their possession." 1-ter. "The articles of association of SMEs may contemplate a threshold different from that indicated in section 1, however not less than twenty-five percent nor greater than forty percent. If the articles of association are emended after the start of trading of the securities on a regulated market, the shareholders who have not participated in the relative resolution have the right to withdraw for all or part of their securities; articles 2437-bis, 2437-ter and 2437-quater of the Italian Civil Code shall be applied."			

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16	Annex 2A "Procedure for drawing up the bid document", Model 1, of the Issuers' Regulation "Takeover Bids for Financial Instruments Traded on a Regulated Market of the European Union" "A) WARNINGS (*) (*) Each paragraph must refer to the points of the bid document which describe the topics discussed. The following indication is not exhaustive since specific and additional Warnings may be required based on the type of transaction. [...] a.3 – description of any issues regarding: (i) the economic/capital and financial position of the bidder and of the issuer; (ii) significant extraordinary transactions (indicate the type of transaction, the relative timing and the procedures for market disclosure); (iii) management trends which are negative or characterised by significant discontinuity compared to the past. If financial reports or interim management reports are expected to be published during the subscription	Article 6 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids "Information concerning bids" 2. "Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any	The Italian legislator decided to implement changes claiming that it would ensure greater transparency towards the market and completeness of the document.	This exemplifies gold-plating due to the fact that annex 2A to the Issuers' Regulation provides for larger content of the bid document than required by the Directive 2004/25/EC. The required additional information for drawing up the bid document are beyond the minimum level of information required by the Directive 2004/25/EC, so that the preparation of the bid document in Italy is more burdensome than in other EU Member States.

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	period, the indication of those events, procedures and timing for market disclosure; a.4 – in the case of an offer made through recourse to borrowing, indicate if the issuer's assets and/or the cash flows expected from operations constitute a general guarantee or a source to repay said debt. Also summarise the main conditions of existing loans, any opening of new loan contracts and the relative guarantees as well as any consequent amendments to existing loan contracts with the relative guarantees (in the case of guarantees pledged on financial instruments being offered, also indicate any agreements on the relative voting rights); a.5 – indicate if the bidder and/or its significant shareholders and/or the members of its board of directors and internal control bodies are related parties of the issuer; [...] a.12 – an indication of the provisions of the bylaws concerning the rights of savings shares if ordinary or savings shares are excluded from trading;	translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject." 3. "The offer document referred to in paragraph 2 shall state at least: a. the terms of the bid; b. the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;		

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	B) PERSONS PARTICIPATING IN THE TRANSACTION b.2 – Issuer of the financial instruments being offered b.2.5 – Recent performance and prospects: where the bidder is the controlling shareholder of the issuer, include: - the accounting statements: financial position, income statement, cash flow statement and statement of changes in shareholders' equity of the company or, if drawn up, of the group, taken from the most recent financial reports, with a comment on the evolution of the main equity and economic items; - a table of the net financial position at the closing date of the most recent year or, if prepared, the most recent interim report, drawn up in compliance with recommendation CESR 05-54b, accompanied by the appropriate comments on the main components. Also indicate the debt and credit positions with related parties as well as any guarantees related to existing loan contracts (including therein „negative pledges" and „covenants") at the closing date of the reference year and at the date that the bid document is	c. the securities or, where appropriate, the class or classes of securities for which the bid is made; d. the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid; e. the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it; f. the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;		

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	drawn up, if significant. The operating performance comment must allow for reasonably foreseeing the net income for the year in progress."	g. details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company; h. all the conditions to which the bid is subject; i. the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business; j. the time allowed for acceptance of the bid;		

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		k. where the consideration offered by the offeror includes securities of any kind, information concerning those securities; l. information concerning the financing for the bid; m. the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company; n. the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts."		

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17	Article 69-novies, section 1 and 2 of the Issuers' Regulation "Transmission to CONSOB and publication of recommendations" 1. "Issuers of financial instruments, licensed parties and the subjects in a controlling relationship with them, which shall disclose written recommendations, provide CONSOB with a copy at the same time as starting distribution." 2. "CONSOB may ask the persons indicated in subsection 1 to see to the immediate publication of the investment recommendations. Should the following conditions all be met: a. presence of information on the contents of a recommendation attributed to one of the parties indicated under paragraph 1; b. significant change in the market price of financial instruments concerned by the recommendation with respect to the last price	Article 23, paragraph 2, letter m) and 3 of the Regulation (EU) No. 596/2014 (the "Regulation on Market Abuse" or "MAR") "Powers of competent authority" 2. "In order to fulfil their duties under this Regulation, competent authorities shall have, in accordance with national law, at least the following supervisory and investigatory powers: [...] (m) to take all necessary measures to ensure that the public is correctly informed, inter alia, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement." 3. "Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties."	Notwithstanding the MAR, CONSOB has deemed it appropriate to maintain its authority, pursuant to article 69-novies of the Issuers' Regulation, to require immediate publication of investment recommendations to issuers of financial instruments, licensed parties and the subjects in a controlling relationship with them with the aim of ensuring that the correct information regarding the content of these recommendations is not compromised. Such measure safeguards cases where the information is misleading due to being incorrect or partial.	This is an example of gold-plating because the Italian law goes beyond the standards foreseen in the EU legislation. The provision under article 69-novies of the Issuers' Regulation is additional to the MAR provisions under article 23, which already establishes CONSOB's general supervisory power to investigate cases involving misleading information as defined by the MAR.

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	on the previous day and/ or significant change in the volume of the trade of said instruments with respect to the previous day; c. there commendation indicated under letter a) has already been disseminated, the subjects established by paragraph 1, on request of CONSOB, immediately provide for the publication of the recommendation."			
18	Consob Recommendation no. 1 of May 7, 2020 "Recommendation on the methods of fulfilling the obligation of ex-post reporting of costs and charges related to the provision of investment services and ancillary services" vii. "Intermediaries should transmit ex-post reports for the calendar year by the month of April of the following year to enable clients to appreciate the costs and their impact on returns as close as possible to the decisions made on invested assets."	Article 50, paragraph 9, of Delegated Regulation (EU) 565/2017 of April 25, 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (the "Delegated Regulation (EU) 565/2017") "Information on costs and associated charges"	The rationale behind this gold-plating example is that CONSOB deemed it appropriate to provide incentives to operators by imposing a deadline for the submission of the report.	This is an example of gold-plating, as the Italian regulator imposes additional terms not foreseen in EU legislation. In the context of a market consultation regarding CONSOB's recommendation outlined in column I, it became clear that this recommendation introduces additional guidelines beyond the framework of MiFID II, resulting in an unlevel playing field for the Italian industry compared to its European counterparts.

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		9. "Investment firms shall provide annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis." Question 5, Answer 5, of "Information on costs and charges" of ESMA's Q&A on MiFID II and MiFIR investor protection and intermediaries' topics Question 5 "How can a firm provide ex-post information on total costs and charges more regularly (e.g. on a quarterly basis)?"		Considering that the mentioned CONSOB Recommendation also applies to branches of EU intermediaries, this circumstance imposes additional burdens on such entities, stemming from the need to differentiate the reporting structure from intermediaries within the same group.

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		Answer 5 "ESMA notes that based on Article 50(9) of the MiFID II Delegated Regulation, and without prejudice to any other explicit reporting requirements (e.g. Article 60 of the MiFID II Delegated Regulation), there is only a legal obligation to provide ex-post information on costs and charges to clients on an annual basis if there is or has been an ongoing relationship with the client during the year. However, firms can choose to provide this information more regularly, which could improve the clients' insights in the costs and charges of the investment service (based on an ongoing relationship). If a firm chooses to provide the client with more frequent information, for instance on a quarterly basis, it should ensure the differences between the annual ex-post figures based on actual costs, and the quarterly cost figures are minimized. The firm could for instance do this by applying the same methodology when calculating the annual total costs and charges figures. Further, the firm should – where available – use realised and known ex-post cost figures.		

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		To ensure clients are not confused by such ex-post information on costs and charges in relation to the mandatory annual costs figures, it is important that the firm informs clients on the characteristics of the ex-post information."		
19	Article 48 of Consob Resolution no. 20249 of December 28, 2017 (the "Consob Market Regulation") "Notices on access to markets" 1. "Italian investment firms and banks engaging in high frequency algorithmic trading shall promptly transmit a detailed document to CONSOB, upon initial application of the trading techniques. This document shall include the assessments performed on the implementation of such high frequency algorithmic trading techniques, specifying: a. the reference period for analysis of the message intraday rate referred to in art. 19, paragraph 1, of Delegated Regulation (EU) 2017/565;	Article 10 of the Delegated Regulation (EU) 589/2017 of July 19, 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading "Stress testing" "(Article 17(1) of Directive 2014/65/EU) As part of its annual self-assessment referred to in Article 9, an investment firm shall test that its algorithmic trading systems and the procedures and controls referred to in Articles 12 to 18 can withstand increased order flows or market stresses. [...]."	The annual statement to be sent to CONSOB increases the regulator's monitoring tools on the procedures implemented for validating, developing and deploying trading algorithms. Given the high risk involved in high frequency algorithmic trading, CONSOB deemed it appropriate to provide additional disclosure obligations on Italian investment firms and banks engaging in such activity.	This is an example of gold-plating because Italian regulator imposes additional disclosure requirements regarding algorithmic trading. EU Delegated Regulations outlined in column II only include the annual stress test, while CONSOB adds a further duty, namely an annual statement on the procedures implemented for validating, developing and deploying trading algorithms. The statement is to be delivered to CONSOB each year by May.

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	b. the scope of application of high frequency algorithmic trading, with respect to markets and financial instruments; c. any request to trading venues for an estimate of their trading operations, according to the provisions of art. 19, paragraph 5, of Delegated Regulation (EU) 2017/565." 2. "Upon starting the operations and upon any subsequent change, Italian investment firms and banks shall notify CONSOB of any algorithmic trading activity being performed or high frequency algorithmic trading techniques being implemented, providing the following information: a. the trading start date; b. the trading venues the activity is performed on, identified by means of a dedicated Market Identifier Code (MIC); c. the financial instrument category the activity is performed on; d. any high frequency algorithmic trading activity			

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	activity being performed, or any high frequency algorithmic trading being implemented by means of DEA to the market." 3. "The provisions of paragraph 2 also apply to the persons referred to in art. 67-ter, paragraph 8, of the Consolidated Law." "Notices on algorithmic trading" 1. "1. By May of each year, the control functions of Italian investment firms and banks engaged in algorithmic trading shall inform CONSOB of: a. the procedures implemented for validating, developing and deploying trading algorithms, for their subsequent updates and for arranging solutions to the problems which may have been detected during monitoring; b. the procedures set forth for developing and testing trading algorithms, according to the provisions of art. 5 of Delegated Regulation (EU) 2017/589.			

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	2. "The compliance control function of Italian investment firms and banks engaged in algorithmic trading shall promptly provide CONSOB with: a) the validation report prepared within the self-assessment procedure, according to the provisions of art. 9 of Delegated Regulation (EU) 2017/589; b) the results of annual audits on automated monitoring systems, as provided for by art. 13 of Delegated Regulation (EU) 2017/589 and the business continuity mechanisms under art. 14 of said Regulation." 3. "The notices provided for in this article shall also be sent to the persons referred to in art. 67-ter, paragraph 8, of the Consolidated Law."			
20	Article 34-bis.2 of the Issuers' Regulation "Access to KIDs by CONSOB" 1. "PRIIP manufacturers shall make the KIDs of the products developed by them, and marketed in Italy to the retail investors,	Article 5, paragraph 2, of the Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (the "PRIIP Regulation")	This example shows that CONSOB has seized the opportunity provided by the PRIIP Regulation to request the ex-ante notification of the KID.	This is an example of gold-plating, as the local law opts to increase the scope of CONSOB's powers to access KIDs. According to the PRIIP Regulation, EU Member States were afforded the option, not the obligation, to provide the ex-ante notification of the KID to

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	electronically accessible by CONSOB, according to the methods specified in CONSOB's operative instructions." 2. "The obligation set out in para. 1 shall be met before the start of the marketing of products."	2. "Any Member State may require the ex ante notification of the key information document by the PRIIP manufacturer or the person selling a PRIIP to the competent authority for PRIIPs marketed in that Member State."		the relevant authority. CONSOB opted to request to PRIIP manufacturers the ex-ante notification of the KIDs.

Licensing process and time periods in financial regulations

As a general rule, the licensing process for entities such as investment firms, UCITS management companies and AIF managers this process is bound by specific regulatory timelines. In Italy, entities seek authorization from regulators such as the *Commissione Nazionale per le Società e la Borsa* (CONSOB) and the Bank of Italy.

The maximum duration of the authorization processes for the obtaining licenses as an investment firm, AIFM and UCITS Management Company, are respectively, (*i*) 120 days, (*ii*) 90 days and (*iii*) 90 days. However, authorities may require further information or documents at any time, and during such period and until the authority deems the request to be fully satisfied, the authorization process is suspended.

These requests therefore often lead to durations of processes considerably longer than the theoretical statutory length due to requests for additional information and other complexities. As a result, the overall timetable, including preparation time, typically ranges from 3 to 12 months, depending on the specifics of each case.

As is evident from the practice authorities typically do respect the deadlines, however they often exercise their right to require further documents or information, and this often results in longer durations as described above.

The licensing process and associated timeframes are a good example of the nuanced regulatory landscape in which financial entities operate. Understanding these complexities has great importance, especially in light of the concept of gold-plating. While not strictly constituting gold-plating, these licensing processes illustrate the intricacies of capital market regulations. In practice, the application of different terms in licensing processes can have the same effect as gold-plating. Therefore, a comprehensive analysis of these regulatory frameworks is indispensable for financial entities to operate effectively and compliantly within the dynamic landscape of the capital markets.

3.3. Spain vs. gold-plating

Overview of gold-plating in the Spanish legal system

Gold-plating is still one of the main factors disrupting the EU single market. Not only does it unjustly disadvantage national businesses and consumers, but it also reduces the competitiveness of the EU as a global player. Thus, preventing gold-plating is among the top explicit tasks of the EU in reducing barriers to the single market.

There is not one definitive answer to how Spain approaches the issue of gold-platting, which refers to the practice of adding extra or stricter requirements to EU legislation when transposing it into national law, sometimes exceeding the original objectives or scope of the EU directives or regulations.

While Spain is among the EU member states with a relatively low level of gold-platting, as regards the implementation of financial sector EU regulation, Spain has shown a more reluctant or conservative attitude. When the protection of consumers is at stake, Spain has typically included stricter rules than its EU peers.

Likewise, Spain has used the Q&A both at the level of funds regulation and MiFID not only to make interpretation of the Law but also to impose obligations which go beyond the regulation. This practice is doubtfully covered by the Spanish regulation, but it is customary accepted by the industry.

The reason behind such position might be an overreaction on the high number of past financial scandals linked to the aggressive selling of certain complex products to retail investors along with the poor average financial culture of Spanish customers.

Countermeasures and actions to prevent gold-plating in Spain

Spain has not developed specific process to reduce gold-planting and measures to combat gold-plating are scarce or non-existent, as there is no process during transposition that is directly involved in the supervision of possible gold-plating. However, the transposed standard goes through different phases of generic review in which this phenomenon may be noticed. Depending on the legal form that the transposed regulation adopts, it will be submitted or not to debate and vote in the Parliament.

However, the opinion of the Council of State is always mandatory and, being a more technical body than the Government or the Parliament, it can highlight the existence of gold-plating if it considers it necessary, however, it is not obliged to pronounce on this topic.

Likewise, it is very common to share draft text of the regulation with the stakeholders of the financial sector, which should improve the quality of the rules. However, as in many cases, the gold-plating is not technical but politically driven, it is not easy to discuss with the authorities the merits of removing gold-plating provisions.

In order to prevent the gold-plating in the future, we suggest avoiding practices as issuing Q&A in which the criteria go beyond the pure interpretation of the regulation and incorporate new requirements or rules to the existing ones and to reinforce and respect the opinions of the Council of State or the industry stakeholders in the approval process.

Examples of gold-plating in Spain

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1	Royal Decree 1082/2012 Article 5- Fees and Expenses The number of unitholders of an investment fund cannot be less than 100.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD. The decision to implement this gold-plating example was deemed necessary during the legislation process due to the previous Spanish regulations on the minimum number of unitholders.	This is an example of gold-plating as this requirement is not provided for in the UCITS/AIFMD. Prior to the implementation of UCITS/AIFM directives, the Spanish open-ended funds were required to have a minimum of 100 investors. Such obligation is still applicable, except for open-ended hedge funds in which 25 investors are required.
2	Royal Decree 1082/2012 Article 5- Fees and Expenses 1. (...) 3. In the investment Funds of financial nature, the Management fee will be calculated on its assets or its performance or both. The following limits will be applicable: When the fee is calculated solely on the basis of the fund's assets, 2.25% of such assets. b. When the fee is calculated solely on the basis of the results, 18% of the results.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	The identification of this example as gold-plating is based on the maximum fee limits applicable to the funds. Spanish UCITS/quasi-UCITS or real estate investment funds are addressed to retail investors. Historically the Spanish regulation has imposed maximum fee limits to such funds, which might create a disadvantage towards the foreign UCITS distributed among Spanish investors.

[22] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[23] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

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	c. When both variables are used, 1.35% of the net assets and 9% of the results. (...)			
3	Royal Decree 1082/2012 Article 5- Fees and Expenses 1. (...) 5. In investment funds of a financial nature, the depositary's fee may not exceed two per 1,000 per annum of the assets. This fee shall constitute the remuneration to the depositary for the performance of all functions.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	The identification of this example as gold-plating is based on the maximum fee limits applicable to the funds. Spanish UCITS/quasi-UCITS or real estate investment funds are addressed to retail investors. Historically the Spanish regulation has imposed maximum fee limits to such funds, which might create a disadvantage towards the foreign UCITS distributed among Spanish investors.
4	Royal Decree 1082/2012 Article 5- Fees and Expenses 1. (...) 13. The investment funds may bear the expenses corresponding to the service of financial analysis on investments, referred to in Article 26.e) of Law 6/2023, of March 17, on Securities Markets and Investment Services, provided that this appears in the fund's informative prospectus and the following requirements are met:	**UCITS/AIFMD**	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	The identification of this example as gold-plating is based on the maximum fee limits applicable to the funds. Spanish UCITS/quasi-UCITS or real estate investment funds are addressed to retail investors. Historically the Spanish regulation has imposed maximum fee limits to such funds, which might create a disadvantage towards the foreign UCITS distributed among Spanish investors. In this particular, case, rules limiting the cost of research activities are envisaged.

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	a. The analysis service must constitute original thought and propose significant conclusions, which are not obvious or in the public domain, derived from the analysis or processing of data. b. Such service must be related to the investment vocation of the investment fund and contribute to improve investment decision making. c. The cost of the analysis service shall not be influenced or conditioned by the volume of intermediation operations. Likewise, when the charge for the financial analysis service on investments is made together with a brokerage commission, a separate identifiable charge corresponding to the indicated analysis service must appear, and all the above requirements must be met. However, investment funds may also bear combined analysis and intermediation			

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	expenses if the following circumstances are met: 1st) That before the intermediation or analysis services are provided, an agreement has been entered into between the manager and the analysis service provider indicating what portion of the combined expenses or joint payments for intermediation and analysis services is attributable to the analysis; 2nd) That the annual report of the CIS includes information on the co-payments for intermediation and analysis services made to third party analysis service providers; and 3) That the analysis for which the combined charges or the joint payment is made refers to issuers whose market capitalization during the thirty-six calendar month period prior to the performance of the analysis has not exceeded 1,000,000,000 euros, on the basis of year-end contributions for the years in which they are or were listed,			

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	or on the basis of shareholders' equity for the years in which they are or were not listed. The management companies must have procedures in place to periodically evaluate the quality of the analysis and its contribution to the adoption of better investment decisions, as well as to ensure that the selection decisions of the entities that provide the financial analysis service are taken separately and independently from the selection of intermediaries through which they carry out the transactions for the CIIs, establishing mechanisms to adequately manage the conflicts of interest that may arise, in order to fulfil their duty to act in the best interest of the unit-holders.			
5	Royal Decree 1082/2012 Article 5- Fees and Expenses 1. (...) 4. In the investments funds of financial nature, fees for subscription or redemption, including discounts in favour of the fund applicable to subscriptions or redemptions, or the sum of both concepts, can be higher than 5% of the NAV of the units.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	The identification of this example as gold-plating is based on the maximum fee limits applicable to the funds. Spanish UCITS/quasi-UCITS or real estate investment funds are addressed to retail investors. Historically the Spanish regulation has imposed maximum fee limits to such funds, which might create a disadvantage towards the foreign UCITS distributed among Spanish investors.

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6	Royal Decree 1082/2012 Article 5- Fees and Expenses 1. (...) 10. When an investment fund invests in another CII that is managed by the same SGIIC or by a company belonging to the same group, the management fees accumulated and borne directly or indirectly by its unitholders may not exceed the percentage fixed for this purpose in the prospectus of the fund within the limits of this article. The percentage of management fees accrued and borne indirectly by the investment in other CIS, in accordance with the above paragraphs, shall be calculated according to the amount actually borne in relation to the assets invested in these CIS.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	The identification of this example as gold-plating is based on the maximum fee limits applicable to the funds. Spanish UCITS/quasi-UCITS or real estate investment funds are addressed to retail investors. Historically the Spanish regulation has imposed maximum fee limits to such funds, which might create a disadvantage towards the foreign UCITS distributed among Spanish investors.
7	Royal Decree 1082/2012 Article 103. Indebtedness limit and prohibition to grant loans.	Article 7 of AIFMD and Article 7 of the UCITS	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	This is an example of gold-plating as it introduces stricter regulations on indebtedness limit and lending rules that enhance the financial situation of Spanish Fund Management Companies

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	1. SGIICs may only borrow up to the limit of 20% of their own resources described in paragraph 1 of Article 101. 2. The SGIIC may not grant loans, except to its employees or salaried employees, up to the limit of 20% of its own resources described in article 101.			
8	Royal Decree 1082/2012 Article 104. Diversification of Risks. The investments of the SGIIC in cash or in financial instruments issued or guaranteed by the same entity, or by entities belonging to the same economic group, may not exceed 25% of the SGIIC's own resources. For these purposes, investments shall be computed at their book value. (...)	Article 7 of AIFMD and Article 7 of the UCITS Directive.	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing UCITS/AIFMD.	This is an example of gold-plating as it introduces additional restrictions on investments limits that enhance the financial position of Spanish Fund Management Companies
9	CNMV Circular 1/2009 Rule 9.º Additional requirements to the delegation of functions. 3. The control of the activity of the entity to which the delegation is made shall be the responsibility	Article 13 of the UCITS Directive and Article 20 of the AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD/UCITS	This is an example of gold-plating as it introduces additional requirements to the delegation of functions in relation to UCITS and AIFMD.

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	of an independent committee set up within the board of directors of the SGIIC or investment company, or of a general manager or similar. The members of the independent committee, as well as the general manager or equivalent, must have adequate knowledge and experience in the field and may not hold executive functions in the SGIIC or investment company, nor perform functions that could undermine their independence and objectivity.			The obligation to appoint a member of the board or a general manager to control the activities of the delegated entity, introduces, in practice, the need to have an independent director at the level of the Spanish fund managers.
10	Law 22/2014[24] Article 26- Definition and Legal Regime SCRs are venture capital entities that take the form of public limited companies.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD.	This meets the definition of gold-plating because introduces restrictions on the permissible legal form for operating as collective investment schemes. Spanish closed-ended collective investment schemes are obliged to be incorporated as a PLC. This measure limits the capacity to use standard structures within the Private Equity space as Partnerships.

[24] Law 22/2014, of November 12, regulating venture capital entities, other closed-end collective investment entities and management companies of closed-end collective investment entities, and amending Law 35/2003, of November 4, on Collective Investment Institutions.

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11	Royal Decree 1082/2012 Expenses limitation (CNMV Q&A) 62. What expenses are attributable to an investment fund? (P&R 59, section 1) In general, article 5.11 of RD 1082/2012 establishes that the expenses to be borne by investment funds must be expressly provided for in their prospectus and may not involve an additional cost for services inherent to the work of their SGIIC or depositary, which are already remunerated by their respective fees. Specifically, the following expenses are attributable to the fund: - Brokerage and settlement of transactions. - Audit - CNMV fees - Financial expenses for overdrafts or loans - Fees and commissions. - Expenses derived from the contracting, if applicable, of the calculation agent. - Expenses for the use of indexes, except when they are part of the name of the fund, which, if applicable, will be borne by the fund manager.	**UCITS/AIFMD**	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD	The identification of this example as gold-plating is based on the expenses limits applicable to the funds, which are not provided for in EU legislation. Spanish CNMV has a very restrictive approach regarding the expenses that could be charge to investment funds. Only certain expenses are admitted, and this limitation creates differences with foreign UCITS registered in Spain.

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12	Law 22/2014 Article 72. Conditions of access and exercise of the activity of the SGEICs that manage ECR or EICC below certain thresholds. 1. 1. All the provisions of Chapter II shall not apply to SGEICs whose assets under management are below the following thresholds: a. EUR 100 million, including assets acquired by recourse to leverage, or. b. EUR 500 million, where the investment entities they manage are not leveraged and have no redemption rights exercisable for a period of five years after the date of initial investment. (...) 5. The provisions of paragraph 1 shall not apply to SGEICs that market ECRs other than the ECR-Pymes to non-professional investors, in accordance with the provisions of Article 75.2 and 75.3.	Article 3.2 of the AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD This instance of gold-plating was rationalized in the legislative process as extending the powers of supervisory authorities.	This is an example of gold-plating as it extends the powers of supervisory authorities. Spanish Sub-threshold AIFM, which commercialize its funds to non-professional investors, are obliged to comply with AIFMD requirements and be subject to authorization process.

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13	Law 22/2014 Article 6. Excluded entities. This Law shall not apply to the following entities: 1. (...) 8. Listed Real Estate Investment Companies regulated by Law 11/2009, of October 26, 2009, which regulates Listed Real Estate Investment Companies.	Articles 2.3 and 4 1 (a) of the AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD	This is a specific example of the implementation of EU law, which illustrates that Spanish law introduces exceptions that go beyond the regulations provided by AIFMD. It can be seen as not introducing additional burdens but rather making local regulations more flexible. Exclusion of Spanish REITS SOCIMI from the scope of AIF definition.
14	Question 23.1 Application of MiFID regulation to Spanish fund managers. (MIFID Q&A)[25] The above implies applying to the marketing activity carried out by SGIICs and SGEICs, both of their own vehicles or instruments and those of third parties, the same rules and SGEICs, both of their own vehicles or instruments as well as those of third parties, the same obligations that obligations that affect other intermediaries regarding product governance,	**UCITS/AIFMD**	**No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD**	The characterization of this as gold-plating arises from imposing additional MIFID obligations on the Spanish AIFMs. The compliance with MiFID obligations to Spanish fund management companies impose a further burden to Spanish entities which is not applicable to EU peers.

[25] https://www.cnmv.es/docportal/Legislacion/FAQ/FAQ_MiFIDII.pdf

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	knowledge and skills required of sales personnel, remuneration policies for sales personnel, incentives, reporting duties, updates in relation to the to the evaluation of the suitability and classification of clients, as well as the keeping and and the keeping and maintenance of records established in the aforementioned Title VII.			
15	Law 35/2003 Title IV	Article 3.2 of the AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD	This is an example of gold-plating as it introduces stricter regulations on Spanish Fund Management Companies. Spanish AIF Open-Ended Management Companies are required to fully comply AIFMD, regardless of the assets under management.
16	CNMV TECHNICAL GUIDE 4/2017 for the evaluation of the knowledge and competencies of personnel who inform and advice	UCITS/AIFMD/MIFID	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD	This is an example of gold-plating due to additional criteria set for personnel that are not provided for in EU regulations. The Circular impose obligations for the personnel which advice/ inform to clients are regards financial instruments. Specific number of hours of formation in authorized service providers are required.

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17	Law 35/2003 (Article 30.6) Securities Lending (CNMV Q&A)[26] Securities lending. Until the corresponding regulatory development takes place, operations are limited.	UCITS/AIFMD	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD.	This is an example of gold-plating because Spanish regulations restrict securities lending in comparison to EU regulations. Excluding Hedge Funds, the rest of Spanish Funds cannot make securities lending, which limit the possibility of getting revenues in this regard.
18	Circular 1/2018, of March 12, 2018, of the National Securities Market Commission, on warnings regarding financial instruments.	Directive 2014/65/EU of the Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II)	According to the Spanish regulator, it is therefore necessary to reinforce the informed consent of retail clients when contracting investment products, especially when these are particularly complex.	This is an example of gold-plating because the Spanish regulator's approach and practice goes beyond the standards provided by EU legislation. The obligations contained in the Circular, which entail, for instance, handwriting confirmation by the retail clients, investing in such products, lead to extremely burdensome obligations to entities operating in the Spanish market.
19	Law 10/2010, of April 28, 2010, on the prevention of money laundering and financing of terrorism. Article 2- Obliged entities	AML DIRECTIVE	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD	This is an example of gold-plating because it tightens the AML reporting requirements.

[26] https://www.cnmv.es/docportal/Legislacion/FAQ/QAsIIC.pdf

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	This Law shall apply to the following regulated entities: a. Credit institution. (..) c. Investment services companies. d. Management companies of collective investment institutions and investment companies whose management is not entrusted to a management company. f. Management companies of venture capital entities and venture capital companies whose management is not entrusted to a management company. Non-resident persons or entities which, through branches or agents or through the provision of services without a permanent establishment, carry on in Spain activities of the same nature as those of the persons or entities mentioned in the preceding paragraphs, will be understood to be subject to this Law.			The obligation for non-resident persons or entities acting without permanent establishment to report Spanish AML authorities is extremely burdensome, taking into account that such entities are reporting to its local authorities.

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20	Communication from the CNMV on the distribution to customers of classes of shares of CII and cloned funds[27].	Article 24 of MIFID	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I, implementing AIFMD. In the Spanish regulator's view, the catalogue of entities to which the presented obligation applies should have been expanded.	This is an example of gold-plating because the Spanish regulator's approach and practice goes beyond the standards provided by EU legislation. This communication imposes obligations to entities based in Spain, including branches, providing MiFID services, to apply measures addressed to choose the best class of shares of the Funds offered to its clients. Such obligation is extended to the so-called clone- Funds.
21	Circular 2/2011, of June 9, 2011, CNMV, on the information on foreign collective investment institutions registered with the Investment institutions registered in the (CNMV). Rule one. Sending to the CNMV of information relating to harmonized foreign CIIs. harmonized.	UCITS	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	This is an example of gold-plating because the Circular impose to UCITS managers obligations to get a Spanish tax id to pay CNMV fees and/ or appoint an entity based in Spain to communicate the number of investors when the fund is incorporated as a company.

[27] https://www.cnmv.es/webservices/verdocumento/ver?t=%7bd458ae02-ad56-4ecb-8287-3ff343bc6a06%7d

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	1. The foreign CIIs referred to in Article 15(1) of Law 35/2003, of November 4, 2003, on Collective Investment Institutions (hereinafter, the CII Law). 35/2003, of November 4, 2003, on Collective Investment Institutions (hereinafter referred to as the „CII Law"), that intend to market their shares or units in Spain must include in section B of the notification letter defined in article 15.1 of the B of the notification letter as defined in Annex I of Commission Regulation (EU) No. 584/2010, to 584/2010, to send to the competent authorities of their Member State of origin, the following information: a. The identification of the entity responsible for representing the CIS before the CNMV and, in particular, for sending the information referred to in number 3 of this Rule. b. In the case of CIS with a corporate legal form, the identification of the marketing entity with a Spanish establishment in Spain designated by the CIS or its manager to make			

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	the communication referred to in number 3 of this Rule. c. The identification of the entity with domicile in Spanish territory responsible for the payment of the fees to be paid for the payment of the fees to the CNMV, in accordance with the provisions of article 47 of Law 58/2003, of 17 December 2003, of 17 December 2003. of Law 58/2003, of December 17, 2003, General Tax Law, as well as the expected volume to be traded in Spain.			
22	Incentives (Vertical Integration) MIFID Q&A 3.1 Would the incentive regime be applicable in the case of a distribution model where there is vertical integration? (Last updated: October 30, 2017). The CNMV considers that the new regulation on the collection (or prohibition) of incentives cannot be circumvented by vertical integration practices. incentives cannot be circumvented by means of vertical integration practices, whereby	MiFID II. Article 24	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system. The identification of this as gold-plating is based on the opinion of the supervisory authority regarding incentives.	This is an example of gold-plating because the Spanish regulator's approach and practice in relation to incentives goes beyond the standards provided by EU legislation. The position of the CNMV identify the so-called vertical integration practices (group) in which no payment of explicit inducement is made, to those situations in which the payment to the distributors is made via dividends.

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	the explicit payment of incentives by the SGIIC to the group marketer without altering the the group's marketer, without altering the rest of the conditions for the provision of services. The economic background would be the same, since the bank would provide the fund manager with a service (the distribution of its CIIs) which, instead of being explicitly paid via retrocession of commissions, it would be paid via distribution of dividends or accumulation of reserves in the subsidiary.			
23	Royal Decree 1464/2018, implementing the consolidated text of the Securities Market Act and Royal Decree-Law 21/2017 on urgent measures to adapt Spanish law to European Union regulations on the securities market – Article 59a). Client classification. Need for investment firms (ESIs) to carry out a proper assessment of the knowledge and experience of retail clients requesting treatment as a professional client before accepting the change of classification.	MiFID II - Annex II, section II.1.	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	The attribution of gold-plating to this is because the wording of local regulation is more restrictive in nature than MIFID II. In the case where the ESI assesses compliance with the first requirement of the rule, the number of transactions of significant volume undertaken by the client in the „relevant market for the financial instrument in question or similar financial instruments" should be considered.

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24	Royal Decree 1464/2018 - Articles 31 and 31bis Internal organisation. Requirement for ESIs to have a risk committee and a risk management unit where proportionate in light of the nature, scale and complexity of the business. MiFID II only requires a risk function, where proportionate in light of the nature, scale and complexity of its business, and the nature and range of investment services and activities.	MiFID II Delegated Regulation 565/2027/EU - Article 23	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	This is an example of gold-plating, as the scope regarding the internal organisation of ESIs as defined by local regulations is stricter compared to MiFID. Strictly local regulation.
25	Royal Decree 813/2023 of 8 November on the legal regime for investment firms and other entities providing investment services - Chapter II: Incentives, Articles 120, 121 and 122. Incentives.	Q&A on MiFID II and MiFIR investor protection and intermediaries topics - 12 Inducements, question 8.	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	This is an example of gold-plating because the local law in relation to incentives goes beyond the standards provided by EU legislation. Spanish regulation was more restrictive than MiFID II and specific assumptions were determined to justify the increase in the quality of service, in order to explain its proportionality to the level of incentives received. However, some of the best practices indicated by ESMA do coincide with the cases of Spanish regulation. ESMA sets out the assumptions for considering the provision of an additional or higher level of service to the client,

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				which is proportionate to the level of inducements received. However, ESMA explains that these examples would not apply to jurisdictions whose regulations list the assumptions of increased quality of service as a closed list.
26	Law 6/2023 of 17 March on Securities Markets and Investment Services - Article 149 Cross-border provision of investment services. The CNMV may require, in view of the volume of activity, the complexity of the products or services, or reasons of general interest, that a third-country firm which provides or intends to provide investment services or activities in Spain, with or without ancillary services, to professional clients or eligible counterparties, establish a branch.	Directive 2014/65/EU of the Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II).	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I.	The designation of this as 'gold-plating' is due to the additional requirements that the regulator may impose on the entities providing cross-border services. Strictly local regulation.
27	Question 82.3 of the CII Q&A imposing special transparency and disclosure requirements to certain fixed income funds.	Supervisory briefing on the supervision of costs in UCITS and AIF	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	The identification of this as gold-plating is based on the opinion of the supervisory authority regarding transparency obligations.

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				Maturity or buy&hold funds. UCITS regulations do not establish any speciality for this type of investment funds, as long as they comply with all the diversification and other criteria. As they have proliferated a lot in Spain, in April 2023 the CNMV published a specific guide on additional measures that the prospectuses of these UCITS have to comply with, both in the information presented in the prospectus (risk warnings) and even in the maximum limits of management fees that can be charged, which are well below the legal limits. This limit has also been included in a CNMV Q&A on collective investment institutions (IICs).
28	CNMV Circular 6/2010 on derivative transactions of collective investment undertakings.	UCITS DIRECTIVE	No legal basis for introducing these provisions in EU legislation transposed into the Spanish legal system by the Act referred to in column I	This exemplifies gold-plating due to the additional limits on derivative transactions. The limits for the use of derivatives based on leverage calculated by the commitment method are stricter than those in other jurisdictions. Thus, Rule 13 of the CNMV Circular establishes the need to incorporate leverage measures for positions invested in other collective investment

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				undertakings (IICs). In the event that the management company has up-to-date information, either on the level of leverage recently reported in its latest periodic public information or through the maximum level of leverage that the IIC could reach as reported in its prospectus.

Licensing process and time periods in financial regulations

The licensing process for investment firms, UCITS management companies and AIF managers in Spain is governed respectively by:

- Law 6/2023 on Securities Markets and Investment Services (hereinafter 'Law 6/2023');
- Law 35/2003 on Collective Investment Institutions (hereinafter 'Law 35/2003');
- Law 22/2014 which regulates the venture capital entities, other closed-ended investment fund entities and management companies of close-ended collective investment entities and amending Law 35/2003 (hereinafter 'Law 22/2014')

and in each case requires an application to be submitted to the Spanish regulator, i.e. Comisión Nacional del Mercado de Valores (CNMV).

According to art. 131 of Law 6/2023, the administrative decision of CNMV concerning the authorization to create an investment firm shall be reasoned and shall be notified within six months of receipt of the application or when the required documentation is completed. If the application is not resolved within the period specified above, it may be deemed to have been rejected.

According to respectively art. 41 of Law 35/2003 and art. 46 of Law 22/2014, the CNMV's authorization decision concerning a collective investment management company, which in all cases must be reasoned, must be notified within three months of the submission of the application or of the day on which the required documentation is completed. This period may be extended by three months by means of a reasoned decision when it is considered necessary due to the specific circumstances of the case and the management company is notified in advance. If this period elapses without an express decision being issued, the application may be deemed to have been accepted by administrative silence, with the effects provided for in Law 30/1992, of 26 November, on the Legal Regime of the Public Administrations and Common Administrative Procedure.

However, the above indicated legal regulations set out maximum term limits for the authorization proceedings, the regulations refer to the required documentation being completed as the beginning of said terms, therefore if in view of the regulator the application is missing certain information or documents, said terms may be extended significantly. Having considered the above, the applicants should expect longer application processes, with realistic deadlines estimated to be between 6 and 12 months depending on the complexity of the application project.

3.4. Malta vs. gold-plating

Overview of gold-plating in the Maltese legal system

Traditionally, Malta's approach to the transposition of EU laws relating to financial services, particularly investment services and fund management, has been to adopt a copy-out or no gold-plating approach. This firm approach can be found in multiple public documents published by the Malta Financial Services Authority ("MFSA") as competent authority for financial services in Malta and the entity that generally takes a lead with the transposition of EU financial services laws including, most recently, in the MFSA's Strategic Statement[28]. The rationale for this approach is clear given Malta's positioning as an EU financial services domicile where lack of gold-plating of relevant EU laws is one of the selling points of the jurisdiction. Accordingly, gold-plating of EU financial services laws is not that common in Malta, particularly where this could impact Malta's attractiveness to financial services promoters. There are, however, certain areas where Malta has strategically opted to gold-plate provisions where these are said to serve to either:

a. protect local clients or the reputation of the jurisdiction;
b. provide a perceived advantage by offering regulatory certainty by licensing certain activities or service providers which would otherwise be either exempt or fall outside the scope of relevant EU laws; or
c. increase the MFSA's oversight over licence holders.

In relation to (a), this approach has become increasingly common, particularly in relation to Conduct of Business obligations, since the MFSA's transposition approach for EU financial services laws heavily relies on the MFSA's own rulebooks which can be amended by the MFSA with ease. In relation to (b), as noted in the Annex, some of these perceived advantages or strategic choices may require a periodic reassessment, which is not always done. In relation to (c), these instances tend to arise from the MFSA Rulebooks and include for example prior notification to MFSA requirements or MFSA prior approval requirements for licence holders (Investment Firms, AIFMs, or Management Companies) for activities which are not required under the relevant EU Directives.

Countermeasures and actions to prevent gold-plating in Malta

We are not aware of any formal legal methods or initiatives to reduce gold-plating in Malta.

In practice, the MFSA and the legislator will consult prior to transposing EU laws or amending laws or rules transposing same and will readily listen to feedback from the industry including in relation to gold-plating.

Generally, gold-plating is not considered to be a prevalent problem in Malta where financial services laws are concerned, but at the same time there are clear examples of gold-plating in local legislation or even widespread soft-core gold-plating where the regulator puts additional requirements on top of national laws.

[28] https://www.mfsa.mt/wp-content/uploads/2023/02/MFSA-Strategic-Statement.pdf

Therefore, a more balanced wording at a local level, further formalizing the review process to remove unnecessary gold-plating would be a good development rather than relying on strategy statements, goodwill, and industry feedback.

From an EU perspective, besides the current "single rulebook" trend which obliviates the risk of gold-plating through the use of Regulations, we would recommend that: (a) better publicity be given to transposition matrices (historically these used to be made public by the EU Commission but it seems this practice has been discontinued) and gold-plating, and (b) it be proposed that similarly to the approach adopted by ESMA in relation to its Level 3 measures where competent authorities are required to comply or explain, EU Member States should in relation to minimum harmonization Directives be required to publicize where they depart from or gold-plate EU Directives and explain the rationale for each such departure.

Examples of gold-plating in Malta

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[29]	Assessment of gold-plating and its impact on the local capital market[30]
1	Article 10C of the Investment Services Act (Cap. 370, Laws of Malta) (the "**ISAct**"): "10C. (1) Notwithstanding anything contained in any other law, and without prejudice to article 10(1) and (2), the consent of the competent authority given in writing shall be required before an investment services licence holder may lawfully: a. sell or dispose of its business or any significant part thereof; b. merge with any other company, whether licensed under this Act or not; c. undergo any reconstruction or division; or d. increase or reduce its nominal or issued share capital or effect any material change in voting rights."	No direct equivalent.	These "homegrown" additional prior MFSA consent requirements were introduced in 2009 and are included in all relevant regulatory laws as safeguards / additional layers of regulatory scrutiny. Since these requirements are included in the ISAct and apply to any licence holder they apply equally to MiFID, AIFM, and UCITS licences. The net result of this requirement is that the legality and therefore the validity of certain transactions by licence holders and potentially with third parties is subjected to the MFSA's prior consent.	This is an example of gold-plating because the local law requires additional regulatory approval, which is not required by the European regulations. This requirement potentially causes delays in the implementation of corporate transactions. This is further compounded by an informal arrangement between MFSA and the Malta Business Registry ("**MBR**") to not register corporate document where the company is a licence holder and no MFSA consent is presented to MBR. Under company law rules (e.g. the EU Mobility Directive), the competent authority's approval or no objection is typically separate from the corporate process. For example, under the EU Mobility Directive, the competent authority's "no objection" or consent to a cross-border merger will arise prior to the pre-merger certificate being issued (i.e. at the end of the creditor notice period). In Malta on the other

[29] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[30] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

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				hand as a result of the prior approval requirement the merger proposal requires the MFSA's prior approval accordingly the creditor notice period (3 months) cannot commence before the MFSA's no objection is issued therefore delaying the start of such period.
2	Paragraph 5, First Schedule, ISAct "FIRST SCHEDULE (Article 2) Investment Services and Activities... 5. Trustee, Custodian or Nominee Services(a) Acting as trustee, custodian or nominee holder of an instrument, or of the assets represented by or otherwise connected with an instrument, where the person acting as trustee, custodian or nominee holder is so doing as part of his providing any investment service in paragraphs 1, 2, 3, 4 or 6 of this Schedule; Provided that for the purposes of this sub-paragraph any person who is authorised or otherwise exempt from authorisation in the terms of article 43 or 43A of the Trusts and	No direct equivalent. This represents an additional investment service added to the list of investment service under Annex I, Section A to MiFID II (EU Directive 2014/65/EU).	This "homegrown" additional investment service under Malta's transposition of MiFID I and later MiFID II was originally introduced to better regulate the safekeeping of clients' assets and ensure that only licence holders with this licence "top-up" may hold clients' assets / provide nominee services. It is to be noted that this additional investment service does not refer to holding of clients' monies since like all other investment services it must be provided in relation to a "financial instrument". The same additional investment service (in sub-paragraph (c)) also provides the basis for the regulation of Fund Depositaries / Custodians.	This is an example of gold-plating, as Maltese law introduces an additional investment service that differs from the MiFID regime. While historically this additional investment service made sense since pre-MiFID II "ancillary services" did not have a statutory footing under Maltese law and instead where solely included in MFSA's rulebooks and guidance, post MiFID II, this rationale no longer holds water. Safekeeping of clients' assets and monies is an Ancillary Service under MiFID I and MiFID II. Post-MiFID II, Investment Firms may only provide an Ancillary Service if they are authorised to provide such service and conduct of business obligations and other requirements apply equally to Ancillary Services accordingly subjecting local operators

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	Trustees Act shall not by virtue of holding such assets be required to have a licence in terms of this sub-paragraph if such person does not provide an investment service and delegates all activities which are investment services in terms of this Act to a person who is licensed to provide such services; or (b) Holding an instrument or the assets represented by or otherwise connected with an instrument as nominee, where the person acting as nominee is so doing on behalf of another person who is providing any investment service in this Schedule or on behalf of a client of such person, and such nominee holding is carried out in relation to such investment service: Provided that for the purposes of this paragraph any person who is authorised or otherwise exempt from authorisation in the terms of article 43 or 43A of the Trusts and Trustees Act shall not by virtue of holding such assets be required to have a licence in terms of this Act. c. Acting as trustee or custodian in relation to a collective investment scheme."			to a licensing top-up which cannot be passported into other EU member states could constitute an additional cost and bureaucratic requirement.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[29]	Assessment of gold-plating and its impact on the local capital market[30]
3	Paragraph 12, Second Schedule, Investment Services Act (Cap. 370, Laws of Malta) (the "**ISAct**"): "SECOND SCHEDULE (Article 2) Instruments … 12. Foreign exchange acquired or held for investment purposes."	No direct equivalent. This represents an additional financial instrument added to the list of financial instruments under Annex I, Section C to MiFID II (EU Directive 2014/65/EU).	This "homegrown" additional financial instrument under Malta's transposition of MiFID I and later MiFID II was originally introduced to suitably regulate Online Forex brokers particularly given, pre-MiFID II, there was a lack of clarity in relation to when a spot foreign exchange ("**FX**") transaction should be considered to be an FX financial derivative (future) and vice versa.	This is an example of gold-plating, as Maltese law introduces an additional financial instrument outside the MiFID regime. Post-MiFID II's guidance in relation to Spot FX and FX Derivatives, the rationale for this additional financial instrument seem to no longer stand. Instead, by including Spot FX as a financial instrument, local operators are required to assess whether to provide what would otherwise typically be an ancillary investment service (foreign exchange services where these are connected to the provision of investment services) requires a licensing top-up which cannot be passported into other EU member states. Again, this could constitute an additional cost and bureaucratic requirement.
4	Regulation 3(1)(p), Investment Services Act (Exemption) Regulations (S.L. 370.02, Laws of Malta): "(1) The following persons are hereby being exempted for the purposes of the requirement for a licence for investment services in terms of article 3 of the Act: …	Article 2(1)(j) of MiFID II: "1. This Directive shall not apply to: … (j) persons: (i) dealing on own account, including market makers, in commodity derivatives or emission allowances or	The rationale for this additional annual notification requirement (which is a recent reversal of a prior position – see Column 4) is unclear, however, the proviso / clarification at the end of the exemption (which predates the reversal of the annual notification requirement – see Column 4) could be	This is an example of gold-plating as it gives the MFSA enhanced supervisory powers that are not foreseen in MiFID. The additional requirement to annually notify the MFSA that a commodity proprietary trader was a recent addition (2023) by the

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	(p) Persons: (i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or (ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business; Provided that: a. for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis; b. b. those persons are not part of a group the main business of which is the provision of investment services within the meaning of MiFID, the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market maker for commodity derivatives; c. those persons do not apply a high-frequency algorithmic trading technique, and	derivatives thereof, excluding persons who deal on own account when executing client orders; or (ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business; provided that: – for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis, – those persons are not part of a group the main business of which is the provision of investment services within the meaning of this Directive, the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market maker for commodity derivatives, – those persons do not apply a high-frequency algorithmic trading technique, and	interpreted that failure to notify the MFSA will not prejudice reliance on this exemption. This would imply that this requirement is purely administrative and related to ensuring that the MFSA is made aware of persons relying on the exemption.	Maltese legislator / MFSA. Originally this exemption (as amended) closely mapped the exemption set out by MiFID II following the "Quick Fix" in 2021 which removed the requirement to annually notify the competent authority of the use of this exemption.

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	d. those persons notify annually the competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under sub-paragraphs (i) and (ii) is ancillary to their main business: Provided further that persons exempt under this paragraph are not required to meet the conditions laid down in paragraph (d) in order to be exempt;"	– those persons report upon request to the competent authority the basis on which they have assessed that their activity under points (i) and (ii) is ancillary to their main business,"		In 2023, the annual notification requirement was added back by the Maltese legislator / MFSA by means of Legal Notice 290 of 2023 without explanation.
5	Rule R1-1.4.1 of Part BI: Rules applicable to Investment Services Licence Holders which qualify as MiFID Firms (the "**MiFID Firm Rulebook**")[31] forming part of the MFSA's Investment Services Rules for Investment Services Providers: "The Licence Holder shall obtain the written consent of the MFSA before: ...iv. acquiring 10 per cent or more of the voting share capital of another company;"	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included during the legislative process as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations.

[31] The MFSA's Investment Services Rules for Investment Services Providers does not constitute legally binding provisions of law, however it should be noted that there is an expectation for regulated entities to comply with the rules set therein.

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6	Rule R1-1.4.1 of the MiFID Firm Rulebook: "The Licence Holder shall obtain the written consent of the MFSA before: ... v. establishing a branch in Malta or abroad;	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included during the legislative process as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations.
7	Rule R1-1.4.1 of the MiFID Firm Rulebook: "The Licence Holder shall obtain the written consent of the MFSA before: ... vi. taking any steps to cease its Investment Services business;"	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included during the legislative process as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. The additional prior MFSA consent requirement may potentially cause delays in the implementation of certain transactions or business activities which may potentially have a negative influence on costs and financial standing of the company.
8	Rule R1-1.4.1 of the MiFID Firm Rulebook: "The Licence Holder shall obtain the written consent of the MFSA before: ... vii. agreeing to sell or merge the whole or any part of its undertaking;"	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included during the legislative process as a safeguard / additional layer of regulatory scrutiny. This requirement also duplicates that under Article 10C of the ISAct – see above.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. The additional prior MFSA consent requirement may potentially cause delays in the implementation of certain transactions or inability to conduct them due to lack of approval.

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9	Rule R1-1.4.1 of the MiFID Firm Rulebook: "The Licence Holder shall obtain the written consent of the MFSA before: ... viii. making application to a Regulator abroad to undertake any form of licensable activity outside Malta;"	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included during the legislative process as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. The additional prior MFSA consent requirement may potentially cause delays in the implementation of certain transactions or disallow a financial institution from undertaking activity outside Malta.
10	Rule R1-1.4.1 of the MiFID Firm Rulebook: "The Licence Holder shall obtain the written consent of the MFSA before: ... xi. any persons, whether Directors, Senior Managers or other employees are engaged in any of the following activities: (a) Portfolio or fund management; (b) Investment advice."	No direct equivalent.	The incorporation of this "homegrown" additional prior MFSA consent requirement was intended to serve as a safeguard / additional layer of regulatory scrutiny / fitness and probity.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. However, the additional prior MFSA consent constitutes gold-plating by virtue of being a burden onto regulated entities unforeseen by EU law, it Potentially this requirement could have material impact on regulated entities should obtaining consents from the MFSA cause delays and/or disturbances of operations of the regulated entity.

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11	Rule R1-1.7.1 of the MiFID Firm Rulebook: "The Licence Holder shall inform the MFSA in writing on investmentfirms@mfsa.mt, of: vi. the provision of a related company loan, within 15 days of making the loan;	No direct equivalent.	This "homegrown" additional MFSA notification requirement was included as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. We do not consider this additional MFSA notification requirement to have had a material impact on the local capital market.
12	Rule R1-1.16.1 of the MiFID Firm Rulebook "The Licence Holder shall appoint an auditor approved by the MFSA. The Licence Holder shall replace its auditor if requested to do so by the MFSA. The MFSA's consent shall be sought prior to the appointment or replacement of an auditor."	No direct equivalent.	This "homegrown" additional prior MFSA consent requirement was included as a safeguard / additional layer of regulatory scrutiny. Note that under Maltese company law a statutory auditor must always be appointed since companies are required to draw up audited financial statement.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations. We do not consider this additional prior MFSA consent requirement to have had a material impact on the local capital market other than potentially causing delays in the appointment of auditors and/or adding a layer of scrutiny as to who may act as an auditor for a regulated entity, which may restrict the freedom of choice of an auditor for the license holders.

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13	MFSA Conduct of Business Rulebook – various provisions including: "R.4.1.12 A Regulated Person shall not: – (a) make inaccurate or unfair criticism of any other Regulated Person or any Product offered by such other Regulated Persons; (b) make comparisons with other types of Products or Services unless the differing characteristics of each Product or Service are made clear." "R.4.1.13 A Regulated Person shall not: (a) persuade or attempt to persuade a Client to surrender or cancel any Product or Service which such Client may have already purchased, if such surrender or cancellation is not in the best interest of the Client; (b) in general, entice Clients to purchase Products or Services it offers by giving or promising to give gifts to such Clients. Any gifts which the Regulated Person may offer its Clients must be related to the Product or Service being offered and/or enhance the value thereof. Such gifts should not be of a substantial value.	MiFID II and delegated acts.	The MFSA Conduct of Business Rulebook and its related Conduct of Business Supervision Unit mirrors the MiFID II and other EU sectoral financial services laws' shift towards more conduct-based supervision. The Conduct of Business Rulebook transposes, among other things, MiFID II, certain aspects of the PRIIPs Regulation, and their delegated acts as well as ESMA guidance.	This is an example of gold-plating as it gives the MFSA enhanced supervisory powers that are not foreseen under MiFID regime (enhanced scrutiny measures and requirements). The MFSA's Conduct of Business Rulebook has over the years developed into an expansive document now far exceeding its original aims. Areas regulated by the Conduct of Business Rulebook include detailed rules on investment advertising practices including aspects such as prizes and other promotions, how licence holders may phone clients, websites, how licence holder deal with other licence holders, additional "conduct-related" regulatory reporting including exact lists of instruments in respect of which the licence holder is providing services, and enhanced scrutiny and requirements in relation to cross-border provision of services including where reverse solicitation is concerned. The Conduct of Business Rulebook now exceeds 480 pages which, given that a fair number of requirements are not based on EU legislation but represent additional gold-plating or supervisory scrutiny measures

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	G.4.1.1 In offering gifts to Clients, Regulated Persons should have regard to the following: – the value of such gifts, – the timing of when such gifts are given (e.g. gifts should not be given at appointment stage, prior to the provision of the Product or Service). – The relation between the nature of the gift and the Services/Products being sold by the Regulated Person and the possibility of such gift to enhance the Product or Service being provided. Any gifts offered by Regulated Persons to their Clients should: – Not be of a high value (e.g. cruises, holidays, jewellery, electronic gadgets); – Not be given at the stage where the client merely makes an appointment with the Regulated Person with a view to discuss a Product or Service offered by the latter;			increase costs for local operators subject to the Conduct of Business Rulebook. It is to be noted that presently the Conduct of Business Rulebook does not apply to AIFMs or fund depositaries.

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	– be related to the nature of the service being provided or enhance the nature of the Product or Service (for example roadside membership assistance with motor insurance would be acceptable)" "R.4.1.19 Where the Regulated Person engages in more than one Regulated Activity, it shall not make use of Client information held by it or any other entity within its group, with respect to the provision of a particular Regulated Activity, for the purposes of marketing another Regulated Activity to such Clients unless it obtains the explicit consent of the Client in question. The Regulated Person shall accompany the request for such consent with a warning that the nature and risks of the Products and Services which are going to be offered to the Client differ from those of the Products and Services which have been offered to the Client to date. The Regulated Person should also warn Clients that they should seek to ensure that they clearly understand all the relevant risks before purchasing any new Products and/or Services."			

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	"R.4.1.25 Regulated Persons which fall under Point (i) of the Definition of 'Regulated Person' in the Glossary to these Rules who provide MiFID services to retail, professional and/or eligible counterparties are required to submit to the MFSA: (a) on a quarterly basis, that is, within 42 days after quarter end, all the information in Part A Conduct-Related Data) MiFID Firms Quarterly Reporting. This information is to be submitted pursuant to pursuant to the Circular on MIFID Firms Quarterly Reporting of 30 September 2021 and the Guidelines on the compilation and submission of the MiFID Firms Quarterly Reporting: Provided that, a Regulated Person with a different financial year end from 31 December, shall submit the MiFID Firms Quarterly Reporting Page 290 of 465 42 days following the end of the reporting quarter, according to its financial year end; (b) on a bi-annual basis, that is, within 42 days after the end of the reporting period, the List of Financial Instruments pursuant to the Circular on MIFID Firms Quarterly Reporting of 30 September 2021 and the Guidelines on the compilation and submission of the list of financial instruments.			

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	Provided that, the requirements set out in paragraphs (a) and (b) do not apply to: (i) a firm authorised to act as custodians/depositories; and (ii) a firm dealing for its own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets, or dealing for the accounts of other members of those markets and being guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such a firm is assumed by clearing members of the same markets. R.4.1.26 Regulated Persons which fall under Point (iii) of the 'Regulated Person' in the Glossary in the Glossary to these Rules are required to submit to the MFSA, on an annual basis, within 42 days after year end, the Conduct Related Data Return pursuant to the Circular on the Submission of the Conduct-Related Data Return for Insurance Undertakings of 26 May 2020."			

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14	Paragraph 4, First Schedule, Investment Services Act (Cap. 370, Laws of Malta) (the "**ISAct**"): "FIRST SCHEDULE (Article 2) Investment Services and Activities... 4. Management of Investments... Collective portfolio management of assets, belonging to a collective investment scheme, where the arrangements for their management are such that the person managing or agreeing to manage those assets has discretion to invest in any movable and, or immovable property." and Section 1 – Part BIII: Investment Services Licence Holders – De Minimis AIF Manager.	Article 3(3) of AIFMD (EU Directive 2011/61/EU, as amended).	The official rationale provided by the MFSA for this is investor protection. MFSA claims to safeguard investors by ensuring that financial markets are transparent, and efficient.	This is an example of gold-plating because Malta applies a full-fledged licensing regime for small or de minimis alternative investment fund managers. Under AIFMD, small or de minimis AIFMs who do not "opt up" to full AIFM status are exempt from AIFMD but are subject to (a) registration and (b) certain limited reporting obligations. Article 3(3) of AIFMD, through the wording "This paragraph and paragraph 2 shall apply without prejudice to any stricter rules adopted by Member States with respect to AIFMs referred to in paragraph 2", contemplates Member State discretion to impose more onerous requirements. However, the experience to date in Malta is that applying a full-fledged licensing requirement and ongoing licensing obligations akin to those for AIFMs / investment firms may not be entirely justified and stifles innovation and competition.

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15	Article 4 of the ISAct (licensing requirement for collective investment schemes marketing in Malta), Regulation 6 of the Investment Services Act (Marketing of Alternative Investment Funds) Regulations (S.L. 370.21, Laws of Malta): "6.(1) An AIF shall not be marketed to retail investors in Malta unless it is in possession of an authorisation for this purpose from the competent authority", Regulation 30 of the Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations (S.L. 370.24, Laws of Malta): " 30.(1) An AIF shall not be marketed to retail investors in Malta unless it is in possession of an authorisation for this purpose from the competent authority", and Section 10. Supplementary Licence Conditions Applicable to AIFMS Marketing AIFs in Malta to Retail Investors, Part BIII to the MFSA's AIFM Rulebook notably: "10.02 An AIF investing in products which fall within the definition of a non-complex financial instrument in terms of MiFID II and its Delegated Acts needs an authorisation to market to retail investors in Malta, as per	Article 43 of AIFMD: "1. Without prejudice to other instruments of Union law, Member States may allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with this Directive, irrespective of whether such AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs. In such cases, Member States may impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIFs marketed to professional investors in their territory in accordance with this Directive. However, Member States shall not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis than on AIFs marketed domestically."	The historical rationale was that AIFs should only be allowed to market to retail investors in Malta if the AIF (notwithstanding its non-retail regulatory status) is akin to a retail product.	This is an example of gold-plating because the MFSA have opted to require AIFs (be they EEA or non-EEA and irrespective of whether managed by an EEA or non-EEA AIFM) that wish to market their shares to Retail Investors to require (in addition to the passporting process or NPPR notification process) authorisation by the MFSA. This is permitted by AIFMD which permits Member States to impose stricter requirements than on AIFMs or AIFs which market their shares or units to professional investors. However, Malta has imposed a condition that in order for an AIF to be authorised for marketing to Retail Investors it cannot invest in "complex instruments" under MiFID II. Previously this requirement read that the AIF must qualify as a non-complex instrument under MiFID which condition became impossible to satisfy post-MiFID II necessitating its amendment. By effectively banning AIFs which invest in "complex instruments" Malta appears, however, to be in breach of the proviso to Article 43(1) of AIFMD since Malta allows for Maltese AIFs to be sold to

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	Regulation 6 of SL 370.21, Investment Services Act (Marketing of Alternative Investment Funds) Regulations. For the avoidance of doubt, AIFs investing in products which fall within the definition of a complex financial instrument in terms of MiFID II and its Delegated Acts cannot market to retail investors under any circumstances."			Retail Investors and for such AIFs to invest in, among other things, financial derivatives and non-UCITS funds each of which would qualify as "complex instruments" under MiFID II.
16	Standard Licence Conditions Applicable to Collective Investment Schemes Authorised to Invest Through Loans (2020) These rules introduce additional requirements and limitations on AIFs investing in loans and originating loans as well as the AIFMs that manage such AIFs. Requirements include leverage limits, inability to be structured as open-ended, and investment restrictions (no short selling). These rules were preceded by the since repealed Investment Services Rules for Loan Funds (2014) and related FAQ.	No direct equivalent. Certain aspects are covered under the 2024 EU Directive amending AIFMD and UCITS as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds.	The stated rationale of introducing a regime as early as 2014 to regulate AIFs investing in (and AIFMs managing such AIFs) loans and originating loans was to regulate what the MFSA perceived were the risks of AIFs being used for shadow banking activity.	This is an example of gold-plating, as Malta applies its own national rules on investing in loans, which are stricter than EU standards. Originally introduced in 2014, the effect of the MFSA's Loan Fund rules was to effectively stunt and exclude Malta's fund industry in so far as fund strategies such as NPLs or Loan Originating Funds were concerned. In fact, only approximately 2 Loan Fund licences were ever issued. In 2020 the MFSA revamped its Loan Fund rules substantially reducing the requirements imposed on Loan Funds, however, since these are homegrown requirements in relation to what is ultimately a largely harmonised area there is no incentive to establishing

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				a loan fund AIF in Malta when it is more regulated than in certain other jurisdictions.
17	SLC 1.18 of PART BIII: Standard Licence Conditions applicable to Investment Services Licence Holders which qualify as Alternative Investment Fund Managers forming part of the MFSA's Investment Services Rules for Investment Services Providers: "1.18 The Licence Holder shall obtain the written consent of the MFSA before: a. making any change to its share capital or the rights of its shareholders; b. establishing a branch in Malta or abroad; c. acquiring 10 per cent or more of the voting share capital of another company; d. taking any steps to cease its investment services business; e. agreeing to sell or merge the whole or any part of its undertaking; f. making an application to a Regulator abroad to undertake any form of licensable activity outside Malta; i. any persons, whether Directors, Senior Managers or other employees are responsible for the day-to-day provision of any of the following	No direct equivalent.	These "homegrown" additional prior MFSA consent requirements were described to be included as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations.

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	activities: - Portfolio or fund management - Risk management - Investment advice"			
18	Rule 3.02 and 3.03, Supplementary Conditions applicable to a Depositary of a UCITS Scheme, Part BIV: MFSA Rulebook for Depositaries: "3.02. The Licence Holder shall, where applicable, supervise the operation of a Scheme to ensure that the Management Company complies with the investment restrictions of the Scheme. 3.03. The Licence Holder shall enquire into the conduct of the Management Company or the Scheme in each annual accounting period and report thereon to the holders of Units in accordance with MFSA's requirements, if any, applicable to the Scheme and with any applicable provisions of its Agreement with the Scheme or (in the case of a Scheme constituted as a Unit Trust or Common Contractual Fund) its Management Company.	No direct equivalent. These represent additional oversight requirements for depositaries of Maltese UCITS Schemes.	These requirements pre-date UCITS V's clarifications on the oversight duties of UCITS Depositaries.	This is an example of gold-plating because Maltese UCITS Depositaries are required to include additional oversight obligations in their depositary agreements in this case a more active monitoring role over and above the general oversight roles under UCITS V.

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19	Regulation 7(2) of the Investment Services Act (Performance Fees) Regulations (S.L. 370.12, Laws of Malta): "7 (2) The custodian of a scheme shall ensure that performance fees are payable in accordance with regulation 5 and shall also verify the calculation of the performance fee."	No direct equivalent. These represent additional oversight requirements for depositaries of, amongst others, Maltese UCITS Schemes.	These requirements pre-date UCITS V's clarifications on the oversight duties of UCITS Depositaries.	This is an example of gold-plating because Maltese UCITS Depositaries are required to include additional oversight obligations in their depositary agreements including in this case verification of the performance fee.
20	SLC 1.11 of PART BII: Standard Licence Conditions applicable to Investment Services Licence Holders which qualify as UCITS Management Companies forming part of the MFSA's Investment Services Rules for Investment Services Providers: "1.11 The Licence Holder shall obtain the written consent of the MFSA before: a. making any change to its share capital or the rights of its shareholders; b. establishing a branch in Malta or abroad; c. acquiring 10 per cent or more of the voting share capital of another company;	No direct equivalent.	These "homegrown" additional prior MFSA consent requirements were included as a safeguard / additional layer of regulatory scrutiny.	This is an example of gold-plating, because the local law requires additional regulatory approval, which is not required by the European regulations.

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	d. taking any steps to cease its investment services business; e. agreeing to sell or merge the whole or any part of its undertaking; f. making application to a Regulator abroad to undertake any form of licensable activity outside Malta; ...i. any persons, whether Directors, Senior Managers or other employees are responsible for the day-to-day provision of any of the following activities: – Portfolio management – Risk management – Investment advice"			

Licensing process and time periods in financial regulations

In the area of capital market law, the licensing process for entities such as investment firms, UCITS management companies and AIF managers is generally subject to a specific timeframe. Entities in Malta apply for a licence from the regulator, the MFSA.

Based on the market practice in Malta, the estimated time to obtain a license from the MFSA is:

- 3-9 months – for an investment firm regulated by MiFID (timeline dependent on the scope of license);
- 3 months – for an AIFM (more if ancillary MiFID services to Retail are envisaged); and
- 3-4 months – for a UCITS ManCo (more if ancillary MiFID services to Retail are envisaged).

These timelines are heavily dependent not only on the complexity of the application and proposed business but also and more importantly on the quality of the application and accompanying documentation.

According to the Investment Services Act (Art. 6(6)), the MFSA should inform the applicant of its decision whether or not to grant a license within:

- 6 months from the date of submission of a properly completed application form together with requisite documentation – in case of UCITS ManCos and MiFID firms
- 3 months from the date of submission of a complete application – in case of an AIFM.

As the deadlines to inform the applicant about the MFSA's decision whether or not to grant the relevant license depend on the 'date of submission of a properly completed application form together with the requisite documentation', it can be argued that the statutory time period never actually starts running since it stops / restarts each time the MFSA identifies gaps and/or discrepancies in the submitted application and asks the applicant to rectify same.

In order to address the above perception, the MFSA has relatively recently published an authorization process service charter which outlines the time periods within which the MFSA will review documentation and revert with feedback (and expected time periods on the side of the applicant) which has offered more certainty to applicants. This can be found here: https://www.mfsa.mt/wp-content/uploads/2021/06/MFSA-Authorisation-Process-Service-Charter.pdf

In practice, the application of different terms in licensing processes can have the same effect as gold-plating. Therefore, a comprehensive analysis of these regulatory frameworks is indispensable for financial entities to operate effectively and compliantly within the dynamic landscape of the capital markets.

3.5. Luxembourg vs. gold-plating

Overview of gold-plating in the Luxembourg legal system

Luxembourg is one of the leading global financial centres, in particular in the area of investment funds and it's widely acknowledged that one of the reasons for Luxembourg's success is adopting a 1:1 approach, whereby the Grand Duchy implements all EU regulations without any gold-plating, which allows them on one hand to ensure swift implementation of EU regulations (Luxembourg is usually one of the first EU member states to implement EU regulations related to the capital markets) and minimize burdens on existing and upcoming participants of their capital market environment. Luxembourg's status as one of the leading global investment fund hubs also means its position on the regulations EU lawmakers and policymakers intend to introduce is often taken under consideration during the legislative process, which lessens the need to gold-plate EU regulations to reflect the specificities of the Luxembourg market.

However, there are very few examples of literal gold-plating of EU regulations in the Luxembourg legal acts implementing said regulations, it should be noted that in certain areas there are additional burdens imposed on financial institutions either in the form of guidelines and recommendations of the Luxembourg regulator or in the form of established market practice, which goes beyond the standards set by EU regulations. Specific examples of identified gold-plating are included in the table below and in most cases there are being justified by the need to increase investor protection, in particular but considering Luxembourg's role as one of the largest global investment fund hubs. Nevertheless, these gold-plating measures could potentially disrupt the level playing field between EU jurisdictions and make the full implementation of the Capital Markets Union more challenging.

In conclusion, while there might be some instances where Luxembourg implements regulations that go beyond the EU minimum or additional burdens being caused by applied regulatory practice, the overall approach appears to favour a balance between investor protection and market efficiency.

Countermeasures and actions to prevent gold-plating in Luxembourg

The authors of this report have not identified any official countermeasures and/or actions related to prevent gold-plating, as the policy of Luxembourg entails implementing EU regulations without any additional local regulations, which would constitute gold-plating.

Examples of gold-plating in Luxembourg

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[32]	Assessment of gold-plating and its impact on the local capital market[33]
1	Article 32-1(2) of Law of 5 April 1993 on Financial Sector "Third-country firms providing investment services or performing investment activities (2) Third-country firms that wish to provide investment services or activities as well as ancillary services in Luxembourg to retail clients or professional clients within the meaning of Annex III, Section B, shall be required to establish a branch in Luxembourg. They "shall be in possession of a written authorisation of the CSSF, shall be subject to the same authorisation rules as credit institutions and investment firms incorporated under Luxembourg law and shall comply with the provisions of Article 32(2) to (4). Furthermore, authorisation shall be subject to the following requirements: (...)".	Article 39-41 of Directive 2014/65/EU (MiFID II)	No official rationale.	This is gold-plating as local law requires third-country firms to establish a Luxembourg branch when providing services to retail clients and opt-up professional clients.

[32] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[33] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

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2	Article 46 of Law of 12 July 2013 on AIFMs, CSSF Regulation 15-03 "Precautionary measures available to the CSSF as host Member State (1) (Law of 23 July 2015) "Where the CSSF on the basis of information received from the competent authorities of the home Member State ascertains that a credit institution having a branch or providing services within the Luxembourg territory fulfils one of the following conditions in relation to the activities carried out in Luxembourg, it shall inform the competent authorities of the home Member State: (a) the credit institution does not comply with Regulation (EU) No 575/2013, this Law or their implementing measures; (b) there is a material risk that the credit institution will not comply with Regulation (EU) No 575/2013, this Law or their implementing measures. Where the CSSF considers that the competent authorities of the home Member State have not fulfilled their obligations or will not fulfil their obligations pursuant to the second subparagraph of Article 41(1) of Directive 2013/36/EU, it may refer the matter to the European Banking Authority and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. (...)".	Article 43 of Directive 2011/61/EU (AIFMD)	Gold-plating claimed to be justified by protection of retail investors	This is gold-plating because only AIFs subject to regulation in their home jurisdiction may be marketed to Luxembourg retail investors. Regarding Luxembourg AIFs, specialized investment funds (SIFs), investment companies in risk capital (SICARs) and undertakings for collective investment subject to Part II of the UCI Law of 2010 are deemed to fulfil this requirement; but also, Luxembourg RAIFs may be marketed in Luxembourg to well-informed investors not being professional investors; the investment into Part II AIFs is however not restricted to well-informed investors. Regarding the marketing of non-Luxembourg AIFs to retail investors other than well-informed investors, CSSF Regulation 15-03 sets out the rules for the marketing authorization procedure.

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3	Circular CSSF 18/698 on the authorization and organization of investment fund managers incorporated under Luxembourg law. Chapter 2. Shareholding Sub-chapter 2.1. Initial authorization Paragraph 16 "In order to enhance compliance with the prudential requirements and rules of conduct, the CSSF may request a lettre de patronage (sponsorship letter). The issuer of this letter provides assurance to the CSSF that the entity patronnée (sponsored) complies/will comply with the prudential requirements imposed by the applicable law, particularly regarding the own funds requirements. This letter may be requested: • at the time of the authorisation process of the IFM; • at the time of changes in the shareholding of the IFM; and • during the lifetime of the IFM, when the financial soundness of the IFM and/or of the existing shareholder(s) is not ensured any more".	Article 7 of Directive 2011/61/EU (AIFMD)	To enhance compliance with the prudential requirements and the rules of conduct.	This is an example of gold-plating as it gives the CSSF enhanced supervisory powers that are not foreseen under AIFMD regime. The CSSF may request a lettre de patronage (sponsorship letter) providing assurance to the CSSF that the entity patronnée (sponsored) complies/will comply with the prudential requirements imposed by the applicable law, particularly regarding the own funds' requirements. This letter may be requested: • at the time of the authorization process of the IFM; • at the time of changes in the shareholding of the IFM; and • during the lifetime of the IFM, when the financial soundness of the IFM and/or of the existing shareholder(s) is not ensured any more.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[32]	Assessment of gold-plating and its impact on the local capital market[33]
4	Circular CSSF 18/698 on the authorization and organization of investment fund managers incorporated under Luxembourg law. Chapter 4. The bodies of the IFM Sub-chapter 4.1. The members of the governing body or management body. Section 4.1.3. Conditions for performing multiple mandates. Paragraph 69 „As a result, every candidate for the position of member of the IFM's management body/governing body must ensure compliance with the following requirements: a) the number of hours spent fulfilling professional engagements cannot exceed 1920 hours per year; and b) the number of mandates in regulated entities and in operating companies cannot exceed 20 mandates".	Article 7 of Directive 2011/61/EU (AIFMD)	No official rationale.	This example illustrates gold-plating, as the local legislation introduces additional requirements for AIFM's board members beyond those provided by the directive. These regulations impose stricter compliance standards for AIFMD within the jurisdiction.
5	Circular CSSF 18/698 on the authorization and organization of investment fund managers incorporated under Luxembourg law Chapter 4. The bodies of the IFM Sub-chapter 4.2. Senior management Section 4.2.1. Required number, presence in Luxembourg and contractual relationship with the IFM	Article 7 of Directive 2011/61/EU (AIFMD)	No official rationale.	The local law introduces a threshold above which substance requirements and delegation restrictions are strengthened for the senior management of IFMs.

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	Paragraphs 81 & 82 "Where the value of the portfolios managed by the IFM as defined in Articles 102(1)(a) of the 2010 Law, 8(7) of the 2013 Law and the second subparagraph of Article 14(2) of Delegated Regulation (EU) 231/2013 is less than one billion five hundred million euros (EUR 1,500,000,000), the following conditions must apply:a) the conducting officers cannot perform more than two mandates as conducting officer in IFMs; b) the CSSF may authorise, based on a prior and duly supported request for derogation, that only one of the legally required conducting officers is permanently located in Luxembourg, provided that the IFM employs sufficient and competent staff in Luxembourg in order to support the conducting officer who is not permanently located in Luxembourg in his/her duties and that this conducting officer can regularly come to Luxembourg to demonstrate that the provisions of Section 4.2.3. (Organisation of the senior management) and of point 118 are complied with; c) if the IFM has more than two conducting officers, the provisions of point 81 must also apply to these additional conducting officers.			

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	Where the value of the portfolios managed by the IFM as defined in Articles 102(1)(a) of the 2010 Law, 8(7) of the 2013 Law and the second subparagraph of Article 14(2) of Delegated Regulation (EU) 231/2013 exceeds one billion five hundred million euros (EUR 1,500,000,000), the following conditions must apply: a. the two legally required conducting officers cannot perform other mandates as conducting officers of IFMs; b. if the IFM has only two conducting officers, then these two conducting officers must be permanently located in Luxembourg in accordance with point 79; c. if the IFM has more than two conducting officers, then the CSSF may authorise, based on a prior duly supported request for derogation, that one or more of these additional conducting officers are not permanently located in Luxembourg and/or spend less than an FTE on their duties, provided that the IFM employs sufficient and competent			

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	staff in Luxembourg in order to support these conducting officers are not permanently located in Luxembourg and/or spend less than an FTE on their duties, provided that the IFM employs sufficient and competent staff in Luxembourg in order to support these conducting officers in their duties and that they can regularly come to Luxembourg to demonstrate that the provisions of Section 4.2.3. (Organisation of the senior management) and of point 118 are complied with".			
6	Circular CSSF 18/698 on the authorization and organization of investment fund managers incorporated under Luxembourg law Chapter 6. Specific organizational arrangements Sub-chapter 6.2. Delegation framework Section 6.2.3. Initial due diligence and ongoing monitoring of delegates Sub-section 6.2.3.1. General principles Paragraph 441-476	Delegated Regulation (EU) 231/2013 Section 8 Delegation of AIFM functions	No official rationale.	The local law introduces additional rules on delegation with a particular emphasis on the initial and ongoing due diligence of delegates, going beyond EU standards.

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	"Any use of a delegate within the meaning of point 1(9) of this circular must be subject to a prior written initial due diligence carried out on the third party by the IFM. 442. In accordance with Article 110(1)(f), (g) and (h) of the 2010 Law and Article 18(1)(f) of the 2013 Law, the IFM must be able to effectively monitor and control at any time the delegated task. After having received the mandate, the delegate must be subject to proper ongoing monitoring by the IFM (...)".			
7	CSSF FAQ - Luxembourg Law of 12 July 2013 on alternative investment fund managers Section 26, Question D "Do MiFID rules apply to the performance of functions included in the collective portfolio management by another delegate IFM? Where an IFM delegates the performance of one or several functions included in the collective portfolio management to another IFM, the exemption foreseen under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID does not apply to the delegate IFM. In such case,	Delegated Regulation (EU) 231/2013 Article 78 (2) Delegation of portfolio or risk management	No official rationale.	This example gives the CSSF enhanced supervisory powers that are not foreseen under UE law. For the delegation of the portfolio management by an AIFM to another authorized AIFM the CSSF requires an additional authorization of the delegated AIFM to provide discretionary portfolio management and non-core services according to Article 6 (4) AIFMD

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	the delegate IFM, must in principle, depending on the tasks performed, be authorised to provide discretionary portfolio management and non-core services foreseen under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013 such as investment advice, administration of units of UCIs or, for authorised AIFM, reception and transmission of orders ("RTO"). Those delegate IFMs are not subject to the full scope of MiFID rules, only Articles 1-1, 37-1 and 37-3 of the Law of 1993 / Articles 15, 16, 24 and 25 of MiFID, apply. The delegate IFMs are not authorised to provide other MiFID services or activities than those covered under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013".			
8	Article 20 of Law of 12 July 2013 on AIFMs "Annual report (1) An AIFM established in Luxembourg must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, make available an annual report for each financial year no later than six months following the end of the financial year	Article 24 (3) of AIFMD	No official rationale.	This is an example of gold-plating because the Luxembourg law provides for different standards than EU regulations. Article 24(3) of the AIFMD states that annual reports only have to be made available to a local regulator „on request," whereas Luxembourg laws require the AIFMs to make the annual report available automatically, without

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	to which the report refers. The annual report must be provided to investors on request. The annual report must be made available to the CSSF, and, where applicable, the home Member State of the AIF. Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only such additional information referred to in paragraph 2 hereafter needs to be provided to investors on request, either separately or as an additional part of the annual financial report. In the latter case the annual financial report must be made public no later than four months following the end of the financial year to which it refers. (...)".			a specific request from the regulator.
9	Article 7 (4) of Law of 12 July 2013 on AIFMs "Conditions for granting authorisation (4) The CSSF may restrict the scope of the authorisation, in particular as regards the investment strategies of AIFs the AIFM is allowed to manage".	Article 8 (4) of AIFMD	No official rationale – it is assumed that in view of Luxembourg authorities restricting the AIFMs' authorization to specific investment strategies is motivated by demand for increase supervision of the AIFM	This is an example of gold-plating because Luxembourg law restricts the AIFMs' authorization process. Compared to certain other EU jurisdictions (e.g. Spain, Malta, Poland) where the AIFM authorization is universal (i.e. covers all investment strategies), the decision of Luxembourg to restrict automatically every license issued to specific strategies imposes a significant burden on Luxembourg AIFMs,

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				which need to undergo separate authorization proceedings before launching a fund utilizing a strategy previously not covered by the AIFMs.
10	CSSF FAQ – Cross Border Distribution of Funds – Guidance on Marketing Communications "(...) 1.5. Are the distributors or intermediaries involved in the distribution of Funds managed by the IFM impacted by article 4 of the CBDF Regulation? Please refer to Question 1, Section XIII of ESMA's Questions and Answers on the application of the UCITS Directive (UCITS) as well as to Question 4, Section VIII of ESMA's Questions and Answers on the application of AIFMD (AIFMD) which provide that: "Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not)." In this context, IFMs are also advised to consult the relevant sections on delegation and	Article 4 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014	Luxembourg's position is to be in line with ESMA Guidelines as well as questions and answers to be published by ESMA with respect to marketing communications	This is an example of gold-plating as CSSF's approach and practice goes beyond the standards provided by EU legislation. Luxembourg's interpretation of ESMA's position means the AIFMs and UCITS management companies have to be responsible for all marketing communications concerning the funds they manage, even if they marketing communication was prepared by a third party (e.g. the local distributor) and the AIFM / UCITS ManCo has no relationship with said party

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	organisation of the marketing function provided by Circular CSSF 18/698 on the authorisation and organisation of investment funds managers incorporated under Luxembourg law".			
11	N/A (regulatory practice) Duration of the process	Article 8 (5) of AIFMD	No official rationale.	This is an example of gold-plating as CSSF's approach and practice goes beyond the standards provided by EU legislation. However, art. 8 (5) of AIFMD is implemented fully in art. 7 (5) of Law of 12 July 2013 on AIFMs, in practice, the licensing process concerning obtaining an AIFM authorization is much longer than the 3 months (which can be extended to 6 months) prescribed by AIFMD and depends on the investment strategy or strategies, which the AIFM intends to utilize.
12	CSSF FAQ on AIFMD Section 18, point F & G "Can non-EU AIFMs market their regulated Luxembourg AIFs (UCIs under part II of the Law of 2010, SIFs under the Law of 2007, SICARs under the Law of 2004) to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013	Article 42 of AIFMD	No official rationale provided	This is an example of gold-plating as there is a need for CSSF notification not provided for in the AIFMD. According to the FAQ, non-EU AIFMs cannot market their regulated and non-regulated Luxembourg AIFs to professional investors in Luxembourg without previously informing the CSSF.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[32]	Assessment of gold-plating and its impact on the local capital market[33]
	without previously informing the CSSF? No. The non-EU AIFMs should inform the CSSF as soon as they start to market the regulated Luxembourg AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013. It should be noted that the requested information may be introduced at the same time as the approval process for a regulated Luxembourg AIF, if the non-EU AIFM intends to market the AIF once the authorisation is received. The requested information should be provided to the CSSF via the information form referred to under point 18.d). Can non-EU AIFMs market their non-regulated Luxembourg AIFs (Luxembourg AIFs other than UCIs under part II of the Law of 2010, SIFs under the Law of 2007, SICARs under the Law of 2004) to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013 without previously informing the CSSF? No. The non-EU AIFMs should inform the CSSF as soon as they start to market the nonregulated Luxembourg AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law			The CSSF indicates that this requirement has basis in art. 45 of the Law of 12 July 2013 on AIFMs, however the legal text does not indicate specific prior notification requirement for the non-EU AIFM.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[32]	Assessment of gold-plating and its impact on the local capital market[33]
	of 2013. The requested information should be provided to the CSSF via the information form referred to under point 18.d)".			
13	CSSF Circular 18/697 on organizational arrangements applicable to fund depositaries which are not subject to Part I of the Law of 17 December 2010 relating to undertakings for collective investment, and, where appropriate, to their branches Part I Chapter 2, point 8 "It shall ensure the appointment, in accordance with Article 19(11) of the 2013 Law of a delegate with whom the safekeeping of assets other than financial instruments to be held in custody of its clients is ensured. In such case, and by way of derogation from the provisions of point 86 hereinafter, the first accounts relating to the assets to be held in custody whose custody has been delegated, must be opened in the name of each client (or, where appropriate, of each of the compartments of an umbrella AIF) at the level of this delegate".	Article 21 (3) (b) of AIFMD	No official rationale provided	This qualify as gold-plating because CSSF's circular requires investment firms to ensure the appointment, in accordance with art. 19 (11) of Law of 12 July 2013 on AIFMs, of a delegate with whom the safekeeping of assets other than financial instruments to be held in custody of its clients is ensured. This requirement imposes additional burdens on investment firms authorized to act as depositaries for alternative investment funds, as the AIFMD does not limit the scope of authorization of such entities (as it does for so-called professional depositaries).

Licensing process and time periods in financial regulations

In the area of capital market law, the licensing process for entities such as investment firms, UCITS management companies and AIF managers is legally complex and, in principle, subject to a certain regulatory timeframe. Entities in Luxembourg apply for authorisation from regulator, i.e., Commission de Surveillance du Secteur Financier (CSSF).

The formal time periods are as follows:

With regard to investment firms, article 15 (7) of the Luxembourg law of 5 April 1993 on the financial sector, as amended, provides that *"the decision taken on any application for authorization must be supported by a statement of the reasons on which it is based and must be notified to the applicant within six months of receipt of the application or, if the application is incomplete, within six months of receipt of the information needed for the adoption of the decision. Such a decision shall in any event be adopted within twelve months of receipt of the application, failing which the absence of a decision shall be deemed to constitute notification of a decision refusing the application"*.

With regard to AIFMs, article 7(5) of the Luxembourg law of 12 July 2013 on alternative investment fund managers, as amended, provides that *"the AIFM shall be informed in writing, within three months of the submission of a complete application, whether or not authorization has been granted. The CSSF may prolong this period for up to three additional months, where it considers it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly"*.

With regard to UCITS (Chapter 15) management companies, article 102 (3) of the Luxembourg law of 17 December 2010 relating to undertakings for collective investment, as amended, provides that *"the applicant shall be informed, within six months of the submission of a complete application whether or not authorization has been granted"*.

The average time for obtaining a license in Luxembourg of either an investment firm, an AIFM or a UCITS (Chapter 15) ManCo is 9 months. The CSSF usually complies with the time limits referred to in the foregone laws and does not exceed such time limits.

3.6. Germany vs. gold-plating

Overview of gold-plating in the German legal system

When implementing EU directives, there is always the phenomenon that a national legislator adopts more or excessive rules than required by the EU directive. This can lead to the intended purpose of EU legal acts, namely the harmonization of law within the EU and thus between the individual EU member states, being thwarted and, in addition, result in locational disadvantages for individual member states. This phenomenon is commonly referred to as „gold-plating". (*Die Arbeit des Nafionalen Normenkontrollrates bei der Umsetzung von EU-Richtlinien - Rechtsgrundlage, Aufgaben und Zusammensetzung, Deutscher Bundestag, WD 3 - 3000 - 037/23, p. 3; EuR 2019, 190*).

In the Federal Republic of Germany, there are no specifications as to how an EU directive should be implemented. This means that there are also no regulations as to whether an EU directive should only be implemented with its minimum requirements or whether the legislator has to regulate more in certain areas than intended by the directive. Only in the individual coalition agreements over the course of the individual governments can anything be found in this regard. The coalition agreements of the 17th, 18th and 19th legislative periods provided for the one-to-one implementation of EU requirements or refrained from going beyond the EU requirements or from combining them with other legal measures. This raises the question of whether or not the German legislator wants to pursue gold-plating as a political issue for the respective government[34].

The following discussion of gold-plating by the German legislator is limited to the UCITS2, AIFM and MiFID II Directive. However, Germany is the EU country with one of the most intensive gold-plating practices. To list all points would be beyond the scope and can only be determined by comparing the requirements of the directive with the applicable regulations down to Q&As and BaFin circulars. In this respect, the following table only gives representative examples of gold-plating in Germany. We herewith intend to show where and to what extend the German legislator has practiced gold-plating in this regard.

Probably the most far-reaching additions were made in the implementation of the AIFM and UCITS Directive.

The implementation of the AIFM Directive in Germany primarily resulted in the introduction of the German Investment Code (KAGB). Previously, the German fund industry had already been regulated by the German Investment Act (InvG). However, the InvG only regulated open-ended products. The German legislator built on this regulation and supplemented or amended existing regulations on the basis of the AIFM Directive. The implementation of the AIFM Directive in Germany is therefore already historically conditioned by a higher density of regulation.

It is also worth mentioning that the AIFM Directive only regulates Special AIFs. Retail AIFs are only considered possible in principle and national legislators have been given the option of individual regulation, which, as

[34] Die Arbeit des Nafionalen Normenkontrollrats bei der Umsetzung von EU-Richtlinien - Rechtsgrundlage, Aufgaben und Zusammensetzung, Deutscher Bundestag, WD 3 - 3000 - 037/23, p. 4

a minimum, also requires the provisions of the AIFM Directive for Retail AIFs. The German legislator has made full use of this option and provides for stricter regulation for Retail AIFs than of course for Special AIFs.

Some further aspects of „gold-plating" in the context of the KAGB are (not exhaustive):

- Tightened Requirements for Managers: Germany introduced stricter requirements for Alternative Investment Fund Managers (AIFM) to ensure more robust supervision and control (e.g. stricter capital adequacy requirements, additional due diligence and suitability assessments for key personnel of AIFMs, internal controls and risk management procedures beyond the minimum standards set by the AIFM Directive)
- Transparency and Reporting Obligations: Additional provisions regarding transparency and reporting obligations for fund managers have been introduced to enhance investor protection and market integrity (e.g. more detailed and frequent reporting requirements, additional information on fees, costs, and potential conflicts of interest to investors)
- Risk Management Requirements: Germany has specified requirements related to the risk management of investment fund managers to ensure financial stability (more rigorous stress testing, specific risk reporting standards, ensuring that AIFMs provide comprehensive and timely information on risk exposures and mitigation strategies to BaFin)
- Additional Requirements for Specific Asset Classes: specific requirements for certain asset classes or strategies to better control specific risks have been introduced (e.g. specific regulations for real estate funds, imposing additional liquidity requirements or valuation standards tailored to the characteristics of real estate investments,

Besides that, the implementation of the AIFM Directive contained a number of new regulations. These include in particular (but not exhaustive):

- the possibility of lending by closed-end funds,
- the clarifications regarding the restructuring and prolongation of loans as original activities of collective asset management,
- the regulations on the reference value of the borrowing limit, the limit for currency risk
- and the principle of risk diversification for closed-end funds and
- the authorization of the merger of special investment funds into investment limited partnerships.

All in all, while the German legislator made use of a large number of deviation and in some cases excessive regulations in the German Investment Code (KAGB) when transposing the UCITS and AIFM Directives into national law, the legislator only engaged in gold-plating at individual points when transposing the MiFID II Directive into the Securities Trading Act. This trend is also becoming increasingly clear for the future, even though the desire of individual governments for a 1:1 implementation of EU law has already been stated several times in the past in the respective coalition agreements. This is intended to counteract the locational disadvantages for the Federal Republic of Germany resulting from gold-plating.

Countermeasures and actions to prevent gold-plating in Germany

To mitigate gold-plating in the transposition of EU regulations into German law, several strategies can be employed. However, most of them are within the power of the German or European legislator.

Firstly, a strict adherence to the principle of „minimum harmonization" should be maintained by the German legislator. This principle advocates for the adoption of EU regulations only to the extent necessary to achieve the objectives outlined by the EU regulations, without adding additional requirements or embellish-mints.

Secondly, establishing clear guidelines for the transposition process at EU level could help prevent unnecessary national additions. This involves developing standardized procedures and protocols that outline the steps to be followed in transposing EU regulations into e.g. German law, thereby minimizing the discretion of individual policymakers.

In addition, the supervisory authorities have an opportunity to exert influence under supervisory law. Even after the national implementation of an EU regulation, supervisory authorities (e.g. BaFin) can decide on a direction for their administrative practice within the scope of their discretionary powers. By improving coordination and cooperation between authorities and across borders, more EU-wide uniformity of administrative practice could be achieved despite national gold-plating. In particular, by promoting communication and cooperation between the competent authorities and interest groups (e.g. associations), superfluous or contradictory provisions can be identified and eliminated at an early stage.

Moreover, fostering greater transparency and public participation in the transposition process at national level can serve as a check against gold-plating. This entails providing ample opportunities for public consultation and input during the drafting and review stages of the transposition process, allowing stakeholders to voice concerns and provide feedback on proposed legislative measures. This can be ensured in particular through the comprehensive involvement of the associations (e.g. BVI and ZIA in Germany).

And last but not least, it is up to the EU legislator to issue more regulations via directives instead of regulations, e.g. the most recent (update of the) ELTIF-Directive. This would ensure direct implementation without national gold-plating. The reason for this is that EU directives are directly applicable in the EU member states and are not first implemented by a national transposition law.

In conclusion, by adhering to the principles of minimum harmonization, establishing clear guidelines, enhancing interagency coordination, promoting transparency, public participation and issuing more directives one could more effectively avoid gold-plating in the transposition of EU regulations into national law. These measures can help ensure that the regulatory framework remains efficient, effective, and aligned with the objectives of EU directives, which is particularly important in order to keep Germany for example attractive as a fund location in comparison to other EU countries.

Although the government's current coalition agreement does not include an agreement to stop gold-plating (*Die Arbeit des National Normenkontrollrats bei der Umsetzung von EU-Richtlinien - Rechtsgrundlage, Aufgaben und Zusammensetzung, Deutscher Bundestag, WD 3 - 3000 - 037/23, p. 5*), the voices against gold-plating are becoming louder, from scientific literature, interest groups as well as from the ranks of politics.

A complete abandonment of gold-plating is not expected in the near future. However, it can be assumed that it will be reduced to an absolute minimum in the future. Particularly in view of the renewed debate about the competitiveness of Germany as a business location.

Examples of gold-plating in Germany

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
1	Sec. 298 (2) Nr. 3 German Investment Code: (2) In addition to publication in an information medium to be specified in the sales prospectus, investors shall be informed without delay by means of a durable medium in accordance with Sec. 167 [...] 3. Changes to the investment conditions that are not compatible with the previous investment principles or changes to material investor rights that are detrimental to investors or changes that are detrimental to investors that affect the remuneration and reimbursement of expenses that can be withdrawn from the investment fund, including the background to the changes and the rights of investors in a comprehensible manner; it must be stated where and how further information on this can be obtained.	Art. 92, 94 UCITS IV Directive (Emde/Dornseifer/Dreibus/Süßmann, 3. Aufl. 2023, German Investment Code Sec. 298 Rn. 9)	No official rationale provided	This example illustrates the increased requirements for disclosure and transparency of information. Much higher management and transaction costs for AIFM.

[35] Rationale and reasons presented by the legislator or regulator justifying gold-plating.

[36] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

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2	Sec. 3 (4) German Investment Code (favourable case of gold-plating) Sec. 3 Designation protection [...] (4) EU management companies may use the same general designations for the exercise of their activities within the scope of this Act as they use in their home Member State. The Federal Financial Supervisory Authority (BaFin) may prescribe an explanatory addition to the name if there is a risk of confusion. [...]	-	The explanatory memorandum to the law assumes that this is an adoption of section 3 (3) German Investment Act, which is to be repealed, with editorial adjustments. (Emde/Dornseifer/Dreibus Schuhmann, 3. Aufl. 2023, German Investment Code Sec. 3 Rn. 21)	This is an example of gold-plating as German legislator extended the provisions of UCITS Directive in relation to general designation of activities. Sec. 3 (4) German Investment Code takes over Sec. 3 (3) German Investment Act, which implemented Art. 96 UCITS IV Directive. In Sec. 3 (3) German Investment Act the EU management company was still called an EU investment company, which according to Sec. 2 (1) sentence 2 German Investment Act expressly only included management companies within the meaning of the UCITS IV Directive. In the course of the creation of the German Investment Code, the legislator extended the provision to all EU investment funds, i.e. UCITS and AIFs, as the EU management company within the meaning of the German Investment Code pursuant to Sec. 1 (17) includes both those within the meaning of the UCITS IV Directive and those within the meaning of the AIFM Directive.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
				It is unclear whether this extension was a deliberate decision by the legislator. The explanatory memorandum to the law assumes that it is an adoption of Sec. 3 (3) German Investment Act, which is to be repealed, with editorial adjustments. The AIFM Directive does not provide for a corresponding regulation. However, doubts as to the conformity of the regulation with EU law should not be justified since Sec. 3 (4) German Investment Code rather grants EU AIF management companies an additional right, instead of imposing additional obligations. This is therefore an unproblematic, favourable and excessive implementation of a directive requirement. If the term „gold-plating" were also to be used in this context, Sec. 3 (4) could be described as a case of „favourable gold-plating". (Emde/Dornseifer/Dreibus/Schuhmann, 3. Aufl. 2023, German Investment Code Sec. 3 Rn. 21)

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
3	Sec. 261 German Investment Code Sec. 261 Permitted assets, investment limits (1) The AIF management company may only invest for a closed-end domestic public AIF in 1. tanglible assets, 2. units or shares in PPP [Public-private partnerships] project companies and infrastructure project companies, 3. units or shares in companies which, according to the articles of association or the articles of incorporation, may only acquire assets within the meaning of no. 1 as well as the assets required to manage these assets or participations in such companies, 4. participations in companies that are not admitted to trading on a stock exchange or included in an organised market,	Only Sec. 261 VII German Investment Code is based on Art. 26-30 AIFM-Directive. The remaining regulatory content represents autonomous German law.	The fact that this is a case of allowed gold-plating is due to recital 10 of the AIFM-Directive. Recital 10 states that the AIFM-Directive does not contain any regulations for AIFs. AIFs should therefore be regulated and supervised at national level. It would be disproportionate to regulate the structure or composition of the portfolios of AIFs managed by AIFMs at Union level and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIFs managed by AIFMs. The AIFM-Directive therefore does not prevent Member States from adopting or from continuing to apply national requirements in respect of AIFs established in their territory. Re Sec. 261 (Permitted assets, investment limits) Re paragraph 1 With the implementation of Directive 2011/61/EU, closed-end funds are subject to comprehensive regulation in Germany for the first time. In particular, product rules will be introduced as part of this new	This is an example of gold-plating as Germany applies its own national regime for local AIFs, which has no equivalent in the AIFM Directive.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	5. units or shares in closed-end domestic public AIFs in accordance with Sec. 261 to 272 or in European or foreign closed-end public AIFs whose investment policy is subject to comparable requirements, 6. units or shares in closed-end domestic special AIFs in accordance with Sec. 285 to 292 in conjunction with Sec. 273 to 277, Sec. 337 and 338 or in closed-end EU special AIFs or closed-end foreign special AIFs whose investment policy is subject to comparable requirements, 7. assets pursuant to Sec.193 to 195, 8. cash loans pursuant to Sec. 285(3) sentences 1 and 3, which shall apply mutatis mutandis subject to the proviso that, notwithstanding Sec. 285(3) sentence 1, no more than 30 per cent of the aggregate contributed capital and the uncalled committed capital of the closed-end public AIF is used for these loans and, in the case of Sec. 285(3) sentence 1 no. 3, the loans granted to the respective company do not exceed		regulation. According to the regulation in paragraph 1, closed-ended public AIFs may invest in real assets, participations in PPP project companies, participations in certain special purpose vehicles, such as real estate companies, units or shares in closed-ended public funds and special AIFs as well as equity participations and equity-like participations in unlisted companies and in assets pursuant to Sec. 193 to 195. However, derivatives and other derivative assets are not covered. Re paragraph 2 Paragraph 2 lists tangible assets within the meaning of paragraph 1 number 1 by way of example. Re paragraph 3 Paragraph 3 adopts the provision of Sec. 90b (8) of the Investment Act to be repealed and extends it to all closed-ended public AIFs. The provision excludes closed-ended public AIFs from entering into transactions with derivatives as part of their investment strategy.	

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	the acquisition costs of the equity interests held in the company, 9. crypto assets within the meaning of Sec. 1(11) sentence 4 of the German Banking Act for investment purposes if their market value can be determined. (2) tangible assets within the meaning of paragraph 1 number 1 are in particular 1. real estate, including forests, woodland and agricultural land, 2. ships, ship superstructures and ship components and spare parts, 3. aircraft, aircraft components and spare parts, 4. installations for the generation, transport and storage of electricity, gas or heat from renewable energy sources 5. railway vehicles, railway vehicle components and spare parts, 6. vehicles used in the context of electromobility, 7. containers, 8. infrastructure used for assets within the meaning of numbers 2 to 6.		Re paragraph 4 Paragraph 4 adopts the provision of Sec. 67(4) of the Investment Act to be repealed and extends it to all assets in addition to real estate that may be acquired by closed-ended public AIFs. As was already the case under Sec. 67(4) of the Investment Act, there is no currency risk in the case of currency congruence, i.e. if, for example, a closed-end AIF invests in real estate in the United States of America and the nominal currency of the AIF is the US dollar. Furthermore, only the net position is included in the calculation of the currency risk, i.e. the components of the AIF that reduce the risk must also be taken into account when calculating the risk. Re paragraph 5 Paragraph 5 is based on the provision of section 67(5) sentence 1 of the Investment Act, which is to be repealed, and extends this to other tangible assets in addition to the acquisition of real estate. The provision serves to protect investors.	

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	(3) Transactions involving derivatives may only be carried out to hedge assets held in the closed-end domestic public AIF against a loss in value. (4) The AIF management company must ensure that the assets of a closed-end domestic public AIF are only subject to currency risk to the extent that the value of the assets subject to such risk does not exceed 30 per cent of the aggregate contributed capital and uncalled committed capital of that AIF, calculated on the basis of the amounts available for investment after deduction of all fees, costs and expenses borne directly or indirectly by the investors. The AIF management company must ensure that the proportion of crypto assets held for the account of the closed-end domestic retail AIF does not exceed ten per cent of the value of the closed-end domestic retail AIF. (5) An investment may only be made in an asset within the meaning of paragraph 1 number 1 if		Re paragraph 6 Paragraph 6 is based on the provision of Sec. 68(2) of the Investment Act, which is to be repealed. Prior to the acquisition of a participation or shares in a company, an unlisted company or an AIF within the meaning of paragraph 1 numbers 2 to 6, the value of the participation or shares must be determined by an external valuer. For this purpose, a current statement of assets must be prepared for the company or the closed-end AIF. The statement of assets must be audited by an auditor. The most recent annual financial statements may be used instead of the statement of assets if they are not older than three months at the time the units are valued. These must be annual financial statements that have been certified by an auditor. Re paragraph 7 Paragraph 7 implements Articles 26 to 30 of Directive 2011/61/EU for closed-ended public AIFs that invest in equity interests in unlisted companies. Whether and to what extent Sec. 288 et seq. apply are in turn governed by section 2.	

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	1. the asset has previously been valued at a value of a. asset up to and including 50 million euros by an external valuer who fulfils the requirements of Sec. 216 (1) sentence 1 number 1 and sentence 2, (2) to (5), or b. an asset worth more than EUR 50 million by two external valuers who are independent of each other, who fulfil the requirements of Sec. 216 (1) sentence 1 no. 1 and sentence 2, (2) to (5) and who value the asset independently of each other, has been valued, 2. the external valuer within the meaning of no. 1 letter a, or the external valuers within the meaning of no. 1 letter b do not simultaneously perform or perform the annual valuation of the assets pursuant to Sec. 272 and 3. the consideration to be received from the closed-end domestic public AIF does not exceed or only insignificantly exceeds		BT-Drucksache 17/12129	

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	the value determined. Sec. 250(2) and 271(2) shall apply accordingly. (6) Before investing in an asset within the meaning of paragraph 1 numbers 2 to 6, the value of the PPP project company, the infrastructure project company, the company within the meaning of paragraph 1 number 3, the company within the meaning of paragraph 1 number 4 or the closed-end AIF within the meaning of paragraph 1 number 5 or number 6 must be determined. 1. by a. an external valuer who fulfils the requirements of Sec. 216 (1) sentence 1 no. 1 and sentence 2, (2) to (5), if the value of the asset does not exceed EUR 50 million, or b. two external valuers who are independent of each other, who fulfil the requirements of Sec. 216 (1) sentence 1 no. 1 and sentence 2, (2) to (5) and who carry out the valuation of the asset independently of each other,			

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	where 2. the external valuer within the meaning of no. 1 letter a, or the external valuers within the meaning of no. 1 letter b do not simultaneously perform or perform the annual valuation of the assets in accordance with Sec. 272. Sec. 250 (2) shall apply accordingly. The valuation shall be based on the most recent annual financial statements of the PPP project company, the infrastructure project company, the company within the meaning of paragraph 1 no. 3, the company within the meaning of paragraph 1 no. 4 or the closed-end AIF within the meaning of paragraph 1 no. 5 or no. 6, which have been audited by an auditor, or, if the annual financial statements are more than three months prior to the valuation date, on the assets and liabilities of the PPP project company, the infrastructure project company, the company within the meaning of paragraph 1 no. 3, the company within the meaning of paragraph 1 no. 4 or the closed-end AIF, the assets and liabilities of the PPP project company,			

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	the infrastructure project company, the company within the meaning of paragraph 1 number 3, the company within the meaning of paragraph 1 number 4 or the closed-end AIF within the meaning of paragraph 1 number 5 or number 6, which are documented in a current statement of assets and liabilities audited by the auditor. (7) If the AIF management company invests in assets within the meaning of paragraph 1 number 4 for a closed-end domestic public AIF, Sec. 287 to 292 shall apply accordingly.			
4	Sec. 343 German Investment Code (4) (8) The investment conditions, the key investor information and the sales prospectus for public AIFs must be adapted to the version of this Act applicable from 18 March 2016 by 18 March 2017 at the latest. Sec. 163 shall apply with the provision that the period specified in Sec. 163 (2) sentence 1 is three months. Sec. 163 (3) and (4) sentences 2 to 5 shall not apply.	(-)	As part of the amendments to the German Investment Code, the new information requirements that apply to the investment conditions, key investor information and prospectus of UCITS under the amended Directive 2009/65/EC were also extended to domestic open-ended public AIFs due to similar interests. This resulted in changes to the key investor information and the sales prospectuses of domestic open-ended public AIFs. In this context, Sec. 343 (8) of the German Investment Code granted AIFMs a transitional	The characterization of this as gold-plating is based on application of the requirements of the UCITS Directive to German public AIFs. Additional administrative expenses.

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			period until March 18, 2017, to adapt these documents to the version of the German Investment Code applicable from March 18, 2016. However, EU law did not provide for any deadlines for AIFs for implementation, as only UCITS were affected by the amendments under the amended Directive 2009/65/EC. The planned transitional periods in Sec. 343 (8) of the German Investment Code therefore represented gold-plating (BVI Positionspapier vom 24.07.2015. S. 21).	
5	Sec. 28 German Investment Code (1) Nr. 9 a process enabling staff, while preserving the confidentiality of their identity, to identify potential or actual infringements of this Act, of regulations adopted pursuant to this Act or of directly applicable rules in European Union acts on European venture capital funds, on European social entrepreneurship funds, on European long-term investment funds, on money market funds, on a pan-European private pension product, on credit rating agencies,	Art. 99d UCITS Directive	Due to comparable interests, not only UCITS capital management companies, but all capital management companies should be obliged to create suitable precautions for the internal reporting of legal violations. The wording of the provision is based on Sec. 25a (1) sentence 6 no. 3 German Banking Act. The capital management companies may set up a suitable office both within and outside the capital management company. If the capital management company commissions an office outside the company, the general requirements of this Act for outsourcing shall apply.	This is an example of gold-plating as local legislation extends whistleblowing rules beyond the UCITS area. A national extension of the whistleblower rules beyond the UCITS area is only justified in relation to funds in which - as with UCITS funds - private investors may be involved. A AIFM that only manages special funds should therefore be completely exempt from the new requirement. (BVI Positionspapier vom 24.07.2015, S.6)

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	on market abuse, on transparency of securities financing transactions and reuse, on indices, used as benchmarks in financial instruments and financial contracts or to measure the performance of an investment fund, on the establishment of a general framework for securitization and the creation of a specific framework for simple, transparent and standardized securitization, on sustainability-related disclosure obligations in the financial services sector, on the establishment of a framework to facilitate sustainable investment or on key information documents for packaged retail and insurance-based investment products, as well as any criminal acts within the management company.		BT-Drucksache 18/6744	
6	Sec. 340 German Investment Code (2): Any person who, intentionally or negligently [...] Nr. 40 contrary to Sec. 164 (4) sentence 1, fails to submit a sales prospectus or the key investor information referred to therein to the Federal	Art. 99a r) UCITS Directive	The newly inserted point 40 serves to implement point (r) of the newly inserted Article 99a in conjunction with Article 74 and Article 82(1) of Directive 2009/65/EC. Contrary to the requirements of point (r) of the newly inserted Article 99a of Directive 2009/65/EC, point 40 does not require a repeated infringement. Rather, in line with the concept of point 32,	This serves as an exemplar of gold-plating as it expands the sanctioning provisions. Faster sanctioning options.

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	Financial Supervisory Authority or contrary to Sec. 164 (5), intentionally or negligently fails to submit an amendment to a sales prospectus or the key investor information referred to therein to the Federal Financial Supervisory Authority or correctly, completely or on time, or contrary to Sec. 164 (4) sentence 2, intentionally or negligently fails to submit fails to shall be deemed to have committed an administrative offense.		a single infringement is sufficient. The repeated infringement is, however, relevant for the new scope of fines in point 40. BT-Drucksache 18/6744, p. 70	
7	Sec. 65 Securities Trading Act (5) An investment services company that provides independent fee-based investment advice, 1. must consider a sufficient range of financial instruments offered on the market when providing advice, which a. are sufficiently diversified in terms of type and issuer or provider and b. are not limited to financial instruments issued or offered by the investment services undertaking itself or whose providers or issuers are closely linked to the investment services undertaking or otherwise have such close		The special prohibition on benefits for independent fee-based investment advice is therefore stricter than the general prohibition on benefits under Sec. 70, which provides for a more generous exception in the case of quality improvement in the event of disclosure. Furthermore, the German regulation is stricter than the requirements under EU law. (Poelzig, Statement for the hearing on the draft of the 2nd FiMaNoG in front of the Finance Committee of the Bundestag, on the 8.3.2017, 9, available at https://www.bundestag.de/resource/blob/496040/d8f980147529723175d2c23d2bbc6c78/13-data.pdf)	This is an example of gold-plating as local legislation implements the special prohibition on benefits for independent fee-based investment advice. On the one hand, Art. 24 (7) lit. b MiFID II in conjunction with Art. 12 (3) Directive (EU) 2017/593 permits the acceptance of minor non-monetary benefits that can improve the quality of service for the client and that are so minor that they cannot be assumed to impair compliance with the duty to act in the best interests of the client. Secondly, under EU law, the acceptance of monetary inducements is always permitted under Art. 24 (7) lit. b MiFID II in conjunction with recital 74 MiFID II and recital 24 and Art. 12

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	legal or economic ties with it that the independence of the advice could be jeopardized as a result; 2. may only be remunerated for the independent fee-based investment advice by the client. In accordance with sentence 1 number 2, no non-monetary benefits may be accepted in connection with independent fee-based investment advice from a third party who is not a client of this service or has not been commissioned to do so by the client.			(1) Directive (EU) 2017/593 if these are passed on directly to the client. The excessive implementation of Art. 24 (7) MiFID II has already been incorporated into German law with the Fee-based Investment Advice Act (Honorar-Anlageberatungsgesetz). (BeckOK WpHR/Poelzig, 10. Ed. 1.10.2023, Securities Trading Act Sec. 64 Rn. 85-85.1)
8	Sec. 87 Securities Trading Act (1) An investment services company may only entrust an employee with the provision of investment advice if the employee is knowledgeable and has the necessary reliability for the activity. The investment services enterprise must inform the Federal Financial Supervisory Authority 1. of the employee and, 2. if the investment services enterprise has sales representatives within the meaning of paragraph 4, the sales representative directly responsible for the employee on	(-)	In future, such employees must also be notified to BaFin before taking up the activities described. Furthermore, BaFin must be notified of any changes in the circumstances requiring notification, including the end of the assignment of this activity. Active registration is intended to have a disciplinary effect on investment service providers by making them aware of the importance of employee selection and their responsibility in this regard. BT-DS 17/3628, S. 22	This example illustrates the retention of the obligation to notify the register is another so-called gold-plating by the German legislator. Particularly in light of the fact that such a requirement was discussed and rejected at European level. The new investment advice regulations of MiFID II An examination of selected conduct and organizational obligations of MiFID II and their implementation in national law, by Jana Mansen; p. 209

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	the basis of the organization of the investment services enterprise before the employee takes up the activity pursuant to sentence 1.			
9	Sec. 21 German Investment Code (1) The license application for an AIF management company must contain: [...] 6 details of the facts indicating a close link between the AIF management company and other natural or legal persons,	(-)	Number 6 is based on the provision applicable to UCITS AIFM in Sec. 7a (1) (6) German Investment Act, which is to be repealed. BT-DS 17/12294, S. 215	This is an example of gold-plating as the standards set by local law has no equivalent in the AIFM Directive. German legislator has opted for so-called national gold-plating, which on the one hand puts the German financial center at a disadvantage in the European competition between financial centres and on the other hand, by increasing the level of regulation at national level, also counteracts the efforts of the European legislator to harmonize the licensing requirements for AIFM throughout Europe. (Emde/Dornseifer/Dreibus/Thole, 3. Aufl. 2023, German Investment Code Sec. 22 Rn. 11)
10	Sec. 20 German Investment Code (2) External UCITS management companies may provide the following services and ancillary services in addition to the collective portfolio management of UCITS:	Recital 20 of the AIFM Directive	As the German Capital Investment Code classifies the case of outsourcing of portfolio management by an external capital management company to a third (external) capital management company under financial portfolio management and not under	The example illustrates gold-plating as financial portfolio management is also subject to the requirements of MiFID II and therefore to the German Securities Trading Act (WpHG), German external capital management companies must take

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	1. the management of individual assets invested in financial instruments within the meaning of section 1 (11) of the German Banking Act (Kreditwesengesetz) for others with discretionary powers, including the portfolio management of third-party investment assets (financial portfolio management), [...] (3) External AIFM may provide the following services and ancillary services in addition to the collective asset management of AIFs: [...] 2. the management of individual assets invested in financial instruments within the meaning of Section 1 (11) of the German Banking Act for others with discretionary powers, including the portfolio management of third-party investment assets (financial portfolio management), [...]		collective asset management as provided for under EU law, this is a case of gold-plating. Undertakings for collective investment in transferable securities (UCITS) or alternative investment funds (AIF) can have their portfolios managed by an internal or external capital management company (*Kapitalverwaltungsgesellschaft*). In the case of internal management, the investment fund is the capital management company itself. All other cases are managed by an external capital management company. This also includes all funds organized as contractual special asset unit (*Sondervermögen*), as those must always be managed externally due to their lack of legal personality. In practice, external capital management companies also outsource portfolio management to third (external) capital management companies (outsourcing case). External capital management companies of UCITS or AIFs always provide collective asset management in accordance with section 20 (2) and	more regulations into account when outsourcing portfolio management than external capital management companies of other member states, which classify the out-sourcing of portfolio management always as collective asset management.

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			(3) of the German Investment Code (KAGB). Collective asset management is the core business of capital management companies. Collective asset management is a consequence of EU law, which regards portfolio management and risk management as the main services that every capital management company licensed under the UCITS or AIFM Directive (2009/65/EC and 2011/61/EU) must offer. EU law also permits further outsourcing of own portfolio management to third-party capital management companies under strict conditions (aforementioned outsourcing case) and also includes this under collective asset management. This is expressly not intended to automatically trigger the definition of financial portfolio management under MiFID II (Directive 2014/65/EU) (see, for example, recital 20 of the AIFM Directive). However, in the German Investment Code the situation is as follows: In addition to collective asset management, capital management companies may provide financial	

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			portfolio management in accordance with section 20 (2) no. 1 and (3) no. 2 KAGB. As a result of MiFID II, this is also an investment service requiring a license within the meaning of the German Securities Trading Act (WpHG). The German Investment Code expressly includes the portfolio management of third-party UCITS or AIFs (aforementioned outsourcing case) under financial portfolio management. The provisions of the German Investment Code therefore represent „gold-plating" compared to the requirements of UCITS and AIFM Directive represent „gold-plating". BT-DS 51/21 (Beschluss), S. 2, 3	
11	Sec. 74 German Investment Code (1) The depositary shall book the following amounts of money in a blocked account set up for the domestic UCITS: 1. the purchase price from the sale of assets of the domestic UCITS, 2. the accrued income, 3. fees for securities loans and	Art. 22 (4b) UCITS IV Directive	Art. 22 para. 4b) UCITS IV Directive (as amended by the UCITS V Directive) also permits the opening of cash accounts of a UCITS with other entities within the meaning of Art. 18 para. 1a), b) and c) Directive 2006/73/EC. (Emde/Dornseifer/Dreibus/Dreibus, 3. Aufl. 2023, German Investment Code Sec. 74 Rn. 4).	With the exclusive responsibility of the depositary for the paying agent function, the German legislator has introduced stricter requirements than provided for in the UCITS IV Directive (as amended by the UCITS V Directive) (gold-plating).

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	4. the option price paid by a third party for the option right granted to it, and 5. other cash amounts due to the domestic UCITS. (2) The Custodian shall carry out the following activities from the blocked accounts or custody accounts on the instructions of the UCITS management company or an enterprise that performs the tasks of the UCITS management company in accordance with § 36 paragraph 1 sentence 1 number 3 or 4: 1. the payment of the purchase price for the acquisition of securities or other assets, the provision and return of collateral for derivatives, securities loans and repurchase agreements, payments of transaction costs and other fees as well as the settlement of other obligations arising from the management of the domestic UCITS, 2. the delivery upon the sale of assets and the delivery upon the transfer of securities by way of loan as well as any other delivery obligations,			

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	3. the distribution of profit shares to the investors. (3) Blocked accounts shall be opened in the name of the domestic UCITS, in the name of the UCITS management company acting on behalf of the domestic UCITS or in the name of the depositary acting on behalf of the domestic UCITS and shall be maintained in accordance with the principles laid down in Article 16 of Directive 2006/73/EC. Where cash accounts are opened in the name of the depositary acting on behalf of the domestic UCITS, no cash of the depositary itself shall be booked in such accounts. (4) For further details on the requirements for the monitoring of the UCITS' cash flows, please refer to Article 10(1) of Delegated Regulation (EU) 2016/438.			
12	Sec. 80 German Investment Code (3) By way of derogation from paragraph 2, the depositary for closed-ended AIFs may also be a trustee who performs the duties of a depositary in the course of its professional or business activities instead of the institutions referred to in section 80(2) nos. 1 to 3 if	Art. 21 (3) AIFM Directive	In the case of closed-ended AIFs, AIFMs do not necessarily have to appoint credit institutions, investment firms or other supervised institutions listed in section 80(2) KAGB to act as the custodian of the AIF. Pursuant to section 80(3) sentence 1 KAGB, closed-ended public or special AIFs may also appoint a trustee as	The provision in section 80 (3) sentence 1 KAGB permissibly goes beyond the requirement in Art. 21 (3) of the AIFM Directive, providing the possibility for member states to regulate for a trustee to act as depositary for those AIFs, investors of which, among other things, do not have the possibility to exercise redemption rights within

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	1. no redemption rights can be exercised for the closed-ended AIF within five years of the first investments being made, 2. the closed-ended AIFs, in accordance with their main investment strategy, generally a. do not invest in assets that must be held in custody pursuant to section 81 (1) no. 1, or b. invest in issuers or unlisted companies in order to potentially gain control over such companies in accordance with section 261(7), sections 287 and 288. With regard to the professional or business activity, the trustee must 1. a legally recognized mandatory professional registration or 2. be subject to legal and regulatory provisions or professional rules that can provide sufficient financial and professional guarantees to enable it to carry out the relevant tasks of a depositary effectively and to fulfil the obligations associated		depositary under certain further conditions, who then performs the task as part of its professional or business activities. The additional requirements allow notaries, lawyers, tax advisors and auditors in particular to act as trustees. (Geurts/Schubert: Folgen der Neudefinition geschlossener Fonds, WM 2014 Heft 46, 2154, S. 2157)	the first five years of the investment.

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	with these functions. Sufficient financial and professional guarantees must be ensured on an ongoing basis. The trustee must notify the supervisory authority immediately of any changes affecting its financial and professional guarantees. If the trustee takes out insurance for the purpose of the financial guarantee, the insurance company must be obliged in the insurance contract to notify the Federal Agency immediately of the commencement and termination or cancellation of the insurance contract as well as circumstances that affect the prescribed insurance cover via an electronic communication procedure provided by the Federal Agency.			
13	Sec. 22 German Investment Code (1) The license application for an AIFM must contain: [...] 6. details of facts indicating a close connection between the AIFM and other natural or legal persons, [...]	Art. 21 (1 No. 6) UCITS Directive	Pursuant to para. 1 no. 6, facts indicating close links between the AIFM, and other natural and legal persons must be disclosed. The standard corresponds to section 21 (1) no. 6 but has no equivalent in the AIFM Directive. (Emde/Dornseifer/Dreibus/Thole, 3. Aufl. 2023, German Investment Code Sec. 22 Rn. 11)	This is an example of gold-plating, as German law sets different standards to EU rules and tightens the requirements for AIFMs. Once again, the German legislator has opted for so-called national gold-plating, which on the one hand puts the German financial center at a disadvantage in the European competition between financial

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				centers and on the other hand, by increasing the level of regulation at national level, thwarts the European legislator's efforts to harmonize the licensing requirements for AIFM throughout Europe. As the AIFM Directive in Art. 7 (6) and (7) delegates to ESMA the power to create uniform technical regulatory standards for the authorization of AIFMs, there are serious doubts as to whether § 21 No. 6 does not violate higher-ranking (European) law.
14	Sec. 25 German Investment Code (1) An investment management company must: 1. with an initial capital of b. at least EUR 300,000 if it is an internal capital management company, c. at least 125,000 euros if it is an external capital management company, 2. have additional own funds of at least 0.02 per cent of the amount by which the value of the investment assets under management exceeds EUR 250 million if the value of the investment	Art. 9 AIFM Directive	The investment regulations in sec. 25 para. 7, which were only designed for AIFMs under the AIFM Directive, also apply to UCITS-Managers. (Emde/Dornseifer/Dreibus/Stabenow, 3rd ed. 2023, KAGB Section 25 para. 8)	This is an example of gold-plating, as German law imposes stricter capital adequacy requirements for fund managers. Sec. 25 of the German Investment Code summarizes the capital requirements applicable to external and internal UCITS management companies and AIFMs in a single provision. It incorporates into national law the partially differing regulations under European law for UCITS and AIF and for internal and external management companies. This applies, among other things, to the lower initial capital requirements for external management companies compared to

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	assets under management exceeds EUR 250 million if the value of the investment assets managed by the AIFM or by the external UCITS management company exceeds EUR 250 million; however, the required total amount of initial capital and additional own funds may not exceed EUR 10 million. (2) An AIFM or an external UCITS management company need not fulfil the requirement to raise additional own funds in accordance with paragraph 1 sentence 1 number 2 in the amount of up to 50 percent if it has a guarantee in the same amount provided by one of the following institutions or companies: [...] (7) Own funds, including additional own funds in accordance with paragraph 6 number 1, shall either be held in liquid assets or invested in assets that can be converted directly into bank deposits in the short term and do not contain speculative positions.			internal management companies, the lack of a requirement for additional own funds for internal UCITS management companies and the additional own funds to cover potential professional liability risks in accordance with para. 6 for AIFMs. Besides that, the so called "IFD-UmsG" has introduced increased requirements for the initial capital for external AIFMs when providing services and ancillary services, which were, however, located in section 5 para. 2 sentence 2, 3 German Investment Code.

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15	Sec. 22 German Investment Code The licence application for an AIFM must contain: [...] 2. the name of the managing directors, 3. Information on the assessment of the managers' reliability, 4. Information on the assessment of the professional suitability of the managing directors, [...]	Art. 7 (2a) AIFM Directive	According to para. 1 no. 2-4, the license application for an AIFM must include details of the managers as well as information on the assessment of their reliability and professional suitability. These provisions serve to implement Art. 7 (2a) of the AIFM Directive and are at the same time based on the wording of sec. 21 (1) nos. 2-4 applicable to UCITS Managers. (BT-Drs. 17/12294, 215) (Emde/Dornseifer/Dreibus/Thole, 3rd ed. 2023, KAGB Sec. 22 para. 7)	This is an example of gold-plating as it imposes additional due diligence and suitability assessments for key personnel of AIFMs. The operations of an AIFM requiring a license are given a separate provision in sec. 22 of the German Investment Code, with the requirements for the submission of a license application and the documents to be submitted for an AIFM. The legislator justifies the creation of a separate regulation for AIFM with its own authorization requirements that go beyond the requirements of sec. 21 (requirements for UCITS Managers) by stating that the UCITS IV Directive and the AIFM Directive provide for different requirements.
16	Sec. 23 German Investment Code (1) A capital management company must be refused authorization if [...] 3. facts exist which indicate that the managers of the capital management company are not reliable or do not have the professional qualifications required for management within the meaning of Section 25c (1) of the German Banking Act (KWG);	Art. 29 (1) lit. b) AIFM Directive	Sec 23 (1) 3. refers on Sec. 25c (1) German Banking Act (KWG) where a legal presumption is defined. A manager is presumed to have professional qualifications if he has been in a managing position in a comparable institution for three years. On the one hand qualified criteria for managers are defined. On the other hand, these criteria can be met by fulfilling the legal presumption.	This is an example of gold-plating as it imposes additional due diligence and suitability assessments for key personnel of AIFMs.

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			Emde/Dornseifer/Dreibus/Thole, 3. Ed. 2023, German Investment Code sec. 23 para. 25	
17	Sec. 119 German Investment Code (1) The Management Board of an investment stock corporation with variable capital shall consist of at least two persons. It is obliged to [...] (2) The members of the Management Board of the investment stock corporation with variable capital must be reliable and have the professional qualifications required to manage the investment stock corporation with variable capital, also with regard to the nature of the business purpose of the investment stock corporation with variable capital.	Article 29(1) sentence 2b) UCITS Directive and Art. 7 (2a) AIFM Directive	Article 29(1) sentence 2b) of the UCITS Directive contains specific requirements for the directors of an investment company, but only for cases in which the investment company has not appointed a management company, i.e. self-managing investment companies. The UCITS Directive therefore does not impose any specific requirements on directors for investment companies managed by third parties. There is no corresponding differentiation in German law. The specific requirements for managers therefore apply not only to self-managed investment companies, but also to externally managed investment companies. (Emde/Dornseifer/Dreibus/Dornseifer3. Ed. 2023, German Investment Code sec. 119 Para. 6-8)	This is an example of gold-plating, as national rules impose specific requirements on managers that go beyond the requirements of the EU directives. This requirement applies in accordance with sec. 113, 119, 128, 147 and 153 of the German Investment Code for all externally managed fund vehicles in corporate form. This can certainly be questioned in view of the fact that the managers of the externally managed investment company already fulfil the special requirements for managers under investment law. On the other hand, it seems appropriate that the management board of an investment company, even if it is managed by a third party, should also be familiar with the investment business and have the appropriate qualifications to fulfil its function as a management board.

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18	Sec. 29 German Investment Code (1) The capital management company shall establish and maintain a permanent risk control function that is hierarchically and functionally independent of the operating units (separation of functions). [...] (2) The management company must have appropriate risk management systems in place [...] (5) For AIF management companies, the criteria for the AIFs they manage are as follows 1. The risk management systems, 2. [...] in accordance with Articles 38 to 45 of Delegated Regulation (EU) No 231/2013. (6) The Federal Ministry of Finance is authorised to issue more detailed provisions on risk management systems and procedures for capital management companies that manage UCITS or retail AIFs by ordinance that does not require the approval of the Bundesrat. The Federal	Art. 15 AIFM Directive	The provision comprehensively regulates the risk management system (paras. 2-6), including its risk controlling function (para. 1) as an essential organizational form, for the entire business activity of a capital management company. The standard applies equally to internal and external capital management companies and, according to the German legislator, implements Art. 15 of the AIFM Directive. However, the AIFM Directive has placed the organizational of Art. 15 in the hands of the European Commission and has not issued a legislative mandate to the member states in this regard. Unsurprisingly, dec. 29 paras. 1, 2, 3 and 4 are therefore largely redundant and regulate what the directly applicable and much more detailed Articles 38-45 and 50-56 of the AIFM Regulation already prescribe. The largely irrelevant nature of the requirements of sec. 29 is articulated in para. 5 by a discrete reference to their applicability. In order to ensure that the organizational requirements for AIFMs and UCITS management	This is an example of gold-plating as German law imposes additional controls and risk management procedures. For its part, BaFin has further differentiated the requirements of Sec. 29 through Sec. 5 KAVerOV and Sec. 4 of KAMaRisk.

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	Ministry of Finance may delegate this authorisation to the Federal Financial Supervisory Authority by ordinance.		companies consistent, the KAVerOV[37] issued by BaFin pursuant to sec. 29 para. 6 also refers in para. 5 to Articles 38-45 and 50-56 of the AIFM Regulation with regard to the risk management requirements for UCITS-Managers. Sec. 29 para. 6 authorizes the Federal Ministry of Finance to „issue more detailed provisions on risk management systems and procedures for capital management companies that manage UCITS or public AIFs by statutory order that does not require the approval of the Bundesrat". In accordance with para. 6 sentence 2, the Federal Ministry has transferred this authorization to issue a statutory order to BaFin, which in turn has made use of it by issuing the KAVerOV. Sec. 5 KAVerOV, which is relevant here, briefly states in para. 1 that Articles 38-45 of the AIFM Regulation apply to UCITS-Managers with regard to their risk management systems. Para. 2 obliges UCITS- Managers and AIFMs that manage public AIFs to make forecasts and carry out analyses of	

[37] Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsregeln nach dem Kapitalanlagegesetzbuch (Capital Investment Conduct and Organization Ordinance under the German Investment Code).

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			the effects of the acquisition of assets on the composition of the investment assets, on their liquidity and on their risk and return profile. There are no corresponding provisions in the European regulations for the managers of public AIFs; their equalization with UCITS management companies within the framework of Sec. 5 para. 2 KAVerOV is an autonomous decision of the German legislator. (Emde/Dornseifer/Dreibus/Steck/Schmidt/Stockhorst, 3rd ed. 2023, KAGB Section 29 para. 45).	
19	Sec. 26 German Investment Code (8) The Federal Ministry of Finance is authorised, by ordinance not requiring the approval of the Bundesrat, to issue additional provisions for capital management companies in relation to public AIFs to the criteria listed in Articles 16 to 29 of Delegated Regulation (EU) No. 231/2013 in accordance with paragraph 7 and to issue more detailed provisions in relation to UCITS		BaFin has made use of the power to issue regulations delegated to it in accordance with sec. 26 para. 8 sentence 2 by issuing the KAVerOV, which came into force on 22 July 2013. The KAVerOV serves to implement the UCITS Implementing Directive and to harmonies the standards between UCITS and AIFMs, as already laid down in principle in the German Investment Code. It contains provisions on organizational, conflict of interest and conduct obligations that capital management companies must observe in the collective asset	This is an example of gold-plating because the German implementation of the EU regulations goes beyond the minimum requirements by adding additional provisions and specifying detailed rules for capital management companies, particularly in the areas of organizational, conflict of interest, and conduct obligations.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
	1. on rules of conduct that meet the requirements set out in paragraphs 1 and 2 numbers 1 and 2 and 2. on the means and procedures required for the proper conduct of business by such capital management companies.		management of UCITS and public AIFs. The standardization of the organizational regime for UCITS management companies and AIFMs takes place via the reference in Sec. 2 para. 1 KAVerOV to the AIFM Regulation. The aim was to avoid legal ambiguity due to the identical wording of the provisions. The regulations provided for in the AIFM Regulation essentially correspond to the requirements already known from the UCITS Directive and which already had to be complied with via the corresponding implementations in the KAVEerOV. These regulations, particularly with regard to risk and liquidity management, have been further specified in the course of the financial crisis, so that harmonization of the standards for UCITS management companies was necessary. As a large number of capital management companies manage both UCITS and AIFs, the requirements of the KAVEROV are also intended to facilitate a uniform organization of business processes. (Emde/Dornseifer/Dreibus/Steck/Schmidt/Stockhorst, 3rd ed. 2023, KAGB Section 26 para. 99-101)	

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20	Sec. 27 German Investment Code (6) The Federal Ministry of Finance is authorized [...] to issue more detailed provisions on: 1. on the measures to be taken by such a management company to a. recognise, prevent, manage and disclose conflicts of interest; and b. establish appropriate criteria for defining the types of conflicts of interest that could harm the interests of the investment fund; and 2. on the structures and organizational requirements necessary to reduce conflicts of interest in accordance with paragraph 1.		Sec. 27 specifies the requirements for the conflict of interest management of AIFMs required pursuant to sec.26 para. 2 no. 3. However, even more detailed regulations on the avoidance, management, and disclosure of conflicts of interest can be found in Art. 30-37 of the AIFM Regulation. These provisions, which are directly applicable to AIFMs, also apply to UCITS management companies in accordance with sec. 3 para. 1 KAVerOV. With regard to AIFMs, Art. 30 et seq. AIFM Regulation take precedence over the similar provisions of Sec.27. Sec. 27 para. 5 explicitly states this in a declaratory manner. Sec. 27 implements Art. 14 (1) and (2) of the AIFM Directive and must therefore be read together with Art. 30 et seq. of the AIFM Regulation. (Emde/Dornseifer/Dreibus/Steck/Schmidt/Stockhorst, 3rd ed. 2023, KAGB Section 27 para. 2)	This is an example of gold-plating as Germany has adopted its own specific rules on conflict of interest management, which have no equivalent in the AIFMD. The Federal Ministry of Finance used its authorization to issue such provisions in Sec. 3 Capital Investment Conduct and Organization Ordinance (KAVerOV), which came into force on 22 July 2013.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
21	Sec. 34 German Investment Code (1) An investment management company shall inform the Federal Financial Supervisory Authority of all material changes to the conditions for the licence, in particular material changes to the information submitted in accordance with section 21(1) and section 22(1) 1, before implementing the change.	Art. 10 AIFM Directive	Section 34 regulates the notification and reporting obligations of capital management companies vis-à-vis BaFin and authorises BaFin to intervene with regard to significant changes to the status quo from a regulatory perspective. Para. 1, which obliges capital management companies to notify significant changes to the conditions for granting authorisation, is a novelty in German law, as is para. 2, which authorises BaFin to impose restrictions on authorisation or reject planned structural changes under certain conditions. Both provisions implement Art. 10 of the AIFM Directive with regard to AIFMs, but also apply to UCITS-Managers, because the German legislator has decided to treat UCITS-Managers and AIFMs essentially the same with regard to the notification and reporting obligation pursuant to section 34. (Emde/Dornseifer/Dreibus/Steck/Schmidt/Stockhorst, 3rd ed. 2023, KAGB Section 34 para. 1)	This is an example of gold-plating because German law imposes additional notification and reporting obligations to BaFin.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[35]	Assessment of gold-plating and its impact on the local capital market[36]
22	Sec. 230 German Investment Code (1) The provisions of sections 192 to 211 apply mutatis mutandis to the management of real estate investment funds, unless otherwise provided for in sections 231 to 260.	UCITS Directive	Sec. 230 is the basic legal standard for property investment funds. The provision subjects this type of investment to the intensive regulation of the German Investment Code and declares that the provisions applicable to investment funds in accordance with the are also applicable to the real estate investment funds. (Emde/Dornseifer/Dreibus/Schultz-Süchting, 3rd ed. 2023, KAGB Section 230 marginal number 2)	This is an example of gold-plating as local law imposes specific requirements for real estate funds and real estate investments.

Licensing process and time periods in financial regulations

The duration and procedural details for obtaining licenses for financial entities such as investment firms, Alternative Investment Fund Managers (AIFMs), and Undertakings for Collective Investment in Transferable Securities Management Companies (UCITS ManCo) are subject to specific regulatory frameworks and procedural requirements.

The average time to obtain a license varies based on the type of financial entity, the thoroughness of the application, and the efficiency of the regulatory authority handling the application. In practice, the timeframes are as follows:

- Investment Firms: The average time to obtain a license is approximately 3-6 months,
- AIFMs: The average duration for obtaining a license is around 6-9 months,
- UCITS ManCos: Similar to AIFMs, the average time required is also about 6-9 months.

These periods can fluctuate depending on the completeness and quality of the submitted application as well as the responsiveness and workload of the relevant department at BaFin, Germany's Federal Financial Supervisory Authority.

There are explicit regulatory guidelines that set maximum time limits for the licensing procedures:

- Investment Firms: According to Section 16 (3) of the German Securities Institutions Act (WpIG), BaFin must inform the applicant within six months from the submission of the complete application whether a license will be granted or denied.

- AIFMs: Per Section 22 (2) of the German Investment Code (KAGB), BaFin is required to decide on the license within three months of receiving the complete application. This period may be extended by up to three months, if necessary, due to specific circumstances of the case. Applicants must be informed about such extensions.
- UCITS ManCos: Under Section 21 (2) of the KAGB, BaFin must make a decision within six months of receiving the complete application.

The determination of a "complete" application is critical and defined by law, including required details about managers and their qualifications, as specified in Section 22 (3) of the KAGB.

There are legal maximum requirements that are linked to the "completeness" of the application. However, it should always be noted that there is a certain amount of leeway as to when an application is actually considered "complete". Official extensions are only possible where this is permitted by law.

3.7. Ireland vs. gold-plating

Overview of gold-plating in the Irish legal system

As in many other EU Member States, in Ireland there are also situations where the local regulation goes beyond the minimum level of regulation of EU law and as a result introduces a higher level of regulation at domestic level. This can in turn lead to an increase in reporting obligations, additional procedural requirements and even the application of a more onerous penalty regime. Traditionally, in respect of the UCITS and AIFMD and MiFID II legislative frameworks, Ireland has adopted a strict transposition approach, avoiding gold-plating and maintaining its position as an attractive domicile for financial services firms seeking to operate within the EU. Where additional requirements occur, they typically tighten the law to address specific needs of the local market rather than apply changes across broader regulatory domains. This makes it difficult to identify specific areas as instances of gold-plating within Irish capital market law. However, certain aspects of these legislative frameworks have been the subject of gold-plating and the nature of such gold-plating together with the rationale for same and the possible impacts on the local capital market are discussed below.

The UCITS Directive 2009/65, as amended ("**UCITS Directive"**) was transposed into Irish law by the statutory instrument as the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, ("UCITS Regulation"), as amended (S.I. No. 352 of 2011)[38]. UCITS, UCITS management companies and UCITS depositaries are also subject to the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015, as amended.

The Alternative Investment Fund Managers Directive 2011/61 ("**AIFMD**") was transposed into Irish law by the statutory instrument as the European Union (Alternative Investment Fund Managers) Regulations 2013 ("**AIFM Regulations**"), as amended (S.I. No. 257 of 2013). The Central Bank has also published the AIF Rulebook that contains chapters concerning Retail Investor AIFs ("RIAIFs"), Qualifying Investor AIFs ("**QIAIFs**"), European Long-Term Investment Funds, AIF Management Companies, Fund Administrators, Alternative Investment Fund Managers ("**AIFMs**") and AIF Depositaries.

The MiFID II Directive (2014/65/EU) was transposed into Irish law by the statutory instrument as the European Union (Markets in Financial Instruments) Regulations 2017 ("**MiFID II Regulations**"), as amended (S.I. No. 375 of 2017). MiFID investment firms are also subject to European Union (Investment Firms) Regulations 2021 and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1) (Investment Firms) Regulations 2023.

Countermeasures and actions to prevent gold-plating in Ireland

UCITS and AIFMD

The Central Bank in its capacity as the responsible regulatory authority in Ireland has published guidance on many different aspects of the UCITS Directive, as well as UCITS Q&A which set out answers to queries

[38] European directives are transposed into Irish law primarily through Statutory Instruments (e.g. regulations), which fall under the scope of Secondary legislation.

likely to arise in relation to the UCITS framework. Broadly speaking, Ireland's domestic laws relating to UCITS reflect that which is applicable at EU level without significant gold-plating. Similarly, the Central Bank has published guidance on many different aspects of the AIF Rulebook, as well as AIFMD Q&A. The general view is that the AIFMR transposed AIFMD with substantially no gold-plating. The above guidance and Q&A documents help to clarify certain aspect of the legislation and address compliance expectations in the Ireland's capital markets.

It is important to note that the Central Bank is mindful of gold-plating. By way of a recent example, based on the approach outlined in its domestic supervisory and reporting framework which will apply to Irish domiciled European long-term investment funds ("**ELTIFs**"), it does not appear likely that the Central Bank will gold-plate the ELTIF regulation.

Irish Funds is an industry association which acts as the representative body for the international investment funds industry in Ireland whose members include fund managers, fund administrators, transfer agents, depositaries, professional advisory firms, and other specialist firms involved in the international fund services industry in Ireland. Irish Funds plays a role in monitoring the risk of gold-plating in Ireland. For example, Irish Funds may carry out a review of the Central Bank's proposed amendments to specific guidelines that may be issued by the European Securities and Markets Authority ("**ESMA**"). In consultation with industry stakeholders, Irish Funds will carry out an analysis of whether it is of the view that any such proposed amendments by the Central Bank would constitute gold-plating by going beyond EU-wide requirements and creating somewhat of an uneven playing field. If Irish Funds is of the view that the proposed changes would mean that Ireland's rules on the particular matter would differ substantially from and possibly conflict with those of other EU Member States, to the detriment of Ireland's attractiveness as a UCITS domicile, Irish Funds would typically raise these concerns with the Central Bank and would give its view on whether there was an alternative way in which to achieve a satisfactory risk mitigation effect.

For illustrative purposes only, as part of Irish Fund's feedback to the Central Bank's Consultation Paper 84 relating to the adoption of ESMA's revised guidelines on ETFs and other UCITS matters, Irish Funds took the view that UCITS were already obliged to ensure that the collateral they hold meets a series of detailed requirements at all times and take remedial action in the event that they do not. Irish Funds opposed to the amendments proposed in Consultation Paper 84 stating that the changes would mean that Ireland's rules on UCITS collateral would conflict with those of other EU Member States[39].

As part of the Irish Funds response to the Call for Evidence on the EU Regulatory Framework for Financial Services, Irish Funds stated that EU passporting had been immensely beneficial to the European funds market and a major policy success and that it was critical that the relevant EU passports live up to their objective of providing ease of access without local barriers or gold-plating in markets across the EU.

More recently, Irish Funds, in consultation with industry stakeholders has provided its feedback in response to ESMA's Call for Evidence on the review of the Eligible Assets Directors 2007/16/EC ("**EAD**"). Irish Funds pointed out that national competent authorities ("**NCAs**") have introduced an enhanced scrutiny process whereby certain financial instruments are scrutinised resulting in investment in such instruments being either prohibited or limited, noting that a lack of harmonised approach in this regard across Member States results in uncertainty regarding what investment strategies can be used in UCITS products for the benefit of investors and an unlevel playing field for UCITS domiciled in different Member States.

As further discussed below, the Central Bank's approach to exchange traded fund ("ETF") share classes within a mutual fund is worth consideration. Despite the possibility of having a single sub-fund with both listed and unlisted share classes, aside from a small number of issuers, the facility has not been widely adopted to date. The Central Bank's requirement to adopt the identifier "UCITS ETF" in the name of such a sub-fund could be considered a barrier to entry for certain issuers, particularly in instances where the

[39] ifia-response-to-cp-84_17-10-2014.pdf (centralbank.ie)

unlisted share classes are the dominant way in which investors participate in the particular sub-fund. Relevant industry stakeholders are currently seeking to address and clarify this matter in an effort to ensure a consistent EU wide approach and in effect to prevent what might be considered "goldplating".

By way of a recent AIFMD related development in respect of loan originating activities, on 15 April 2024, Directive 2024/927/EU („**AIFMD II**") entered into force which will introduce a more harmonised framework in this area across the EU. The entry into force of AIFMD II now provides an opportunity for Ireland to align its existing domestic loan origination rules applicable to funds. In a speech to industry at the 2023 Irish Funds Annual UK Symposium Derville Rowland, Deputy Governor of the Central Bank confirmed that the harmonisation of the rules for funds which undertake lending activity is seen as a positive development.

MiFID

The Central Bank issues little domestic guidance on MiFID II requirements for investment firms. The Central Bank adopts a "wait and see" approach to prevent potential gold plating of MiFID II and instead takes lead from the ESMA, by complying with ESMA guidelines on certain MiFID II requirements and incorporating them into their supervisory practices and processes.

The Irish MiFID Industry Association clg (IMIA) is the representative body for investment firms in Ireland, as well as management companies with MiFID top-up permissions. The IMIA has ongoing interaction with the Central Bank including by way of a quarterly meetings with the Central Bank's MiFID policy team. The IMIA is also involved with the Central Bank Climate Forum and its respective Working Groups. The Central Bank issues discussion papers and consultation papers on proposed regulations and guidance for the MiFID industry. The IMIA also has a role in gold plating prevention and issues responses to consultation papers and other submissions to the Central Bank.

We have provided all available examples of gold-plating in Irish financial market referring to areas covered by MIFID II, AIFMD, UCITS which we are aware of in Ireland.

Examples of gold-plating in Ireland

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
1	**General note:** While the Central Bank does, in practice, limit investment of UCITS in certain types of instruments, these limitations are typically imposed on a case by case basis without being set down in legislation or specific Central Bank guidance. The Central Bank has stated the following in its UCITS Q&A[42] ID 1094 (40th-edition-ucits-qa.pdf (centralbank.ie)): *"During the authorisation process for UCITS, in addition to the required application forms, relevant fund documentation and relevant draft letters, the Central Bank may request such additional information as may be required in the course of reviewing a specific application.*	Not directly related to the transposition of EU law.	Since the adoption of the UCITS EAD in 2007, the number, type and variety of financial instruments traded on financial markets has increased considerably. This has led to uncertainty in determining whether certain categories of financial instruments are eligible for investment. As part of its 2022 Outlook Report, the Central Bank reiterated that a key feature of financial innovation in securities markets is the development of new products for investors. The Central Bank has also noted the complexity of some of these products and potential risk to investor protection.	This is an example of gold-plating because the Central Bank can, in practice, limit the investment of UCITS in certain financial instruments, through an enhanced scrutiny process. The enhanced scrutiny process would appear to be insufficiently transparent in the context of the timeframe involved and rationale for decisions made, especially where the relevant asset manager has expertise in the relevant instrument. It is important to bear in mind that, generally speaking, the instruments subject to the enhanced scrutiny process are instruments that historically have been invested in by UCITS without limitation, subject to the risk management framework of the relevant UCITS management company.

[40] Rationale and reasons presented by the legislator or regulator justifying gold-plating

[41] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation.

[42] The Central Bank's Q&A documents serve as interpretative guidance on regulatory requirements in Ireland, addressing specific queries raised by regulated entities or areas where the Central Bank identifies a need for further explanation. While Q&As are not legally binding for compliance assessment with regulatory requirements, they hold significant role in the market, and market participants are expected to follow this guidance to align with the Central Bank's expectations and views on a matter. The Q&A reference indicates the Central Bank's position, but each case is dealt individually.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	For example, where a UCITS proposes to invest in CFDs, CLOs, CoCos or Binary Options, that UCITS may be subject to enhanced scrutiny at the authorisation phase with a view to ensuring that the proposal is appropriate taking into account the overall portfolio of assets proposed. Such enhanced scrutiny may include review of (i) model portfolio information, (ii) the due diligence carried out in respect of the proposed underlying portfolio and (iii) evidence to support the view that the proposed investment portfolio is suitable taking into account the above-mentioned requirements. Such information should be sufficiently detailed to enable the Central Bank to make an informed judgement with respect to the particular application involved." On that basis, the Central Bank has introduced an enhanced scrutiny process whereby certain financial instruments are scrutinised resulting in investment in such instruments being either prohibited or limited. These scrutinised asset classes include, but are not limited to, contracts for difference, collateralise loan		The Central Bank has indicated that is has introduced this enhanced scrutiny process to scrutinise certain financial instruments, to determine (i) whether the financial instrument is UCITS eligible (ii) whether the proposed level of investment in the relevant financial instrument can be appropriately managed (iii) whether the proposed level of indirect investment via the UCITS may give rise to retail investors being exposed to risks that are subject to specific regulatory measures or concerns regarding retail investor's ability to assess and understand the risks involved. Specifically in respect of SPACs, the ESMA as part of its 15 July 2021 Public Statement, confirmed that it considers that SPAC transactions may not be appropriate for all investors due to a number of factors including, but not limited to, complexity, fees charged and uncertainty regarding identification and evaluation of target companies. In light of such commentary from ESMA in respect of the exposure of retail investors to SPACs, the Central Bank has limited investments in SPACs to a maximum	The case could certainly be made that once an asset qualifies as UCITS eligible then the selection of those UCITS eligible assets should be based on the investment strategy of the relevant fund with the investment manager being best placed to make any such assessment. In terms of SPACs specifically, the size of the SPACs market is significant and access to this market is limited due to the exposure restrictions imposed by the Central Bank.

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	obligations, contingent convertible bonds and binary options. Special Purpose Acquisition Companies ("SPACs") represent a unique asset class that is subject to a heightened level of regulatory scrutiny. In its February 2022 Securities Markets Risk Outlook Report ("**2022 Outlook Report**"), the Central Bank has specifically stated that it will limit investments in SPACs to a maximum of 10% of the relevant retail fund's NAV.		of 10% of NAV for retail investment funds.	
2	The explanations provided above in the general note also apply to this example. Loan obligations represent a unique asset class that is subject to a heightened level of regulatory scrutiny. Based on 2022 Outlook Report, in Ireland, unsecuritised loans can be considered an eligible asset if they satisfy the definition of a money market instrument under the UCITS Directive. Typically, a UCITS can invest up to 10% in such unsecuritised loans.	Not directly related to the transposition of EU law.	As indicated above in the first example.	This is an example of gold-plating because the Central Bank can, in practice, limit the investment of UCITS in certain financial instruments, through an enhanced scrutiny process. Stricter regulations on UCITS funds' investments in unsecuritised loan can limit flexibility for fund managers, and the types of products they can offer. In addition, the enhanced compliance requirements and scrutiny processes could add administrative burdens and increase operational costs for fund managers.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	Investment in securitised loans such as collateralized loan obligations are permitted subject to the enhanced scrutiny process as discussed above.			
3	The explanations provided above in the general note also apply to this example. Contingent Convertible Bonds ("Coco Bonds") represent a unique asset class that is subject to a heightened level of regulatory scrutiny. Based on 2022 Outlook Report, the Central Bank has applied limits of 10% or 20% as part of their enhanced scrutiny process.	Not directly related to the transposition of EU law.	As indicated above in the first example.	This is an example of gold-plating because the Central Bank can, in practice, limit the investment of UCITS in certain financial instruments, through an enhanced scrutiny process. In terms of CoCo Bonds specifically, there are certainly strong merits for allowing direct exposure to CoCo bonds in UCITS funds, noting that, by way of examples only, the valuations of CoCo bonds are typically reliable and banks and insurers, who are the predominant issuers of CoCo bonds, are highly regulated entities with robust oversight regimes in place.
4	**IAF and SEAR Regime** The Central Bank (Individual Accountability Framework) Act 2023 The Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Senior Executive Accountability Regime)) Regulations 2024	No basis in EU law.	The IAF was said to be introduced to "strengthen and enhance individual accountability in the financial services industry, in particular by bringing clarity of responsibilities for senior management and specific positions".	This is gold-plating because the IAF and SEAR regime have no equivalent in European law.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	Guidance on the Individual Accountability Framework (April 2024) The Central Bank introduced the Individual Accountability Regime (IAF) to all regulated financial service providers (RFSPs), including investment funds and their management companies as well as MiFID investment firms, in December 2023. The IAF regime introduces conduct standards (set out in Section 53E and 53F of the 2023 Act) for specific positions in RFSPs and business standards for the RFSPs themselves. The Central Bank introduced the Senior Executive Accountability Regime (SEAR) under the IAF which initially only applies to investment firms which hold client assets or carry out the investment services of dealing on own account or underwriting of financial instruments or placing of financial instruments on a firm commitment basis (or both). The SEAR regime applies to senior management officials only and allocates responsibilities to the senior management of relevant firms.			It is quite early in its implementation to determine the impact of the IAF, and in particular the SEAR regime on the Irish market. The IAF and SEAR regime may lead to increased enforcement action by the Central Bank, in particular individuals can be held accountable without holding the firm accountable. That may significantly increase the risk for individuals employed at senior management positions.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
5	**Client Asset Requirements** Part 6 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023 (S.I. No. 10 of 2023). The Client Asset Requirements are set out under the following chapters: • Chapter 1 – General Requirements • Chapter 2 – Segregation Requirements • Chapter 3 – Designation and Registration Requirements • Chapter 4 – Reconciliation Requirements • Chapter 5 – Calculation Requirements • Chapter 6 – Client Disclosure and Consent requirements • Chapter 7 – Risk Management Requirements • Chapter 8 – Client Asset Examination Requirements • Chapter 9 – Outsourcing, Record-Keeping and Reporting Requirements • Chapter 10 – Miscellaneous[43].	Article 16(8) & (9), MiFID II and Commission Delegated Directive (EU) 2017/593	The client asset requirements are a regime designed to impose stricter requirements for investment firms holding client assets as the Central Bank sees firms which hold client assets as inherently riskier than those firms which do not hold client assets and the client asset requirements impose a regime for in-scope investment firms to ensure that investors are protected against loss or misuse of their funds or financial instruments.	This constitute goldplating as jurisdiction specific requirements for the safeguarding of client assets go beyond the MiFID II requirements. Although the possibility of Member States making enhancements to the MiFID II client asset safeguarding requirements is envisaged under Article 16(11) of MiFID II, it is only permitted in exceptional circumstances and the requirements must be objectively justified and the requirements must be objectively justified and proportionate so as to address, where investment firms safeguard client assets and client funds, specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State.

[43] Full text of the regulation: https://www.irishstatutebook.ie/eli/2023/si/10/made/en/pdf

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	The Central Bank has also published guidance on the client asset requirements[44] to assist in-scope investment firms in complying with the requirements. Some examples of the additional requirements include: • Imposing frequency requirements for performing client funds and client financial instrument reconciliations and calculations; • Requirements to enter into specific facilities agreements with third parties operating client asset accounts; • Certain risk management requirements including a requirement to implement and maintain a client asset management plan (CAMP) which is the investment firm's primary document implementing its client asset arrangements, risks and mitigating controls;			

[44] https://www.centralbank.ie/regulation/industry-market-sectors/client-assets/regulatory-requirements-and-guidance

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	• Client disclosure requirements including providing client with a client asset key information document; • Additional client consent requirement above the requirements imposed under MiFID II; • Requirement to carry out a client asset examination which goes above the client asset audit requirements under MiFID II.			
6	**Corporate Governance Requirements for Investment Firms and Market Operators 2018** Regulation 17(2)(a) of the MiFID II Regulations The Central Bank Corporate Governance Code introduces board and committee requirements for investment firms classified as Medium Low Impact or higher as rated under the Central Bank Probability Risk Impact System (PRISM). The Corporate Governance requirements impose specific board and committee requirements for in-scope investment firms including that:	Article 9(3), MiFID II	The aim stated by the Central Bank was: "to strengthen corporate governance standards following deficiencies identified by the Central Bank across the industry. Following its supervisory engagement with investment firms, the Central Bank identified corporate governance deficiencies whereby poor corporate governance structures have resulted in increased risks for firms. The Central Bank was of the view that such deficiencies may contribute to undermining board effectiveness, prudent management, good culture, strong risk management and oversight, and the safety and	This serves as an example of gold-plating, as Ireland has introduced additional local corporate governance requirements. The Central Bank introduced the corporate governance requirements aimed at enhancing governance standards, particularly for riskier investment firms. Specific board and committee requirements are expected to increase transparency.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	• the board is composed of a majority of independent non-executive directors (save for subsidiaries in groups). • group directors are required to act critically and independently so as to exercise objective and independent judgement. • the board must appoint a Chairperson who should be an independent non-executive director (save for group subsidiaries). • Firms must establish, at a minimum, both a risk and audit committee; • High Impact Firms under the Central Bank's PRISM rating must also establish a remuneration committee.		soundness of in-scope investment firms.	
7	**Central Bank intervention measures for binary options[45] and CFDs[46]** The intervention measures restrict the sale of CFDs and binary options to retail clients.	Article 42(1), MiFIR	The Central Bank has put in place national product intervention measures prohibiting the sale of binary options and restricting the sale of contracts for difference (CFDs) to retail clients.	This exemplifies gold-plating, as European regulations do not impose such a prohibition.

[45] https://www.centralbank.ie/docs/default-source/Regulation/industry-market-sectors/investment-firms/mifid-firms/regulatory-requirements-and-guidance/central-bank-binary-options-intervention-measure.pdf

[46] https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/investment-firms/mifid-firms/regulatory-requirements-and-guidance/central-bank-cfd-intervention-measure.pdf?sfvrsn=8#:~:text=The%20ESMA%20CFD%20Measure%20was,of%20CFDs%20to%20retail%20clients.&text=6.,clients%20in%20or%20from%20Ireland.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	The Central Bank's intervention measures for binary options and CFDs are implemented as regulatory actions under Article 42(1) MiFIR, which grants national authorities the ability to restrict or prohibit certain financial products when they pose significant risks to investors or the financial system.[47]		The Central Bank had significant concerns about investor protection Issues from the sale of binary options and CFDs for retail investors, given their complexity. The intervention measures were introduced to protect retail clients from the risks associated with the products. The measures came into effect upon the expiry of the temporary ESMA product intervention measures.	The imposed measures are binding legal decisions issued by the Central Bank – then published and notify to all market participants. Failure to comply with these prohibitions can lead to administrative sanctions or fines. The Central Bank actively monitors compliance with the restriction.
8	**Regulation 4(3) of the MiFID II Regulations provides an exemption from MiFID II for firms that meet certain criteria (an "Exempt Firm"), exercising the national discretion provided for in Article 3(1) (a), (b) and (c) of MiFID II. An Exempt Firm will be subject to regulation under**	Article 3(1), MiFID II	Investment business firms authorised under domestic law (under the Investment intermediaries Act, 1995 (as amended)) were exempt form requirements prior to the implementation of MiFID II and the Irish government wished to continue the regime when implementing MiFID II.	An example of gold-plating based on an exemption from MiFID II requirements, with application of the local regime[48]. In the government's opinion[49]" to fully bring [IIA firms] into the MiFID framework would represent

[47] in accordance with Article 42 (5) MiFIR, the competent authority publish on its website notice of any decision to impose any prohibition or restriction. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice (the Irish Central Bank's notice).

In abovementioned case:

a. the Binary Options Measure took effect on 2 July 2019. It replaced ESMA's temporary product intervention measure prohibiting the sale, distribution or marketing of binary options, which was set out in Decision 2019/509, and which expired on 1 July 2019.

b. the CFD Measure took effect on 1 August, 2019. It replaced ESMA's temporary product intervention measure restricting the marketing, distribution or sale of CFDs to retail clients, which is set out in Decision 2019/679 and which expired on 1 August 2019.

[48] in line with Irish law firm assessments: Regulation 4(3) of the Irish MiFID II Regulations provides an exemption from MiFID II for firms that meet certain criteria, exercising the national discretion provided for in Article 3(1) (a), (b) and (c) of MiFID II.

[49] Department of Finance Feedback Statement on its Public Consultation on national discretions in the Markets in Financial Instruments Directive („MiFID 2").

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	the Investment Intermediaries Act 1995 (the "IIA") and its activities will be limited. Regulation 4(3) of the MiFID II Regulations "(3) These Regulations do not apply to persons whose activities are regulated by the Bank, if the persons: (a) are not allowed to hold clients' funds or securities and therefore are not allowed at any time to place themselves in debit with their clients, (b) are not allowed to provide any investment service except as follows: (i) receiving and transmitting orders in transferable securities and units in collective investment undertakings; (ii) providing investment advice in relation to those securities and units, and (c) in the course of providing the services referred to in clause (i) of subparagraph (b) are allowed to transmit orders only to any or all of the following: (i) investment firms authorised in accordance with the Directive or these Regulations;			a disproportionate response having regard to the fact that the conditions to qualify for the partial exemption addresses the risks arising". To combat gold plating and an uneven playing field, the Consumer Protection Code 2012 and the Investment Intermediaries Act were amended to ensure that comparable requirements apply to the IIA investment firms. As a result, MiFID II investor protections will not apply to Exempt Firms; instead, these firms will only be subject to investor protection requirements under the Central Bank of Ireland's Consumer Protection Code.

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	(ii) credit institutions authorised in accordance with Directive 2013/36/EU; (iii) branches of investment firms or of credit institutions authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those specified in the Directive, the European Union (Capital Requirements) Regulations 2014 (S.I. No. 158 of 2014), the European Union (Capital Requirements) (No. 2) Regulations 2014 (S.I. No. 159 of 2014) or the European Union (Investment Firms) Regulations 2021 (S.I. No. 355 of 2021); (iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of the undertakings; (v) investment companies with fixed capital, as defined in Article 17(7) of Directive 2012/30/EU of the European Parliament and of the Council, the securities of which are listed or dealt in on a regulated market in a Member State."			

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
9	**Safe Harbour Exemption** Regulation 5(4) & (5) MiFID II Regulations This is referred to as the Irish "safe harbour" exemption. "(4) For the purposes of paragraph (1), an investment firm shall not be regarded as operating in the State if the firm provides investment services or performs investment activities, with or without any ancillary services, to eligible counterparties or to professional clients within the meaning of paragraph (2) of Schedule 2 without the establishment of a branch in the State and – (a) the firm's head or registered office is - (i) in a third country, or (ii) in a Member State other than the State and the firm does not provide any investment services in respect of which it is required to be authorised in its home Member State for the purposes of the Directive, or (b) the firm is authorised in a Member State other than the State, under the Directive, but provides only investment services of a kind for which	Article 3(1), MiFID II	he government decided to substantially maintain the status quo when implementing MiFID II as regards the exemption for third country firms providing wholesale investment services in Ireland. The safe harbour exemption under the MiFID II Regulations is more narrow in scope than the previous version of the exemption.	An example of gold-plating based on an exemption from MiFID II requirements, with application of the local regime. The safe harbour exemption existed prior to MiFID II coming into force. This exemption does not have a significant impact as the third country firms were afforded the same exemption under the previous MiFID regime. However, as a result of the narrowing of the exemption under MiFID II third country firms were required to assess whether they were still subject to the exemption or in scope of MiFID II.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[40]	Assessment of gold-plating and its impact on the local capital market[41]
	authorisation under the Directive is not available during the provision of the investment services. (5) A third country investment firm providing investment services or performing investment activities in the State shall not be able to do so on the basis of the firm relying on paragraph (4) unless the following conditions are met: (a) the firm is subject to authorisation and supervision in the third country where the third country firm is established and the third-country firm is authorised so that the competent authority of the third country pays due regard to any recommendations of FATF in the context of anti-money laundering and countering the financing of terrorism, and (b) co-operation arrangements that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors are in place between the Bank and the competent authorities where the third-country firm is established".			

Licensing process and time periods in financial regulations

In Ireland, the licensing process for UCITS management companies, AIFMs and MiFID investment firms is governed by specific regulations that outline formal timeframes for authorisation by the Central Bank of Ireland (CBI). In practice, however, the licensing process may exceed the statutory timelines due to the complexity of regulatory requirements and the nature of the application.

Under the UCITS Regulations, the CBI is required to: *"inform a proposed management company within 6 months of the date of receipt of a complete application whether or not authorisation has been granted. Reasons shall be given where an authorisation is refused"*.

On that basis, the Central Bank has 6 months to grant authorisation to a proposed UCITS management company from the time a 'complete application' is made. In practice the designation of an application as "complete" often follows a period of cooperation between the applicant party and the CBI, which can extend the timeline before the statutory six-month period begins. Discussions and document revisions are typically required to address queries and ensure compliance with regulatory standards. As a result, typically, these types of applications can take between 6 and 12 months from the initial submission to final approval.

For AIFMs, the AIFM Regulations specify that the CBI: *"shall inform, in writing, the applicant for the grant of an authorisation within 3 months after the date of submission to it by the applicant of a complete application, whether or not the authorisation has been granted"*. This three-month timeframe may be extended by an additional 3 months under specific circumstances, provided the CBI notifies the applicant of the extension. On that basis, ultimately it may also be a 6 month timeframe in respect of a proposed AIFM, from the date of submission of a 'complete application'.

Similar to UCITS applications, the determination of a "complete application" is preceded by dialogue with the CBI, which can extend the pre-submission phase by several months.

For firms seeking MiFID authorisation, the CBI follows a similarly structured process. The timeline for a decision begins only upon receipt of a 'complete application'. According to the MiFID II Regulations, the Central Bank must provide a determination within 6 months of receiving a complete application. Pre-submission discussions and responses to Central Bank queries typically result in a total timeline ranging between 6 to 12 months (including preparation time).

While the formal timeframes reflect regulatory clarity, practical implications often extends the overall duration of the licensing process and illustrate the nuances of capital market regulations.

3.8. Finland vs. gold-plating

Overview of gold-plating in the Irish legal system

Gold-plating is relatively minimal in Finland. While it does occur, Finland generally strives to adhere to EU regulations without significant national additions. The Finnish approach tends to focus on implementing EU directives as they are, with only necessary adjustments to fit the national context. This approach is underpinned by efforts to harmonise Finnish regulations with those of the rest of the EU during the legislative process, with a widely shared goal of enhancing Finland's competitiveness.

In Finland, gold-plating occurs in national law. Additionally, gold-plating can be found in the practices and interpretations of public authorities such as the Finnish Financial Supervisory Authority (the "**FIN-FSA**"), and in the form of soft law. There are a few examples of such gold-plating. For example, according to the FIN-FSA, the marketing of fund units is considered reception and transmission of orders when it takes place by a party other than the fund management company or the alternative investment fund manager even though this has not been specified in the legislation.

Gold-plating is most prevalent in consumer protection legislation in Finland. In this area it has been deemed justified to introduce additional national regulations, even in recent times, to ensure a high level of consumer protection. In financial legislation, gold-plating also occurs to some extent. Whilst there are not many examples of gold-plating in legislation, in many cases the FIN-FSA applies in its supervisory practices (especially those relating to AIFMs) interpretations that are more restrictive than the directives or Finnish law would expressly require. Examples have related to inter alia to premarketing and independent board members. This usually occurs in the daily supervisory practices of the FIN-FSA and not necessarily in a form of official guidance of the regulator. This is often being justified by the need to protect investors, uphold traditional practices and ensure market transparency.

Overall, while Finland does engage in gold-plating in certain areas, the general trend is towards minimal deviation from EU regulations, with a strong emphasis on harmonisation and competitiveness.

Gold-plating countermeasures

Deregulation has been a topic of discussion in Finland in recent years, and studies on the matter have also been conducted. There is a strong desire to reduce bureaucracy, and concrete actions have been taken to decrease the regulatory burden.

The issue of regulatory abundance has been recognised in Finland since the 1980s. However, the 2010s have seen a clear trend towards deregulation and a conscious effort to avoid additional national regulations when implementing EU directives. In recent years the Finnish government is committed to reducing excessive gold-plating and overall regulation. This commitment includes a pledge to refrain from introducing additional national regulations during the implementation of EU legislation, however it has not resulted in any formal legislative action against goldplating (e.g. implementing a formal ban on goldplating). Moreover, the government aims to dismantle the national regulatory burden that has been added on top of EU regulations, which is seen as a hindrance to the competitiveness of businesses.

The government has also placed a strong emphasis on enhancing the assessment of the impact of new legislation on businesses. This includes evaluating administrative burdens and costs to ensure that new

regulations do not place unnecessary strain on companies. By reducing gold-plating, the government seeks to create a more favourable business environment and promote economic growth. However, in 2024, the government has introduced a new gold-plating in financial legislation by introducing the obligation to notify major holdings and proportions of voting rights and mandatory offer obligation regarding companies listed on a multilateral trading facility in Finland (Nasdaq First North Growth Market Finland) (whereas in Europe, this is only required for companies listed on the regulated markets).

In addition to governmental efforts, various industry bodies in Finland actively seek to influence national legislation. For instance, Finance Finland (FFI) is a prominent lobbying organisation that represents the interests of the financial sector. FFI engages with policymakers, provides expert insights and advocates for regulatory changes. Through such activities, industry bodies like FFI contribute to the development of legislation while ensuring that the regulatory framework remains balanced and effective. Further, Finnish Venture Capital Association (FVCA) is the industry body and public policy advocate for the venture capital and private equity investors in Finland, which aims to improve the operating environment of the industry through policy work by influencing the law-making and policy implementation process, research and active communications. FVCA is a member of Invest Europe, the association representing Europe's private equity and venture capital industry.

Overall, in Finland, there is a general push for deregulation, driven by both the industry and to some extent, the government, aiming to create a simpler regulatory environment. This approach seeks to align with EU standards while reducing unnecessary burdens on businesses. However, it has not yet led to any formal restrictions on gold-plating.

Proposed actions to combat gold-plating

In general several measures can be taken to reduce gold-plating.

Firstly, at the time of implementing EU directives, a thorough impact assessment should be conducted to understand the necessity and potential effects of additional national requirements. This process should involve engagement with stakeholders, including associations, businesses and consumer groups, to gather information on how additional regulations might impact them.

Secondly, there should be a closer dialogue between the relevant authorities and companies under their supervision to ensure that the authorities understand how their interpretations and guidelines can in practice create unnecessary additional requirement and therefore hamper the competitiveness of Finnish companies.

Thirdly, there should be a regular review on existing regulations to identify and eliminate unnecessary national additions. The effects of legislation should be monitored, and the necessity of national additions evaluated. This ongoing assessment can help in making necessary adjustments to reduce regulatory burdens.

Fourth, clear guidelines could be made for policymakers on the implementation of EU directives, emphasising the importance of avoiding unnecessary national additions. These guidelines should be regularly updated to reflect best practices and lessons learned.

Lastly, greater public participation in the legislative process should be facilitated by creating platforms for citizens and businesses to provide feedback on proposed regulations. This can help identify potential issues with gold-plating early in the process.

By implementing these measures, Finland can create a more efficient regulatory environment that aligns with EU standards and thus minimize the unnecessary burdens on businesses and other stakeholders that gold-plating can create.

Examples of gold-plating in Finland

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
1	Finnish Act on Alternative Investment Fund Managers (AIFMA, 162/2014) Chapter 12, Section 2: Good practice in the securities markets[52]: "It is prohibited to act contrary to good practice in the securities markets as provided in chapter 1, section 2 of the Securities Markets Act (746/2012) in the marketing of units in the AIFs. Provisions of subsection 1 shall also apply when the investor has contacted the party offering the AIFs."	AIFMD (no specific article)	By adding a general provision to the law, it is emphasised that all participants in the securities market must follow procedures that are in accordance with good practice in the securities market[53] and in harmony with the detailed provisions of Securities Markets Act and the purpose of the legislation.	This is an example of gold-plating as the local law incorporates a general provision on 'good securities market practice', that is not foreseen in the AIFMD. It is especially important as the ''good securities market practice' are neither defined by the law, nor 'ex-ante' by the regulator. According to the AIFMA, it is prohibited to act contrary to good practice in the securities markets when marketing of units in AIFs. This requirement applies also in reverse solicitation situations. The supervisory authority can apply administrative sanctions in cases of non-compliance with good market

[50] Rationale and reasons presented by the legislator or regulator justifying gold-plating

[51] In principle, the examples presented constitute gold-plating, as they either tighten the requirements/standards of the EU legislation or go beyond the requirements/standards foreseen in the transposed EU legislation

[52] In Finland, 'good securities market practice' is a key concept in capital markets law, guiding how market participants should act, especially in situations where regulations might not provide detailed instructions. The concept of good practice has de facto status of law (as The Finnish Securities Markets Act prohibits practices that are contrary to good securities market practice). The obligation to comply with good securities market practice guides decisions in the absence of a specific rule applicable to the case. Good securities market practice is primarily determined by the market practices followed in individual contractual relationships and legal transactions, market operators in the various sectors and industry organizations, such as NASDAQ Helsinki (Helsinki Stock Exchange) and the Finnish Securities Market Association

While good securities market practice is not always explicitly codified as law, compliance with it is expected for all market participants. Deviations from it are based on the Securities Markets Act and are therefore subject to supervision and sanctions by FIN-FSA, as part of its supervisory role in the securities markets. In many cases, When failing to follow good practice could lead to violations of legal principles, such as rules on investor protection or market transparency, and could result in administrative sanctions under Finnish law.

[53] There are no specific rules in the legislation as to the concept of "good securities market practice" but according to the Government proposal (HE 94/2013 vp), good securities market practice refers to principles and rules, the observance of which, according to the educated opinion prevailing among those operating in the securities market, must be considered a correct and reasonable trading practice for all investors, customers and operating parties.

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		-		practices. A market participant can then be sanctioned for actions that were never clearly defined as forbidden based on ex-post decission of the regulator made at its full discretion. As this is rather a general requirement, it is difficult to assess the concrete impacts to the local capital market. Good securities market practice has certainly enabled the development of self-regulation in various sectors (see, for example, the Corporate Governance Code 2020: https://www.cgfinland.fi/en/corporate-governance-code/, which defines good securities market practice of listed companies in relation to corporate and securities market law), as market participants were trying to establish practices that are followed by all of them, thus minimising the risk of one of them being sanctioned on arbitrary basis.
2	AIFMA Chapter 12, Section 3: Prohibition to give false or misleading information	AIFMD (no specific article)	AIFMA's provisions incorporate the prohibition to give false or misleading information into the regulatory framework concerning AIFMs (as is also seen in other areas of capital markets law). The Finnish Securities	This is an example of gold-plating as the local law incorporates a prohibition to give false or misleading information, that is not foreseen in the AIFMD.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
	"It is prohibited to provide false or misleading information in fulfilling the disclosure obligation in accordance with this Act. Such information that the incorrect or misleading nature of which is revealed after the provision of the information and which may be of material significance to the investor, shall, without delay, be corrected or supplemented in an adequate manner. Provisions of subsection 1 shall also apply when the investor has contacted the party offering the AIFs."		Markets Act also includes a similar requirement which prohibits the provision of false or misleading information. According to the legislator, the scope of the article would cover all parties involved in the marketing of alternative funds, with the provisions aimed at protecting general confidence in the securities markets. There are no specific rules in the legislation as to the concept of "false or misleading information" either but according to the Government's proposal (HE 94/2013 vp), prohibition to give false or misleading information means explaining or presenting something in an incorrect or misleading way. The untruthfulness of the information is evaluated objectively according to the situation at the time of giving the information. Misleading information may be truthful in itself, but it may, for example, give the recipient of the information a wrong impression due to its incompleteness, way of presentation or form.	A breach of AIFMA's article does not require a breach of any other specific information obligation. Therefore, it imposes requirements that go beyond those provided by other applicable regulations, potentially exceeding the baseline standards set by EU law. The misleadingness and effectiveness of the information is assessed from the point of view of the recipient of the information. In this case, the misleading nature of the information is assessed more severely when the recipients of the information are private individuals in the position of non-professional customers than in the case where the target group is professional customers. As this is rather a general requirement, it is difficult to assess the concrete impacts to the local capital market.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
			The provisions of AIFMA regarding misleading information align with the broader regulatory framework, but are separate legal requirements, aiming to uphold market integrity and protect investors by preventing the spread of false or misleading information.	
3	AIFMA Chapter 13, Section 2: Requirement of authorisation "An AIFM that markets AIFs to non-professional customers shall have been authorised in accordance with this Act or granted a corresponding authorisation in another EEA Member State. Notwithstanding the provisions of subsection 1, units in an AIFM subject to the registration requirement or an EEA AIFM subject to the registration requirement, which is an internally managed AIF and the shares of which are admitted to trading in the regulated market referred to in chapter 1, section 2, subsection 1, paragraph 5 of the Act on Trading in Financial Instruments, may always be marketed to non-professional customers in Finland.	AIFMD Article 43(1): Marketing of AIFs by AIFMs to retail investors "Without prejudice to other instruments of Union law, Member States may allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with this Directive, irrespective of whether such AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs. In such cases, Member States may impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIFs marketed to professional investors in their territory in accordance with this Directive. However, Member States shall not impose stricter or additional requirements on EU AIFs established in another Member State	The purpose of the procedure is to bring the protection of retail investors to the level required by the Finnish Act on Common Funds (213/2019) and the Finnish Securities Markets Act (746/2012).	This is an example of gold-plating because the local law requires regulatory approval, which is not required by the European regulations. According to the interpretative practice of the Finnish Financial Supervisory Authority, AIFs established in an EEA Member State (EEA AIFs) may not be granted the right to market an AIF that they manage to non-professional customers in Finland. Thus, it places alternative investment fund managers from other EEA states in a worse position compared to Finnish ones.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
	The Financial Supervisory Authority may, on application, for a special reason, grant an AIFM subject to the registration requirement the right to market an AIF that it manages to a non-professional customer in Finland."	and marketed on a cross-border basis than on AIFs marketed domestically."		
4	AIFMA Chapter 12, Section 4: Disclosure to investors "The AIFM shall for each of the AIFs established in EEA Member States that it manages and the units of which are marketed in Finland or another EEA Member State, make available to the investors of the AIF, material and sufficient information before they invest in the AIF. and Decree of the Ministry of Finance on the operation of Alternative Investment Fund Managers (1040/2021), Section 5: Disclosure to investors "The material and sufficient information referred to in AIFMA Chapter 12, Section 4(1), which the alternative investment fund manager	AIFMD Article 23: Disclosure to investors	No rationale given.	The AIFMD does not require sub-threshold AIFMs to provide an annual report in connection with the disclosure to investors. However, in practice, the Finnish Financial Supervisory Authority requires an annual report. Preparing the annual report causes additional costs for the alternative investment fund manager.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
	must at least make available to the investors of the AIF before investing in the said fund, includes: - - 17) the latest financial statements and annual report referred to in Chapter 11, Section 1 of AIFMA - -"			
5	AIFMA Chapter 20, Section 2a: Right to pre-market an AIF established in a third country "An authorised AIFM may pre-market in Finland the units of an AIF under its management established in a third country to professional customers in Finland. The provisions of chapter 13a, section 1, section 3, subsection 1 and section 4 on pre-marketing in Finland shall be complied with in the pre-marketing of the AIF established in a third country. - -"	AIFMD Articles 42 and 43	According to the legislator applying regulations as uniformly as possible would ensure equal treatment of alternative investment fund managers in Finland and the potential information needs of investors.	- By way of derogation from the EU regulation, the Finnish implementation of the AIFMD rules regarding pre-marketing extends the pre-marketing also to third country AIFs managed by non-EEA AIFMs.
6	AIFMA Chapter 20, Section 3: Marketing from a third country "An authorised AIFM established in a third country may market in Finland the units of an EEA AIF or an AIF established in a third country under its management to professional customers after having made a written notification thereof to the Financial Supervisory Authority - -"	AIFMD (no specific article)	According to the legislator, applying regulations as uniformly as possible would ensure equal treatment of alternative investment fund managers in Finland and the potential information needs of investors.	- The Finnish implementation of the AIFMD rules regarding marketing allows the marketing of the units of an EEA AIF or a third country AIF managed by a third country AIFM in Finland, but only to professional customers. This has been left as a matter of discretion in the AIFMD.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
7	Act on Investment Services (747/2012) Chapter 7, Section 14: Insider register of an investment firm "An investment firm shall keep a register of the insider declarations referred to in section 13 (an insider register of an investment firm), indicating, with regard to each insider, the shares and financial instruments referred to in section 13, subsection 2 held by the insider, the minor referred to in paragraph 1 and the organisation or foundation referred to in paragraph 2 as well as an itemization of the acquisitions and disposals. If the declarations are submitted in accordance with section 13, paragraph 6, the insider register of an investment firm may, for that part, be formed from the information available from the book-entry system. The maintenance of the insider register of an investment firm shall be arranged in a reliable manner. Information entered in the register shall be kept for five years from the making of the entry. Anyone shall have the right to get extracts and copies of the information in the register against	MiFID (no specific article)	According to the rationale, there is a long tradition of public ownership in Finland by persons belonging to the insider circle of investment firms as well as listed companies. Regulation has also been supported by the prevailing general broad principle of publicity in Finland, according to which all ownership must be public.	Finnish regulation is stricter for domestic investment service companies than for foreign operators, as only domestic companies are required to maintain an insider register. This additional domestic regulation causes costs and administrative strain for operators, which foreign competitors do not have.

No.	Reference to local law containing gold-plating	Reference to EU law which is being transposed by local law	Rationale for gold-plating/Legislator's view on gold-plating[50]	Assessment of gold-plating and its impact on the local capital market[51]
	costs. The personal identity number and address of a natural person as well as the name of a natural person other than an insider shall, however, not be public."			
8	Act on Investment Services Chapter 1, Section 15(1): Investment services or investment activities: "For the purposes of this Act, investment services or investment activities mean: 1. reception and transmission of orders relating to financial instruments (transmission of orders)"	MiFID (Annex 1, Section A)	According to the Finnish Financial Supervisory Authority, the marketing of fund units (both UCITS and AIF) is also considered reception and transmission of orders when it takes place by a party other than the fund management company or the alternative investment fund manager. This interpretation is based on a publicly available decision by the Finnish Financial Supervisory Authority: https://www.finanssivalvonta.fi/en/publications-and-press-releases/Press-release/2023/fin-fsa-prohibits-ermitage-partners-oy-from-providing-investment-services-without-authorisation/	This is an example of gold-plating as the Finnish regulator's approach and practice in relation to marketing of fund units goes beyond the standards provided by the EU legislation. This has an effect how AIFMs/fund managers may organise marketing of funds they manage. For a third party to market funds, this requires them to have an investment firm authorisation as, due to the interpretation of the FIN-FSA, marketing is deemed reception and transmission of orders when it takes place by a party other than the AIFM/fund manager. The abovementioned regulation puts fund managers and distributors distributing products in Finland in more difficult situation then equivalent institutions offering products in other EU markets

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9	Mutual Funds Act (213/2019) Chapter 8, Section 8: Minimum Share Capital and Transparency of an Investment Fund The assets of an investment fund must be at least two million euros (minimum capital). The investment fund is open to all investors in accordance with the subscription and redemption conditions specified in the rules of the investment fund. The investment fund must have at least 30 unit holders. In counting the number of unit holders, a unit holder and any entity or comparable foreign company under their control as defined in Chapter 1, Section 5 of the Finnish Accounting Act, should be considered as one entity. A unit holder's manager is not considered as a unit holder if the manager meets the requirements of Chapter 11, Section 7 of this Act. The minimum capital amount and the minimum number of unit holders must be achieved within one year of the investment fund commencing operations.	UCITS (no specific article)	The minimum requirement does not directly stem from UCITS, but its aim has been to ensure that investment fund operations involve genuine collective investment, and that fund investing is characterised by the collective investment of funds raised from the public. The minimum requirement is also seen to have tax policy objectives, as according to the preparatory works of the law, it was not deemed appropriate to prohibit the activity when it could be demonstrated that the sole purpose of the activity was not, for example, tax evasion.	This is an example of gold-plating because the Finnish law introduces additional rules on minimum share capital and transparency of an investment fund. In some situations, the strict minimum requirement for the number of unit holders can unnecessarily hinder the operations of a newly established investment fund. Investors often want to see the investment fund's return history before subscribing for the units, which is not yet available for a newly established investment fund. The number of unit holders varies over the life cycle of the investment fund. Investment funds have been terminated and merged with others also due to the number of unit holders falling below the legally prescribed limit. This requirement particularly complicates the operations of smaller fund management companies.

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	The fund management company must immediately notify the Finnish Financial Supervisory Authority when the minimum capital or the minimum number of unit holders specified in subsection 1 is first achieved or subsequently falls below the prescribed limit or once again reaches the limit.			
10	AIFMA Chapter 16 a, Section 4: Minimum capital and openness of a special common fund "A special common fund shall be open to the public. However, in derogation from chapter 8, section 8 of the Act on Common Funds, the rules of a special common fund may impose restrictions on its openness. A special common fund that invests mainly in real estate and real estate securities need not have more than ten unitholders, however, when under the rules of the fund each unitholder shall subscribe for units in the minimum amount of EUR 1 million. The provisions laid down in subsection 1 notwithstanding, any other special common fund shall have at least ten unitholders, however. When under the rules of such a special common fund, each unitholder shall	AIFMD (no specific article)	The minimum requirement does not stem from AIFMD or UCITS, but its aim has been to ensure that investment fund operations involve genuine collective investment, and that fund investing is characterised by the collective investment of funds raised from the public.	This is an example of gold-plating as Finland applies its own national regime for special common funds, which has no equivalent in the AIFMD regime.

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	subscribe for units in the amount of EUR 500,000 at least, the special common fund may have fewer than ten unitholders, provided, however, that under its rules, the fund has a minimum total capital of EUR 2 million. When under the rules of such a special common fund an individual unitholder is required to subscribe for units in the minimum amount of EUR 2 million, the special common fund need not have more than a single unitholder. When the special common fund has fewer than 30 unitholders, these shall be professional customers or comparable wealthy private individuals. In calculating the number of unitholders, the unitholder and a corporation under its control within the meaning of chapter 1, section 5 of the Accounting Act or a comparable foreign enterprise shall constitute a single entity. The custodian of a unit shall not be considered to be a unitholder when the custodian satisfies the requirements under chapter 11, section 7 of the Act on Common Funds. A special common fund shall reach its minimum capital and minimum number of unitholders within one year of the commencement of activities"			

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11	Finnish Securities Markets Act (SMA) Chapter 9, Section 5: Obligation to notify holdings and proportions of voting rights "A shareholder shall have an obligation to notify the offeree company and the Financial Supervisory Authority its holdings and proportion of voting rights (notification of major shareholding), when the proportion reaches or exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 90 percent or two thirds of the voting rights or the number of shares of the offeree company. - -" SMA Chapter 9, Section 3: Offeree company "An offeree company shall in this chapter refer to a listed company, an issuer whose shares are subject to trading in Finland in a multilateral trading system at the issuer's request or with their consent, and an issuer referred to in section 1, subsection 2, whose shares are admitted to trading on a regulated market and the holdings and portions of voting rights whereof shall be notified and disclosed in accordance with the provisions of this chapter."	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive), Article 9: Notification of the acquisition or disposal of major holdings "The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % and 75 %. - -" Article 10: Acquisition or disposal of major proportions of voting rights	The so-called flagging obligation in Finland is extended to apply to also companies listed on MTF (whereas according to the directive, this obligation is only for companies listed on the regulated market). The absence of disclosure notifications for companies listed on MTF weakens investors' ability to assess the likelihood of tender offers, as significant concentration of ownership or voting shares does not become apparent to the investor through a disclosure notification. When the regulation of tender offers is proposed to be extended to cover the multilateral trading system, it is considered justified to simultaneously improve, through regulation on notification obligation, investors' ability to detect the possibility of a tender offer. The absence of a notification obligation also increases the risk of increasing ownership stakes hidden from the public (so-called creeping takeover situations). When the market cannot detect the offeror's intentions to make an offer in such situations in advance, it tends to affect the offer price negatively."	This is an example of gold-plating as local law introduces the obligation to notify major holdings and proportions of voting rights and mandatory offer obligation regarding companies listed on a multilateral trading facility in Finland. Considering that especially small investors do not always necessarily perceive much difference between the First North Growth Market Finland (the only MTF in Finland) and the regulated market, it is considered justified that the same, statutory notification obligation limits apply to them. A different solution could potentially cause confusion among investors. The regulation, in its current form, is not considered to be an undue administrative burden for companies in the regulated market. Imposing the obligation to publish disclosure notifications on the target company in a multilateral trading system slightly increases the administrative burden on companies in such a marketplace.

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		"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them - -" Article 13(1): "The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly: (a) financial instruments that, on maturity, give the holder, under a formal agreement, either the unconditional right to acquire or the discretion as to his right to acquire, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market; (b) financial instruments which are not included in point (a) but which are referenced to shares referred to in that point and with economic effect similar to that of the financial instruments referred to in that point, whether or not they confer a right to a physical settlement. - -"		

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12	SMA Chapter 9, Section 5(1): Obligation to notify holdings and proportions of voting rights "A shareholder shall have an obligation to notify the offeree company and the Financial Supervisory Authority its holdings and proportion of voting rights (notification of major shareholding), when the proportion reaches or exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 90 percent or two thirds of the voting rights or the number of shares of the offeree company."	Transparency Directive, Article 9(1): "The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % and 75 %."	In Finland, a shareholder has the obligation to notify holdings and proportions of voting rights when the proportion reaches of exceeds or falls below 90 percent or two thirds of the voting rights or the number of shares of the offeree company deviating from EU regulation, where the maximum flagging obligation is 75%. Finland does not have the 75 % flagging obligation, but instead applies the threshold of two thirds. The aim is to promote market transparency regarding the ownership and power structures of listed companies and the changes related to them.	Additional notification obligation improves corporate transparency and communication to investors. However, it may incur extra costs for companies.
13	SMA Chapter 11, Section 1: General scope of application "This chapter shall be applied when launching a public offer to acquire shares admitted to trading on a regulated market in Finland or, at the issuer's request or with the issuer's consent, on a multilateral trading facility, either voluntarily (voluntary bid) or as obligated by Section 19 (mandatory bid)."	Directive 2004/25/EC of the European parliament and of the council of 21 April 2004 on takeover bids (Takeover Directive), Article 1(1): "This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised	The gold-plating was introduced to ensure consistency and investor protection across different trading venues. Since the Takeover Directive does not apply to multilateral trading facilities, setting the threshold for mandatory bids—and the mandatory bid obligation in general—for such markets is a matter of national discretion. The rationale given for the regulation is the similarity of trading venues and	This is an example of gold-plating as the Finnish law also applies to shares admitted to trading on a multilateral trading facility, which goes beyond what the Takeover Directive requires.

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		to regulate the markets (hereinafter referred to as 'rules'), relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC (1) in one or more Member States (hereinafter referred to as a 'regulated market')."	that it is consistent to apply the same principles to both regulated markets and multilateral trading facilities. This primarily involves ensuring investor protection when control or significant influence is concentrated or transferred. Additionally, since investors in Finland may not always perceive a significant difference between a regulated market and a multilateral trading facility, setting a mandatory bid obligation on the MTF and setting the mandatory bid threshold at the same level for both types of markets is justified. This approach aims to prevent confusion among investors and ensure a clear and consistent regulatory framework. By setting the mandatory bid threshold at the same level for both regulated markets and multilateral trading facilities, the regulation aims to ensure uniform application of investor protection rules.	

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14	SMA Chapter 9, Section 10(1): Disclosure obligation of the offeree company "Upon receipt of the notification of major shareholding, the offeree company shall, without undue delay, disclose the information in the notification of major shareholding."	Transparency directive, Article 12(6): Procedures on the notification and disclosure of major holdings "Upon receipt of the notification under paragraph 1, but no later than three trading days thereafter, the issuer shall make public all the information contained in the notification."	The offeree company must arrange the receipt of flagging notifications in a clear manner and strive to carry out any necessary checks on the received notifications as swiftly as possible [and in a tighter timetable than allowed by the Transparency Directive], as the information contained in the flagging notification may affect the value of the share. The regulation is said to promote transparency and investor confidence. This, in turn, was expected to enhance market efficiency and stability, contributing positively to the development of the local capital market.	This is an example of gold-plating because it introduces a stricter timetable than the Transparency Directive.
15	SMA Chapter 8, Section 2(1): Notification of transactions in own shares "An issuer shall notify any transactions in own shares to the operator of the regulated market on which its shares are admitted to trading. The notification shall be filed prior to the start of the next trading day."	Transparency directive, Article 14(1): "Where an issuer of shares admitted to trading on a regulated market acquires or disposes of its own shares, either itself or through a person acting in his own name but on the issuer's behalf, the home Member State shall ensure that the issuer makes public the proportion of its own shares as soon as possible, but not later than four trading days following such	According to the self-regulation of the Finnish stock exchange, Nasdaq Helsinki, if the notification of transactions in own shares concerns a significant acquisition of own shares, the notification must be made immediately. An acquisition is considered significant at least when it exceeds 10% of the maximum amount of share acquisition specified in the issuer's decision regarding the acquisition of own shares.	This is an example of gold-plating because it introduces stricter notification terms than the Transparency Directive. The rapid notification obligation improves investors' access to information. However, it may incur extra costs for companies.

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		acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 % or 10 % of the voting rights. The proportion shall be calculated on the basis of the total number of shares to which voting rights are attached."	This regulation ensures that significant transactions are disclosed promptly, enhancing market transparency and investor confidence. Immediate disclosure of large acquisitions helps prevent market manipulation and ensures that all market participants have access to the same information, thereby supporting fair and efficient market operations.	
16	SMA Chapter 12, Section 2: Insider lists of issuers whose financial instruments are admitted to trading on the SME growth market "The issuer whose financial instruments are admitted to trading on the SME growth market must include in their insider lists all persons referred to in Article 18(1)(a) of the Market Abuse Regulation."	Market Abuse Regulation (MAR) Article 18: Insider lists "Issuers whose financial instruments are admitted to trading on an SME growth market shall be entitled to include in their insider lists only those persons who, due to the nature of their function or position within the issuer, have regular access to inside information. By way of derogation from the first subparagraph of this paragraph and where justified by specific national market integrity concerns, Member States may require issuers whose financial instruments are admitted to trading on an SME growth market to include in their insider lists all persons	The EU requires only individuals who, due to the nature of their function or position within the issuer, have regular access to inside information, meanwhile Finland requires all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies. It is argued that the regulation addresses specific national concerns related to market reliability. The regulation aims to ensure the proper management of insider information by the issuer, which is considered a key factor for securities markets.	It constitutes goldplating as the requirement in the Finnish regulation is much broader than in the European regulation. The regulation affects the local market as it enhances investor information,. It is also claimed that the regulation facilitates the Finnish Financial Supervisory Authority's investigation of misconduct, as otherwise there would be no information on who has had access to insider information regarding a specific project. Additionally, the regulation may aid the investigation and improve the legal safeguards of insiders in relation to their trading and any potential insider trading investigations conducted by authorities.

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		referred to in point (a) of paragraph 1. Those lists shall comprise information specified in the format determined by ESMA pursuant to the fourth subparagraph of this paragraph. - -"	According to the legislator, the management of insider information by the issuer can be compromised if the issuer does not have comprehensive and up-to-date information on all persons who have received insider information regarding the issuer's specific project. For example, one of the conditions for delaying the disclosure of insider information is that the issuer can guarantee the confidentiality of the information.	Regulation may, however, incur some extra costs for the companies involved.
17	Act on the Registration of Certain Credit Providers and Credit Intermediaries 16.2.2023/186 Section 3: The right to grant consumer credits and housing credit and to mediate peer-to-peer lending "A trader may grant consumer credits or housing credits only if it is registered as a lender in accordance with this law. A trader may mediate peer-to-peer lending only if it is registered as a peer-to-peer lender or credit intermediary in accordance with this law."	Directive 2008/48/EC of the European parliament and of the council of 23 April 2008 on credit agreements for consumers	Registration would be conditional, inter alia, on the trader being reliable and having sufficient knowledge of the credit business.	This is an example of gold-plating as it introduces additional registration requirements for certain Credit Providers and Credit Intermediaries. Companies willing to offer consumer credit are required to register in a register maintained by the Finnish Financial Supervisory Authority.

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18	Chapter 7 of Consumer Protection Act (38/1978) relating to consumer credits cover, for example, mortgage credit, credit secured by immovable property, residential property or tenancies with buildings, and credit of small amounts which are excluded from the scope of the Directive 2008/48/EC of the European parliament and of the council of 23 April 2008 on credit agreements for consumers: "Consumer credit means credit that a trader (creditor) under an agreement grants or promises to grant to a consumer in the form of a loan, deferred payment or other similar financial accommodation. The provisions of this chapter do not apply to: 1. consumer credit for which no interest or other payments are charged; 2. credit based on an agreement under which the consumer has the right to pay the price of goods or services supplied on a continuing basis by means of instalments over the duration of the agreement;	Directive 2008/48/EC of the European parliament and of the council of 23 April 2008 on credit agreements for consumers, Article 2	The regulation was being justified by the issues consumers have faced in recent years with instant consumer loans. This was presented as the rationale for extending the provisions to small loans and other forms of credit not covered by the directive.	This is an example of gold-plating because the definition of a consumer credit in Finnish legislation is wider than foreseen in the EU legislation. Companies need to comply with the consumer protection legislation even when offering small consumer loans.

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	3. credit granted by a pawnbroker; 4. credit granted under the Act on Social Lending (1133/2002); 5. housing credit or consumer credit secured by a residence falling under the scope of application of chapter 7a, unless otherwise provided in the said chapter."			
19	Limited Liability Companies Act Chapter 15, Section 11(1): Restrictions on acquisition, redemption and acceptance as pledge "In a public company, the decision to acquire or redeem treasury shares or to accept them as pledge shall not be made so that the treasury shares in the possession of, or held as pledges by, the company and its subsidiaries would exceed one tenth (1/10) of all shares."	Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (no longer in force), Article 19(1)(b): "Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make such acquisitions subject to at least the following conditions: - -	The restriction is based on a directive that is no longer in force. In Finland, the regulation has not been revoked despite the fact that EU regulation currently allows it.	This is an example of gold-plating as local law has the restriction on owning its own shares, which is not provided for by the European regulations. The significance of the provision as a limiter on the acquisition of a company's own shares is limited, because the company can at any time annul the shares it has acquired and then acquire more. Companies have also been able to acquire their own shares through a tender process in such a way that they are considered to be annulled before coming into the company's possession. Even a large ownership of its own shares does not have a significant impact in any legal relationship, because own shares do not produce voting rights or any other rights

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		(b) the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed 10 % of the subscribed capital"		in the company, and own shares cannot be transferred outside the company except by following the same share issue procedure as when issuing new shares. However, the restriction on owning its own shares does cause practical problems, at least when delivering shares in exchange for payment, combining shares (reverse split), and when the company makes such a public purchase offer for its own shares, in which it acquires a large portion of its own shares at once.
20	Act on the Provision of Crowdfunding Services, Section 9: Non-disclosure obligation "Anyone who, in the capacity of a member or deputy member of a body of a crowdfunding service provider or an undertaking belonging to the same group or consolidation group with it or of a consortium of credit institutions or of a representative of a crowdfunding service provider or of another undertaking operating on behalf of the crowdfunding service provider or as their employee or agent, in performing their duties,	Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937	As the EU crowdfunding regulation does not deal with so-called banking secrecy, this is regulated at national level.	This is an example of gold-plating as local law widens the regulation equivalent to banking secrecy onto crowdfunding related information. The so-called banking secrecy is a legally established practice in the Finnish financial markets (see Act on Credit Institutions (610/2014), Chapter 15, Sections 14-15). It broadly applies to financial service providers, and actions contrary to this obligation are criminalised. This is also the case in the current Crowdfunding Act (Act on the Provision of Crowdfunding

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	has obtained information on the financial position or private personal circumstances of a customer of the crowdfunding service provider or an undertaking belonging to the same group, consolidation group or consortium of credit institutions with it or to a conglomerate referred to in the Act of the Supervision of Financial or Insurance Conglomerates (699/2004) or of another person connected with its activities or on a trade secret shall be liable to not disclose it unless the person in whose benefit the non-disclosure obligation has been provided for consents to its disclosure. Non-disclosable information may not be given to a general meeting of a crowdfunding service provider or to the meeting of a corresponding body or to any shareholder, member, active agent or other person attending the meeting."			Services, Section 9: Non-disclosure obligation). The basis of banking secrecy is the customers' demand that their affairs are not disclosed to third parties without a valid legal basis. Additionally, crowdfunding services are comparable to other financial services, These factors support uniform regulation.

Licensing process and time periods in financial regulations

In Finland, the process for authorizing iinvestment firms, UCITS management companies, and AIFMs is governed by the Finnish Financial Supervisory Authority (FIN-FSA). Typically, obtaining each licence takes approximately 6 to 8 months, but can extend to up to a year, depending on practical application and review timelines.

Finnish regulations specify deadlines for the licensing process.

For UCITS management companies, the FIN-FSA must issue an authorisation decision within 6 months of receiving a complete application or upon submission of necessary documents and clarifications. However, a decision on the granting of an authorisation shall always be made within 12 months of the initial application's receipt.

For AIFMs a decision on authorisation of an AIFM must be issued within 3 months of the applicant's submission of the necessary documents and clarifications. The FIN-FSA may grant, at most, a 3-month extension of the deadline for an authorisation.

For investment firms, the FIN-FSA must issue an authorization decision within 6 months of receipt of an official application or, if the application has been incomplete, of submission by the applicant of documents and accounts necessary for deciding the issue. A decision must, however, always be made within 12 months of receipt of the application.

In all cases, if the decision is not made within the specified time frame, the applicant has the right to appeal to the Helsinki Administrative Court.

In practice, the FIN-FSA generally adheres to these deadlines, although delays may occur during the preparatory phase. Applications often require several months of preparation to ensure all relevant documents and clarifications are included. The actual duration often depends on the completeness of the application and the complexity of the applicant's operations.

4

Postulates

Gold-plating poses significant challenges and opportunities for the European Union's capital markets. While it can elevate regulatory standards and bolster investor protection, it also risks fragmenting regulations and hindering the realization of a unified capital market. Addressing this phenomenon requires a multifaceted approach, combining regulatory harmonization, enhanced cooperation, investor empowerment, and strong initiatives from the EU.

Key postulates:

1. **Harmonization of Regulations:** There is a need for greater harmonization of capital market regulations across EU member states to reduce the prevalence of gold-plating and promote a level playing field for market participants.

2. **Enhanced Regulatory Cooperation:** EU institutions should encourage closer cooperation between national regulators to ensure consistent enforcement of EU directives and prevent regulatory arbitrage.

3. **Streamlining of Procedures:** Simplifying the process of transposing EU directives into national law can help minimize the temptation for member states to engage in gold-plating.

4. **Investor Education and Protection:** Efforts should be made to enhance investor education and protection across the EU to mitigate the need for excessive gold-plating as a means of safeguarding investors. Education is one the most effective means of investor protection.

5. **Coordinated action at both the national and EU levels:** Focusing on harmonization, cooperation, and investor empowerment. Moving forward, the EU must strive to strike the right balance between regulatory robustness and market efficiency to foster sustainable economic growth and financial stability.

6. **Strengthening the Capital Markets Union (CMU):** The EU should prioritize the completion of the Capital Markets Union to create a more integrated and efficient capital market across member states. It can be achieved, for example, through greater regulation at the EU level, leaving less space for gold-plating during implementation, drafting more precise EU regulations, and increasing the role of ESMA as a pan-European regulator. This would involve removing barriers to cross-border investment, harmonizing regulations, and enhancing regulatory cooperation to reduce the incentives for gold-plating.

7. **Enhanced Research and Analysis:** Further study into the prevalence and impact of gold-plating in capital market law is necessary to understand its underlying causes and consequences better. This research should examine the motivations behind gold-plating, its effects on market efficiency, and best practices for mitigating its adverse effects.

8. **Promotion of Best Practices:** National regulators should promote best practices in regulatory implementation to minimize the need for gold-plating, rather than potentially engaging in lobbying and pressing national legislator to implement stricter regulations and grant more power to the regulators (such actions are often driven by regulator's interest in ensuring stricter rules to mitigate

market risks they oversee and to enhance their discretionary powers). This could involve benchmarking against other EU countries with more streamlined regulatory frameworks and fostering dialogue between regulators to share insights and lessons learned.

9. **EU-Level Initiatives:** The EU institutions should take proactive measures to address gold-plating, including issuing guidance on the transposition of EU directives, providing technical assistance to member states, and conducting peer reviews to assess compliance with EU regulations.

10. **Political Will and Commitment:** Ultimately, addressing gold-plating requires political will and commitment from both national governments and EU institutions. Policymakers should prioritize the development of a coherent and effective regulatory framework that balances the need for investor protection with the goal of fostering a dynamic and competitive capital market in Europe. Especially, as local capital market development depends on fewer restrictions.

By implementing these recommendations, the EU can advance the development of its capital markets, foster economic growth and stability, and reinforce its position as a global financial hub, navigating the challenges posed by gold-plating while seizing its potential benefits.

Annex 1: List of abbreviations

AFS	Act on Financial Supervision in the Netherlands ("AFS" -Algemene Financiële Supervisiewet)
AIF	Alternative Investment Fund
AIFM/AIF Manager	Alternative Investment Fund Manager
AIFM Directive/ AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
AIFMA	Finnish Act on Alternative Investment Fund Managers 162/2014
AIFM Regulations	European Union (Alternative Investment Fund Managers) Regulations 2013, as amended (S.I. No. 257 of 2013)
BaFin	Federal Financial Supervisory Authority in Germany ("BaFin" - Bundesanstalt für Finanzdienstleistungsaufsicht)
CBI	Central Bank of Ireland
CII / IIC	Collective Investment Institutions
CII Law	Law 35/2003, of November 4, 2003, on Collective Investment Institutions in Spain
CIS	Collective Investment Schemes
CMU/Capital Markets Union/ EU Capital Markets Union	European Union Capital Markets Union
CNMV	Spanish supervisory authority ("CNMV" - Comisión Nacional del Mercado de Valores)
CONSOB	Italian Companies and Exchange Commission ("CONSOB" - Commissione Nazionale per le Società e la Borsa)
CRR	Capital Requirements Directive - Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC
CSSF	Luxembourg Financial Sector Supervisory Authority ("CSSF" - Commission de Surveillance du Secteur Financier)
DDL Capitali	Capital Law in Italy ("DDL Capitali" - Decreto del Presidente del Consiglio dei Ministri sulle Disposizioni in materia di crisi di liquidità e solvibilità delle imprese di assicurazione e di riassicurazione)

DNB	De Nederlandsche Bank
ECR	Venture capital entities in Spain ("ECR" - Entidades de Capital Riesgo)
EICC	Closed-ended type collective investment entities ("EICC"- Entidades de Inversión Colectiva de Tipo Cerrado)
EAD	Eligible Assets Directive (2007/16/EC)
ELTIFs	Irish-domiciled European Long-Term Investment Funds
ESMA	European Securities and Markets Authority
EU	European Union
ETF	Exchange Traded Fund
FIN-FSA	Finnish Financial Supervisory Authority
FX	Foreign exchange
Green Book	Green Book on the competitiveness of Italian Financial Markets to Support Grow
Guidance for Lawmaking/ Guidance/ Guidance for Regulation	Prime-Minister Circular dated 18 November 1992 on Guidance for Lawmaking (Aanwijzingen voor de Regelgeving)
IFD	Investment Firm Directive - Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU
ISAct	Investment Services Act in Malta
KAGB	German Investment Code ("KAGB" - The Kapitalanlagegesetzbuch)
KAVerOV	Capital Investment Conduct and Organization Ordinance under the German Investment Code ("KAVerOV" - Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsregeln nach dem Kapitalanlagegesetzbuch)
ManCo	Management Company
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
MBR	Malta Business Registry
MEF	Italian Minister of Economy and Finance
Member State	Member State of European Union

MFSA	Malta Financial Services Authority
MIC	Market Identifier Code
MIFID/ MiFID II/ MiFID II Directive	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MIFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
MiFID II Regulations	European Union (Market in Financial Instruments) Regulations 2017, as amended (S.I. No. 375 of 2017)
OECD	Organization for Economic Co-operation and Development
PRIIPs	Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products
QIAIFs	Qualifying Investor Alternative Investment Funds
RAIF	Reserved alternative investment fund
RIAIFs	Retail Investor Alternative Investment Funds
Report	this report
SGEIC	Closed-ended collective investment entities ("SGEIC" - Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado)
SGIIC	Asset management firm of collective investment institutions ("SGIIC" - Sociedad Gestora de Insitituciones de Inversión Colectiva)
SICAV	Open-ended investment company ("SICAV" - Société d'Investissement à capital variable)
SICAF	Investment company with fixed capital ("SICAF" - Société d'investissement à capital fixe)
SPACs	Special Purpose Acquisition Companies
TUF Law	Italian Legislative Decree no. 58 dated February 24th, 1998 ("TUF" - Testo Unico della Finanza)
UCITS	Undertakings for Collective Investments in Transferable Securities
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

UCITS Regulations	European Communities (Undertakings for Collective Investment in Transferable Securities) Regulation 2011, as amended (S.I. No. 352 of 2011)
SICAR	Investment company in risk capital ("SICAR" - Société d'investissement en capital à risqué)
SIF	Specialized investment fund
SMA	Finnish Securities Markets Act 746/212

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Annex 3:
REPORT ON GOLD-PLATING IN POLISH CAPITAL MARKET LAW,

Beata Chmielewska, Piotr Sieradzan CFA Society Poland 2021

CFA Society Poland

REPORT ON GOLD-PLATING IN POLISH CAPITAL MARKET LAW

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EXECUTIVE SUMMARY

- In the Capital Market Development Strategy (hereinafter referred to as the "Strategy"), the Council of Ministers considered gold-plating a barrier to the development of the capital market in Poland and expressed its endeavour to avoid gold-plating in the future and to remove instances of excessive regulations from the existing Polish laws.
- The Strategy defines gold-plating as: "implementation of European Union laws which goes beyond the minimum requirement." (p. 77)
- In our opinion, the definition of gold-plating provided in the Strategy is too narrow. Such an understanding of gold-plating does not lead to the removal of excessive regulations, since it does not encompass the introduction of regulations having no clear legal bases in EU law to Polish capital market law. Acquiescence to gold-plating within this meaning implies consent to the multiplication of legal, administrative, organizational and financial burdens for participants of the Polish capital market, which are not required by EU law and do not serve the purpose of its harmonization, and thus to the multiplication and exacerbation of barriers to its development.
- We propose the introduction of an expanded definition reading as follows:

"Gold-plating describes a process by which a Member State which has to transpose EU Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation.", i.e. the definition introduced by the European Commission in the "Better Regulation Guidelines" (Commission Staff Working Document, SWD (2017) 350, 7 July 2017, p. 88, Glossary, publication available at: https://ec.europa.eu/info/law/law-making-process/planning-andproposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

- The EU considers gold-plating permitted yet undesirable, since, while hampering harmonization of EU law, it is a barrier to the development of the single market and sector markets, e.g. Capital Markets Union and free movement of capital.
- Although there is no EU-level prohibition of gold-plating, some Member States, in order to protect local businesses and their competitive positions in the European market, apply rules prohibiting the introduction of excessive regulations or restricting them to exceptional cases preceded with the regulatory impact assessments as regards costs, administrative and financial burdens for stakeholders and influence on their competitiveness compared with businesses from other Member States. For example:
  - The United Kingdom prohibited gold-plating unless it were to serve its interests; even then, however, prior to adopting an excessive regulation, it required performance of a cost benefit analysis, stakeholder consultations, regulatory impact assessment and consent of the Reducing Regulation Committee;
  - France introduced a statutory prohibition of gold-plating; derogations from this prohibition may be granted exclusively when they are justified by the identified national priorities;

– Germany did not introduce a formal prohibition of gold-plating; gold-plating is eliminated on a factual basis such that: “EU law is to be implemented 1:1.”

> In Poland, gold-plating is legally permitted, as it is not prohibited by generally applicable laws. The regulations regarding gold-plating permit its application in particularly justified cases only. This prohibition concerns, however, exclusively the Council of Ministers and refers to its right of legislative initiative. This results from § 30 sec. 2 of the Rules and Regulations of the Council of Ministers, which reads as follows:

> “The draft act aiming to implement the European Union law may contain provisions going beyond this aim in particularly justified cases only. In such an event, the requesting authority shall append the draft with a tabular statement of the proposed provisions of the act that go beyond the aim of implementing the European Union law along with the explanation of the necessity to have them included in this draft, hereinafter referred to as the «reverse correlation table».”

> In the draft, we have identified numerous examples of gold-plating in Polish capital market law, but there could be many more instances of gold-plating in Poland. This permits the conclusion that gold-plating is a common practice in Poland.

> We call for actions aimed to derogate from the excessive regulations in the Polish law.

> We call for actions aimed to eliminate the gold-plating practice in Poland in the future, in particular through:

– introduction of a legal definition of gold-plating;

– limitation of the possibility to apply gold-plating by introducing its general prohibition with derogations restricted to exceptional cases serving the achievement of specific goals, protection of specified values, benefits for defined groups of stakeholders, with the goals being enumerated in the reasons for the respective legal act, e.g. reduction of regulatory and financial burdens, increase in competitiveness of Polish businesses, benefits for Polish businesses or Polish economic interests taking into account the necessity to ensure an appropriate level of protection to investors;

– extension of the scope of the examination, as part of the regulatory impact assessment (RIA), of draft normative acts serving the purpose of implementing the EU legislation by issues related to the introduction of excessive regulations (introduction of provisions to an extent unrequired by the European Union or broader than required);

– performance of a separate regulatory impact assessment with respect to excessive regulations in particular as regards the comparison to the solutions applied in other Member States, impact on entrepreneurship and competitiveness, introduction of administrative burdens and the related costs, satisfaction of the prerequisites for introducing excessive regulations, purposes of their introduction, potential benefits from regulations;

– reinforcement of the RIA Coordinator by establishing a standing team of professional

and experienced advisors on capital market whose role would be to participate in performing and preparing the regulatory impact assessment of the draft normative act at the preparation stage (i.e. before including it in the list of legislative works), in particular as regards the comparison to the solutions applied in other Member States, avoidance of excessive regulations, impact on entrepreneurship and competitiveness, introduction of administrative burdens and the related costs, satisfaction of the prerequisites for introducing excessive regulations, purposes of their introduction, potential benefits from regulations;

- stakeholder consultations on the regulatory impact assessment at an earlier stage of the legislative process, i.e. at the stage of RIA preparation by the RIA Coordinator, before submitting the draft normative act to the list of legislative works;
- introduction of clear and binding guidelines for the public officials engaged in EU law implementation process as regards the rules and methods of implementing the EU legislation to the Polish law, with “copy out” introduced as the main implementation method;
- creation of the excessive regulation register containing all excessive regulations in the Polish legislation and their justifications;
- periodic (e.g. every 3 years) review of excessive regulations, actual effects of their application (including stakeholder consultations) and their comparison to the regulations of the Member States where excessive regulations are not applied in the respective area;
- inclusion of the actual application method and the application of the implemented EU laws by state authorities, rather than a mere literal wording of the laws, to gold-plating.

PURPOSE OF AND NEED FOR THE REPORT

The observation of the wording of the regulations applicable in Polish capital market law and the methods of implementing EU legal acts to the Polish law applied by the Polish regulator in close cooperation with the supervisor leads to the conclusion that gold-plating is a common practice in Polish capital market law and, what is more, one applied on a grand scale and with commitment, surprisingly, also after the publication of the Strategy (i.e. since November 2019).

Gold-plating is an unfavourable, and hence undesirable, phenomenon. Some Member States use legal mechanisms that effectively protect them from excessive implementation of the obligations arising from EU law, also through introduction of strict measures in the form of prohibition of gold-plating and liability for its breach.

Introducing stricter obligations than the minimum requirements arising from EU law with respect to participants of the Polish capital market results in increased administrative and financial burdens of the Polish economic operators compared to operators of the same type from other Member States operating in the same market. Consequently, it leads to lower competitiveness of Polish operators.

Hopefully, this report will contribute to a broad market debate, where market participants will present their standpoints on the effect of gold-plating on their business activities and market positions and express their postulates for the future.

We intend this report to:

- present the identified instances of gold-plating: see Section VII and the expanded version contained in the table appended to the report,
- describe the legal situation regarding gold-plating in Poland: see Section VI,
- describe the European Union's approach to gold-plating: see Section IV,
- present the legal measures applied by selected Member States to combat gold-plating: see Section V,
- propose measures aimed to rationalize the issue of excessive regulations in the Polish law: see Section VIII.

CONCEPT OF GOLD-PLATING

Presentation of selected definitions of gold-plating requires a prior indication of its sources. Polish capital market law is based on the EU legislation. EU institutions legislate by, in particular, adopting regulations and directives. Regulations have direct effect, which means that they become part of the national legal system on their entry into force with no need of being transposed (in principle). Directives, in turn, must be implemented to national legal systems. This results from the fact that they bind Member States as regards the purpose of the regulation, while enabling them to select the methods and means for achieving this purpose by a specified deadline. Directives contain at the same time the minimum requirements the satisfaction of which is to lead to harmonization of the Member States' legislations in the area regulated by the respective directive.

Implementation of a directive to the national legal system requires that a legal act is adopted or an existing legal act, i.e. a statutory act or a regulation, is amended. Hence, it is necessary to commence a legislative process as part of which the wording of the Polish laws the adoption of which will constitute implementation of a directive will be determined. It is the works on the wording of such laws that allow space for introducing excessive regulations with respect to the minimum requirements arising from the implemented directive.

Consequently, the most common source of gold-plating in Poland is the process of implementing directives to the Polish law.

Directives may be implemented to national legal systems using various methods, from among which the following are the most relevant for the purposes of this report: the "copy out" method, the "copy out" method extended by the necessity to adapt the wording of directives to the legal institutions and concepts existing in the Polish legal system and methods of going beyond the minimum requirements provided for in the implemented directive, which normally result in introducing additional provisions having no bases in the wording of the implemented directive and, frequently, also the purpose to be achieved by it.

The "copy out" methods ensure that directives are implemented according to the 1:1 model and, in principle, are an effective barrier to introducing excessive regulations, whereas the natural consequence of other implementation methods is going beyond the framework of the implemented directive. What needs to be borne in mind is that a thorough interpretation of the European laws must be made, since provisions worded in a certain manner may be interpreted differently in different legal systems.

It is characteristic that the Member States which have introduced anti-gold-plating regulations implement directives using the "copy out" method or the "copy out" method extended by the necessity to adapt the wording of directives to the legal institutions and concepts existing in their legal systems.

The concept of gold-plating is not defined in a uniform manner. The European Commission defined gold-plating e.g. in "Better Regulation Guidelines" (Commission Staff Working Document, SWD (2017) 350, 7 July 2017, p. 88, Glossary, publication available at: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en):
"Gold-plating describes a process by which a Member State which has to transpose EU

Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation."

Polish translation of the foregoing:
„Gold-plating opisuje proces, przez który państwo członkowskie, które musi transponować unijną dyrektywę do prawa krajowego lub musi implementować unijne ustawodawstwo, korzysta z okazji do nałożenia dodatkowych wymagań, obowiązków lub standardów na adresatów prawa krajowego, które wykraczają poza wymagania czy standardy przewidziane w transponowanym ustawodawstwie unijnym".

An exhaustive definition of gold-plating was adopted in the United Kingdom. The UK Department for Business, Energy & Industrial Strategy, in the document of 2018 titled "Transposition guidance. How to implement European Directives effectively"), published at: https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law, provides the following definition of gold-plating:
"**What is gold-plating?**
Gold-plating is 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 UK 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
- retaining pre-existing UK standards where they are higher than those required by the Directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or
- implementing early, before the date given in the Directive."

Polish translation of the foregoing:
„Co to jest gold-plating?
Gold-plating ma miejsce, kiedy implementacja wykracza poza minimum konieczne do zapewnienia zgodności z Dyrektywą, poprzez:

- rozszerzenie zakresu, dodanie w jakiś sposób do materialnych wymagań lub zastąpienie szerszych pojęć prawnych tymi użytymi w Dyrektywie; lub
- nieskorzystanie w pełni z derogacji, które utrzymują wymagania na minimalnym poziomie (np. dla pewnych skal operacji lub konkretnych działań); lub
- utrzymanie wcześniej istniejących standardów w sytuacji, gdy są one wyższe niż te wymagane przez Dyrektywę; lub

> wprowadzanie sankcji, mechanizmów wykonawczych i spraw, takich jak ciężar dowodu, które nie są zgodne z zasadami dobrych regulacji; lub
> wczesne implementowanie przed datą określoną w Dyrektywie".

In Poland, the definition of gold-plating was included in the Strategy. According to it, gold-plating should be understood as: "implementation of European Union laws which goes beyond the minimum requirement." (p. 77)

In the context of the definitions of gold-plating presented above, the Polish definition seems to be quite narrow and laconic on the one hand and, depending on the interpreter, it might encompass also the issue of applying provisions on the other hand. The above definition boils down to deeming regulations that are identical to the provisions of the implemented directive in terms of the subject matter yet implemented to a broader extent than the minimum required by it as gold-plating. Therefore, when examining the existence of gold-plating in the Polish law, according to this definition, in simplified terms, one should juxtapose the wording of a provision of a directive with the wording of the implemented Polish provision and compare the wording of the Polish provision to the EU one it implements in terms of the former being broader or not. If it is broader, gold-plating occurs; if not, it does not occur.

Such an understanding of gold-plating results in leaving significant issues outside the scope of the regulation of this definition; the issues are e.g. derogation from the national provisions or standards that are broader than the minimum requirement, the implementation deadline, sanctions or introduction of provisions going beyond the subject matter of the regulation of the provisions of the implemented directive, i.e. having no legal basis in them (a relevant provision the wording of which to be juxtaposed and compared) while implementing and within the directive.

If, however, the term "implementation of [...] laws which goes beyond the minimum requirement" were to be considered as one encompassing not only the wording of provisions *expressis verbis* but also their implementation, application and interpretation, the definition would need to be considered as encompassing not only the introduction of provisions analogous to the ones contained in European laws to Polish laws, but also introduction of such provisions to Polish laws and such an interpretation and such a conduct of the authorities applying such provisions as ensure that the effect of their application corresponds to the wording of the European provisions and the intentions of the European legislature.

Such an understanding of the concept of implementation is shared by some relevant publications: C. Mik, *Metodologia implementacji europejskiego prawa wspólnotowego w krajowych porządkach prawnych* [Methodology for the implementation of European Community law in national legal systems] [in:] *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of European integration law in national legal systems], ed. C. Mik, Toruń

1998, pp. 28–29.

Applying such a narrow definition of gold-plating might not contribute to removing or identifying all excessive regulations in the Polish law and preventing them from being legislated in the future. This is because the legal analyses and identified instances of excessive regulations lead to the conclusion that the primary source of over-regulation in Poland is production of provisions that have no legal bases in EU law whatsoever rather than implementation of provisions which goes beyond the EU minimum. In this context, the very fact of introduction and application of such provisions is in a certain conflict with a "minimum" that is non-existent, unrequired, in EU law.

Another source of the actual over-regulation is the very application of provisions by state authorities in a manner that is stricter than the provision having its source in the European legislation and that goes beyond it and, first of all, in a stricter manner than the one in which such a provision is implemented and applied in other Member States.

In order to remove excessive regulations from Polish capital market law, and hence remove regulatory barriers to the development of such market, a modification of the definition of gold-plating to encompass the introduction of provisions having no legal bases in EU law while implementing EU legal acts should be considered. This seems to be necessary if the established practice applied in this respect in Poland is to be eliminated.

In Poland, it seems most reasonable to use a definition based on the definition provided by the European Commission in "Better Regulations Standard" reading as follows:

> "Gold-plating describes a process by which a Member State which has to transpose EU Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation."

EUROPEAN UNION VERSUS GOLD-PLATING

European Union Institutions notice the issue of gold-plating and take stance on it in a variety of contexts and documents.

The most important ones are general, regarding the legislation process, transposition and enforcement of EU law as well as check on the correctness of transposition of directives to national legal systems, and consequently applicable to the entire EU legislation regardless of its subject matter. The other group of documents concerns the capital market.

1. PROCESS OF BETTER LAWMAKING

The European Commission and the European Parliament were engaged in the process of developing mechanisms for better law-making for a dozen or so years. The aim of these actions was to not only simplify and improve the existing EU legal regulations but also to develop rules for designing new regulations, ensuring their correct implementation and enforcement.

In the numerous documents issued by the Commission and the Parliament over years, it was emphasized that the measures taken at the EU level are insufficient to ensure the proper quality ad effectiveness of EU law. In order to achieve this aim, it is necessary for Member States to establish cooperation consisting in a correct transposition of EU law to national legal systems to ensure its enforceability.

The risks brought by gold-plating in this context were indicated in the documents on numerous occasions. For example, the following standpoints touching upon the issue of gold-plating can be enumerated:

a) “Commission Working Document, Second progress report on the strategy for simplifying the regulatory environment” of 30 January 2008, COM(2008) 33 final, where the European Commission indicated as follows:

“[…] In the same vein, national, regional or local authorities in charge of transposing and implementing EU law should strive to complement the work done in Brussels. Too often late transposition or layers of “gold-plating” erode the simplifying effect of EU rules. The work currently being carried out to map and measure administrative burden in certain policy areas is expected to provide interesting lessons in this regard. In line with its recent Communication «A Europe of Results – Applying Community Law», the Commission will intensify its upstream efforts to prevent infringements of EC law by improving the quality of assistance it offers to Member States to facilitate the correct transposition and application of directives. Finally, since the greater part of the EU regulatory landscape is not shaped at Community level, simplification programmes must also be developed or reinforced at national (and where appropriate, regional) level to tackle the reams of red tape which spew forth independently of EU legislation. In future, the Commission will place the emphasis on this aspect when it looks at the National Reform Programmes submitted in the context of the Lisbon Agenda.”

b) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Smart Regulation in the European Union” of 8 October

2010, COM(2010) 543 final, where the Commission indicated as follows in the section "Improving the stock of EU legislation. Evaluating benefits and costs of existing legislation":

> "[…] In light of the above, to step up efforts to improve the quality of existing legislation the Commission intends to:
> "(vi) Invite Member States to use the possibilities in EU legislation to waive obligations for businesses such as SMEs. The Commission has asked the High Level Group of Independent Stakeholders to present a report by November 2011 on best practices of Member States in implementing EU legislation in the least burdensome way. In parallel, the Commission will analyse further the issue of 'gold plating' and report on any substantial findings. […]."

The Commission included also the following definition of gold-plating in the document: "the practice of national bodies going beyond what is required in EU legislation when transposing or implementing it at Member State level."

c) In the European Parliament resolution of 4 September 2007 on Better lawmaking 2005: application of the principles of subsidiarity and proportionality — 13th annual report (2006/2279(INI)) (P6_ TA(2007)0364); „Better lawmaking 2005: subsidiarity and proportionality, European Parliament resolution of 4 September 2007 on Better lawmaking 2005: application of the principles of subsidiarity and proportionality" (publication available at: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=urisery%3AOJ.CE.2008.187.01.0022.01.POL&toc=OJ%3AC%3A2008%3A187E%3ATOC#CE20 08187PL.01006701), the European Parliament indicated:

"[…] 11. Emphasises, in particular, that an effective strategy for the reduction of unnecessary European administrative burdens must be implemented both by the Commission, as regards unnecessary administrative burdens arising from European regulations and directives, and by the Member States, as regards such burdens arising from national legislation; calls on the Commission to take the lead and not to make its actions to reduce the unnecessary administrative burden at EU level dependent on the actions undertaken by the Member States at national level to reduce such unnecessary burdens arising from national legislation […]."

Polish translation of the foregoing:
„[…] podkreśla w szczególności, że efektywną strategię na rzecz obniżki zbędnych obciążeń administracyjnych w Europie musi wdrażać zarówno Komisja — w zakresie zbędnych obciążeń administracyjnych wynikających z europejskich rozporządzeń i dyrektyw, jak i państwa członkowskie — jeśli takie obciążenia wynikają z ustawodawstwa krajowego; wzywa Komisję do podjęcia inicjatywy i nieuzależniania działań na rzecz obniżki zbędnych obciążeń administracyjnych na szczeblu UE od działań podejmowanych przez państwa członkowskie na szczeblu krajowym na rzecz obniżki zbędnych obciążeń administracyjnych wynikających z prawodawstwa krajowego […]".

Moreover:
"[…] 28. Calls on the Member States to extend their efforts to reduce the burden resulting from purely national legislation […]"

Polish translation of the foregoing:
„[…] 28. Wzywa państwa członkowskie do zwiększenia wysiłków w celu zmniejszenia obciążenia wynikającego z czysto krajowego prawodawstwa […]".

d) In the European Parliament resolution of 4 September 2007 on the Single Market Review: tackling barriers and inefficiencies through better implementation and enforcement (2007/2024(INI)) – Single Market Review, OJ C 187E, 24.7.2008, P6_TA(2007)0367" (publication available at: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=uriserv%3AOJ.CE.2008.187.01.0022.01.POL&toc=OJ%3AC%3A2008%3A187E%3ATOC#CE2008187PL.01006701), the European Parliament indicated:
"[…] Reducing administrative burdens
38. Points out that ex-post evaluation of legislation should also be undertaken to ensure that rules are working as intended and to highlight any unforeseen negative effects;
39. Shares the Commission's view that co-regulation and self-regulation can be tools which may complement legislative initiatives in some areas, while respecting the legislator's prerogatives; also stresses the effectiveness of closer cooperation in some areas, making it possible to move towards harmonisation on a voluntary basis;
40. Is of the opinion that inadequate transposition is one of the major barriers to the completion of the Single Market and that Member States are responsible for improving transposition and implementation of EU legislation; welcomes the improvement in national transposition and the aim of the above mentioned Brussels European Council gradually to reduce the target transposition deficit to 1%; calls on Member States to avoid the pitfall of national over-regulation ('gold-plating') […]."

Polish translation of the foregoing:
„[…] 38. Przypomina, że należy również prowadzić ocenę ex post aktów prawnych w celu upewnienia się, że przepisy funkcjonują zgodnie z założeniami, i naświetlenia wszystkich nieprzewidzianych skutków negatywnych;
39. Zgadza się z poglądem Komisji, że współregulacja i samoregulacja mogą być — przy poszanowaniu uprawnień organu prawodawczego — narzędziami uzupełniającymi inicjatywy prawne w niektórych dziedzinach; podkreśla również skuteczność ściślejszej współpracy w niektórych dziedzinach w celu osiągnięcia harmonizacji opartej na dobrowolności;
40. Uważa, że deficyt w zakresie transpozycji aktów prawnych jest jedną z głównych przeszkód w realizacji jednolitego rynku oraz że państwa członkowskie są odpowiedzialne za poprawę transpozycji i wdrażania aktów prawnych UE; z zadowoleniem przyjmuje poprawę transpozycji do prawa krajowego, a także cel ustanowiony przez wyżej wspomniany szczyt Rady Europejskiej w Brukseli, aby docelowy odsetek nietransponowanych aktów prawnych został stopniowo zmniejszony do 1%; wzywa państwa członkowskie do unikania niebezpieczeństwa nadmiernej regulacji krajowej (tzw. „gold plating") […]."

e) The Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, Section VII. Implementation and application of Union legislation indicates:

"[…] 43. The three Institutions call upon the Member States, when they adopt measures to transpose or implement Union legislation or to ensure the implementation of the Union budget, to communicate clearly to their public on those measures. When, in the context of transposing directives into national law, Member States choose to add elements that are in no way related to that Union legislation, such additions should be made identifiable either through the transposing act(s) or through associated documents. 44. The three Institutions call upon the Member States to cooperate with the Commission in obtaining information and data needed to monitor and evaluate the implementation of Union law.

The three Institutions recall and stress the importance of the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents and of the Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents, regarding explanatory documents which accompany the notification of transposition measures […].”

f) In the final document on better law-making: “Commission Staff Working Document, Better Regulations Guidelines of 7 July 2017 SWD (2017) 350”, the Commission indicated:

“[…] 3.6. Implementation support and monitoring

The full benefits of an EU intervention will only be delivered if the policy is implemented and applied appropriately. Similarly, burdens for business may be increased beyond what is foreseen by the legislation if the Member States impose additional obligations (so-called „gold-plating”) or implement the legislation inefficiently. That is why it is essential to take into account implementation and enforcement issues when designing an EU intervention including the impact assessment process and associated stakeholder consultation. It is also important to identify ways to assist Member States in the transposition phase (aligning national legislation with EU legislation) by preparing ‚implementation plans’ (in the form of a SWD) which should also be subject to interservice consultation together with the impact assessment and the proposed intervention. Checks on transposition and assessments of compliance are also key tools used to monitor the correct application of EU legislation. (…)”. (p. 9)

“(…) Anticipate Implementation Problems And Facilitate Transposition: Implementation Plans45

Pursuant to the Interinstitutional Agreement on Better Law-Making4, the European Parliament, the Council and the European Commission have committed themselves to promote greater transparency about „gold-plating”. This should be achieved by providing information in the national transposing measure itself or in complementary materials notified by the Member States to the Commission. The Commission cannot insist that such information be provided”. (p. 34)

“(…) The Link Between EU Law And Member State Transposing Measures: Explanatory Documents63 Why is it important to make the link between EU law and national transposition measures?

The Commission is the guardian of the Treaties. That means that it has to monitor the application of EU law and should be able to identify clearly how a Member State’s legislation links with EU legislation64. The European institutions have agreed on a set of joint political declarations, which indicate how the Commission can be provided with this information on the transposition of directives. The Member States undertake to accompany the notification of transposition measures with one or more so-called explanatory documents, which can take the form of correlation tables or other documents serving the same purpose. The Commission must first justify the need for, and the proportionality of, providing such documents on a case by case basis when presenting its proposals […]”. (pp. 40–41)

2. Capital market

It must be noted that the European Commission considered gold-plating a barrier to the development of the Capital Markets Union (CMU). Already in its first communication on the establishment of the Capital Markets Union (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions titled "Action Plan on Building a Capital Markets Union", SWD (2015) 183 final, SWD (2015) 184 final), the Commission indicated:

„Removing national barriers to cross-border investment

Consistency in application, implementation and enforcement of the legal and supervisory framework is pivotal to the free movement of capital and the creation of a level playing field. Now that a significant number of EU financial provisions are in place to facilitate cross-border investment, the focus must move to effective implementation and enforcement. Barriers may have their origins in national legislation or administrative practice. Some relate to national „gold-plating" of EU minimum rules, while others may arise from divergent application of EU rules. Other barriers stem from national measures taken in areas where there is no EU legislation or where responsibility remains at national level.

For those barriers not addressed through other actions, including through supervisory convergence, the Commission will work with Member States to identify and dismantle them through a collaborative approach. The Commission will:

- *set up a network of 28 national contact points and engage in bilateral discussions on the potential for national action to lift barriers;*
- *develop best practice, scorecards, recommendations and guidelines based on the work within the network.*

The Commission, working with Member States, will map and work to resolve unjustified national barriers to the free movement of capital, stemming, amongst other things, from insufficient implementation or lack of convergence in interpretation of the single rulebook and from national law that are preventing a well-functioning Capital Markets Union and publish a report by the end of 2016."

Polish translation of the foregoing:

„Usuwanie krajowych barier w zakresie inwestycji transgranicznych

Spójność w zakresie stosowania, wdrażania i egzekwowania ram prawnych i nadzorczych ma decydujące znaczenie dla swobodnego przepływu kapitału i stworzenia równych warunków działania. Obecnie, gdy w UE obowiązuje wiele postanowień finansowych mających na celu ułatwienie inwestycji transgranicznych, należy skoncentrować się na ich skutecznym wdrażaniu i egzekwowaniu. **Bariery mogą wynikać z prawodawstwa krajowego lub praktyk administracyjnych. Niektóre odnoszą się do nadmiernie rygorystycznego wdrażania minimalnych przepisów UE, natomiast inne mogą wynikać z odmiennego stosowania przepisów UE.**

Jeszcze inne bariery wynikają z krajowych środków podjętych w dziedzinach, w których nie istnieje prawodawstwo UE lub odpowiedzialność spoczywa na organach krajowych.

Jeżeli chodzi o bariery nieuwzględnione w innych działaniach, w tym w ramach spójności w zakresie nadzoru, Komisja będzie współpracowała z państwami członkowskimi w celu ich określenia i zniesienia dzięki wspólnemu podejściu. Komisja podejmie następujące działania:

- stworzy sieć 28 krajowych punktów kontaktowych i weźmie udział w dwustronnych rozmowach na temat potencjału krajowych działań ukierunkowanych na zniesienie barier;
- opracuje najlepsze praktyki, karty wyników, zalecenia i wytyczne w oparciu o prace prowadzone w ramach tej sieci.

Komisja przy współpracy z państwami członkowskimi zidentyfikuje i podejmie działania mające na celu rozwiązanie problemu nieuzasadnionych krajowych barier utrudniających swobodny przepływ kapitału, wynikających między innymi z niewystarczającego wdrożenia lub braku spójności w interpretacji jednolitego zbioru przepisów i prawa krajowego, które uniemożliwiają sprawne funkcjonowanie unii rynków kapitałowych, oraz opublikuje do końca 2016 r. sprawozdanie".

The Commission's standpoint on the significance and effects of gold-plating in the process of building the Capital Markets Union and on the necessity to prevent it in order to harmonize and simplify the capital market law in Member States was shared by the European Parliament. Namely, in the "European Parliament resolution of 8 October 2020 on further development of the Capital Markets Union (CMU): improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation (2020/2036(INI))", when presenting its opinion on the capital market structure, the European Parliament indicated:

"Observes that the regulation of financial services is a very complex undertaking, existing at international, European and national level; encourages all relevant actors to address this complexity in order to ensure the proportionality of financial regulation, and to remove unnecessary administrative burdens; also notes that proportionality of financial regulation can sometimes lead to increased complexity, and calls on the Commission and the Member States to commit to significant efforts to streamline and harmonise existing and future rules, by phasing out national exemptions as appropriate and by preventing the 'gold-plating' of EU law at national level; highlights that regulations with clear timelines for transition and the phasing-out of existing regimes can build a smooth and steady path to regulatory convergence […]."

3. Conclusion

Analysis of the content of the documents referred to above permits, in our opinion, the interpretation of European Union Institutions' present approach to gold-plating: an approach which has been shaped over years. Namely, gold-plating is a permitted and acceptable practice, but it is not a desirable practice, since it hampers harmonization of EU law by introducing differences to its wording, interpretation, application and enforcement. The harmonization of EU law reflected in its uniform wording, application and effective enforcement mechanisms in all Member States is a tool enabling the establishment and development of the European single market and its individual sectors, e.g. Capital Markets Union. Gold-plating, which contradicts harmonization of the law, might be a barrier to the development of the single market and Capital Markets Union.

Aware of the unfavourable effects of excessive regulations, the European Union has created the legal framework enabling the obtainment of information about the national legal norms adopted in connection with the implementation of directives to national legal systems from Member States. The information, provided in the form of tables (in Poland: correlation table and reverse correlation table), is supposed to ensure the European Union the knowledge of the wording of the implementation and facilitate the monitoring of and check on implementation correctness.

In practice, however, information flow in this channel is quite limited and ineffective. This is because the phenomenon of gold-plating is essentially based on (intended or not) actions of the Member States which implement and apply European laws excessively. It is Member States that are the source of such gold-plating. Hence, it is hard to imagine that Member States would actively inform the Commission about the instances of gold-plating unintended by their authorities or actively counteract the intended instances of gold-plating. Introducing an information channel between stakeholders of individual laws and the European Commission would ensure that the Commission is informed about instances of gold-plating, disregarding their purposefulness, much more efficiently and extensively.

As early as at the stage of legislation, European Union Institutions are obliged to allow for the necessity and methods of its later transposition to national legal systems on the one hand and entitled to check the correctness of its implementation on the other hand. According to "Better Regulations Guidelines" ("Commission Staff Working Document, Better Regulations Guidelines of 7 July 2017 SWD (2017) 350"), the check on implementation correctness is to be conducted in accordance with the following assumptions:

"[…] ***6. Monitoring Implementation Compliance assessment65***

The Commission is committed to more systematic monitoring of the implementation of legislation.66,67 This is done, inter alia, by conducting compliance assessments of both transposition and conformity of Directives. Compliance assessment is two-staged: First, the services carry out a transposition check (completeness), assessing the status of the transposition of the directive concerned. If Directives are not completely transposed,

services propose to launch an infringement procedure under Article 258 or, where a legislative Directive is concerned, in conjunction with Article 260(3) TFEU68. Once the transposition check is finalised and once possible ensuing infringement procedures for failure to communicate transposition measures have been closed, services should immediately start the second stage of the compliance assessment, the conformity check without excluding the possibility of launching conformity checks on parts of the Directive that have already been transposed completely. This check aims at getting a meaningful picture of the conformity of the legislation of the Member State with the Directive. Detailed guidance is provided in the Toolbox […]". (p. 42)

Therefore, it must be borne in mind that incorrect implementation of directives may result in instituting a procedure against a Member State, which means that the effects of excessive regulations (gold-plating) could prove painful for the Member State which applies them.

SELECTED MEMBER STATES VERSUS GOLD-PLATING

Regardless of the approach presented by the European Union, which considers gold-plating permitted, some Member States have taken measures to restrict or exclude the possibility to apply the practice of gold-plating.

The most spectacular example of a country which introduced such regulations is the United Kingdom, which, at the time of its membership in the European Union, prohibited gold-plating, save when its application was to serve its interests.

Protection of UK businesses, in particular from excessive administrative and financial burdens and from deterioration in their competitiveness compared with European Union businesses, was indicated as the reason for avoiding gold-plating.

The already cited "Transposition Guidance. How to implement European Directives effectively" explains the British government's approach to implementation of EU law and specifies directive implementation methods clearly and specifically.

While setting goals for the Guidance, it was indicated as follows:
"[…] The Guiding Principles are aimed at ensuring the UK systematically transposes so that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors. The Principles state that, when transposing EU law, the government will:

- *ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;*
- *wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;*
- *endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;*
- *always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts or going beyond the minimum requirements of the measure that is being transposed. If departments do not use copy-out, they will need to explain to the Reducing Regulation Committee (RRC) the reasons for their choice […]."*

The Guidance is, or rather was (as a result of it leaving the European Union, the United Kingdom will no longer implement the EU legislation from 1 January 2021), addressed to the officials engaged in the process of implementing EU law, in particular directives, to the British law.

The Guidance specified the guiding principles to be followed in the implementation process. In order to fully understand the applied approach and its categorical nature, it is worth familiarizing oneself with the most important ones:

- *"Guiding Principle: ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed". (p. 6)*

This principle was expanded in item 2.2. of the Guidance, according to which:

"2.2. When transposing EU legislation, the aim should be to avoid going beyond the minimum requirements of the measure being transposed. Taking such an approach will ensure that the UK does not create unnecessary legislative

burdens and place UK business at a competitive disadvantage."

Pursuant to item 2.3., derogations from this principle are allowed exclusively in exceptional circumstances which justify them on condition that they serve UK interests:

"2.3 This principle should only be departed from where there are exceptional circumstances which would justify it. Such circumstances would include where going beyond the minimum requirements would serve UK interests by, for example, reducing the regulatory burden imposed on business".

> Guiding Principle: endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts". (p. 7)

This principle was expanded in item 2.10. of the Guidance, according to which:

"2.10 Government policy is that you should not to go beyond the minimum requirements of European Directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and consultation with stakeholders. Any gold- plating, as defined below, must be explained in your impact assessment and will need to be cleared by the Reducing Regulation Committee."

> *"Guiding Principle: always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy-out, they will need to explain to the RRC the reasons for their choice." (p. 11)*

What follows from the foregoing is that the UK prohibited gold-plating except in situations where it served its interests. As a consequence, in the process of implementing EU law to the national law, it was in principle forbidden to go beyond the minimum requirements provided for in the European law. This aim was to be ensured by implementing directives with the "copy out" method.

Even if, in exceptional situations, an implementation going beyond the minimum requirements of EU law was intended, the regulation proposal had to be preceded with a cost benefit analysis, stakeholder consultations, and additionally explained in the regulatory impact assessment. Such a proposal required a previous assessment and acceptance of the Reducing Regulation Committee, i.e. a special committee at the governmental level performing, in particular, regulatory impact assessment.

The Reducing Regulation Committee was established in 2009 in order to improve regulatory scrutiny in the UK, including to reduce regulatory burdens, in particular through an ex ante impact assessment of the draft legal acts in terms of the effects of the regulations contained in them. The Committee is composed of subcommittees, which permits it to pursue an extended activity.

The very establishment and operation of this Committee at the governmental level expresses the British government's endeavour to legislate in a reasonable manner, to legislate only where necessary and to minimize the legal regulations which, prior to their implementation, are assessed by specialists in terms of their effects.

What deserves a mention is the provision saying that the purpose of the aforementioned guidelines, and therefore, in fact, the purpose of acting as part of implementation of laws is

that "UK businesses are not put at a disadvantage relative to their European competitors" even if the respective proposed over-regulation was to serve UK interests. Hence, such gold-plating as would result in British businesses being treated less favourably should not be introduced even if it served the national interests.

Gold-plating was prohibited also in France. It was noticed that excessive regulations reduce the competitiveness of the French economy and make it more difficult for French economic operators to compete in the European market with their counterparts from other countries. The prospect of Brexit and the French economic ambitions related to the consequences of the UK leaving the European Union were not insignificant for the process of combating gold-plating. In July 2017, the then French Prime Minister, Edouard Philippe, in his speech delivered at the opening of the European finance panel at the Europlace Forum in Paris, said:
„Notre objectif, c'est, dans toute la mesure du possible, d'éliminer la surtransposition des directives européennes qui est une spécialité bien française, qui peut d'ailleurs parfois se justifier. Après tout, ne critiquons pas ce qui a été fait. Il y a parfois des moments où la surtransposition peut avoir un intérêt, mais enfin, il ne faut pas que ça devienne une règle. Notre objectif, c'est de faire en sorte d'essayer de revenir à la norme commune européenne, c'est- à-dire au fond à celle qui dicte les conditions dans lesquelles la concurrence peut être effectuée et, après tout, être en concurrence avec les autres places financières sans alourdir la tâche n'est pas forcément une mauvaise idée." This means: "Our aim is, as far as possible, to remove over-regulations of European directives, which is our French specialty and which might be justified at times. We do not criticize what has been done. It might happen that over-regulations are in [our] interest, but this should not be a rule. Our aim is to assure you that we are making endeavours to return to the common European standard, that is, in simplified terms, one that imposes the conditions on which competition is to take place, and competing with other financial centres without introducing additional burdens seems to be a good idea."

Polish translation of the foregoing:
„Naszym celem jest – w zakresie w jakim jest to tylko możliwe – eliminować nadregulacje europejskich dyrektyw, co jest naszą francuską specjalnością, która czasami może być uzasadniona. Nie krytykujmy, tego co zostało zrobione. Zdarza się, że nadregulacje mogą być zgodne z [naszym] interesem, ale to nie powinno stanowić reguły. Naszym celem jest zapewnienie, że staramy się powrócić do wspólnego europejskiego standardu, czyli w uproszczeniu – tego, który narzuca warunki, na jakich ma być prowadzona konkurencja, a konkurowanie z innymi finansowymi miastami bez wprowadzania dodatkowych obciążeń jest raczej dobrym pomysłem".

Already in October 2017, public consultations were announced with the view to identify excessive regulations in the French law. The consultations were announced by the Ministry of Finance (publication available at: https://www.tresor.economie.gouv.fr/Articles/2

017/10/02/consultation-publique-sur-la-simplification-et-la-de-surtransposition-en-matiere-financiere).

They were open to all interested parties. The Ministry of Finance developed and published a form for reporting instances of gold-plating, which, due to its standardized character, certainly facilitated efficient review of the reported contents. According to the statement of the Ministry of Treasury, the consultations in the area of financial market were to cover:
„Toutes les activités financières qui constituent les canaux de transmission du financement de l'économie française, c'est-à-dire les activités bancaires, assurantielles, de gestion d'actifs et les marchés financiers (infrastructures de marchés, entreprises d'investissement, règles applicables aux émetteurs, etc.).” Which means: "All financial activities which constitute a channel of French economy finance transmission, i.e. banking, insurance, asset management, financial markets (market infrastructure, investment firms, rules referring to issuers etc.)".

Polish translation of the foregoing:
„Wszystkie aktywności finansowe, które stanowią kanał transmisji finansów francuskiej gospodarki, tj. bankowość, ubezpieczenia, asset management, rynki finansowe (infrastruktura rynku, firmy inwestycyjne, zasady odnoszące się do emitentów i inne)".

Finally, in 2018, "Le loi portant suppression de sur-transpositions de directives européennes en droit français" (publication available on: https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000037460424/) was enacted based on identified examples of gold-plating and introduced a general prohibition of gold-plating and performed deregulation.

The Council of Ministers issued a press release (publication available on: https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000037460424/) in connection with the works related to the aforementioned Act on 3 October 2018, which summarized the hitherto works and presented assumptions for the future.

The press release pointed that:
"The Minister for Europe and Foreign Affairs and the Minister to the Minister for Europe and Foreign Affairs, responsible for European affairs, have presented a draft law to abolish over-transpositions of EU directives under French law. This project is part of the Government's efforts to simplify administrative simplification and control of normative production in order to alleviate constraints on business competitiveness, the daily lives of citizens and the efficiency of public services.

To this end, the Prime Minister signed a circular on 26 July 2017 on the control of the flow of regulatory texts and their impact. It has set the principle of abolishing or, if it is not possible, simplifying at least two existing standards for the adoption of any new regulatory standard. In principle, this circular outlawed any transposition measure that went beyond the minimum requirements of a directive. It strictly supervised the exemptions and provided that inventory work would be carried out on existing over transpositions.

The Government is paying particular attention

to the phenomenon of over-transposition of the European Union directives, which consists of adopting national standards that are more stringent than those which are strictly the result of The European directives, without this being justified by the desire to achieve, at the national level, more ambitious targets than those set at European level in the area concerned. This may be the case, for example, where the law that transposes a directive into domestic law does not use the possibility of a waiver or exemption provided by it. The result is the accumulation of standards and formalities that unjustifiably penalize France's competitiveness and attractiveness, where our European partners will have made less restrictive choices for their businesses and citizens. In order to combat these over-transpositions, the Government has carried out an unprecedented work to identify and analyse the appropriateness of all national measures for transposing the directives that govern the internal market of the European Union.

At the end of this inventory, the Government proposes to eliminate certain formalities and standards deemed unjustified or penalizing, in the areas of consumer law, corporate law, financial services, public procurement, electronic communications, environmental law, transport, agriculture and culture. As a result, medium-sized enterprises will benefit from the annual financial statement relief provided by the 2013/34/EU Directive of 26 June 2013: they will now be able to establish an abbreviated income statement and publish an abbreviated balance sheet and annex, which will reduce their administrative burden and enable them to better protect their strategic financial data.

[…]

Beyond the work carried out, under this bill, on the stock of the directives in force, this process of administrative simplification and normative relief will continue, in the future, within the framework of the transposition of the new directives to be adopted by the European Union.

The Government intends to outlaw, in the bills it will submit to Parliament, measures of over-transposition that are not justified by an identified national priority".

The above passage reveals clearly that gold-plating was essentially prohibited in France. Its permissibility was limited to exceptional situations, which are justified by identified national priorities.

The issue of gold-plating was noticed also in the Federal Republic of Germany. The German Federal Government expressed its standpoint as to gold-plating in the reply given to the 19th German Bundestag to the "minor question asked by Members of Parliament Carl-Julius Cronenberg, Michael Theurer, Renata Alt and other Members of Parliament and by FDP (Letter no. 19/22317 – "Gold-Plating" procedure) during the implementation of European legal acts into the legal systems of individual Member States"[1], by pointing the following after the authors of the question:

> "Additional bureaucratic burdens are a nuisance to most economic operators and citizens. Brussels or the European Union are often perceived as the cause of such excessive regulations. However, in many cases this is only partially true because during the implementation of EU Directives into the law of the respective country (Member State) the

> legislature inserts additional national regulations. This way the implementation of the Directive is overfulfilled by means of regulations which were not stipulated therein. This procedure is designated as "gold-plating". There are both active gold-plating, where the regulations go beyond the minimum standards stipulated in the Directive, and passive gold-plating, where the simplification possibilities stipulated in the Directive are not applied."

(after: "Limitations of the gold-plating procedure during implementation of Directives and introduction of obligatory regulatory impact assessments to the legislative process", Subdivision Europe, Department Europe, project PE 6 – 3000 – 142/15 of 23 December 2015)

In the context of the principle of subsidiarity, the implementation of Directives by Member States on the national level in different manners seems to be in compliance with law. But if excessively bureaucratic regulations are enacted under the guise of an EU Directive, gold-plating constitutes a threat to the reputation of the EU among its citizens. A convoluted tangle of regulations is created for economic operators and consumers, which disturbs the equal opportunities in the internal market. Such forms of distortion of competition promote protectionist interests, which are in contravention to the functioning of the internal market. Examples can be found in the labour market and in social policy. For example, the Directive on Posting of Employees was not implemented precisely (on a 1:1 basis) although CDU, CSU and SPD espouse such a manner of its implementation in several sections of the coalition agreement […]."

As part of the EU ex ante review procedure, the National Regulatory Control Council (NKR) has reviewed the EU legislative proposals and their cost estimates since the beginning of 2016. Because approx. 50% of costs of the follow-up originates from Brussels, this actually affects Germany. In this context NKR states that "the quality of the EU estimates of follow-up costs leaves much to be desired" (after: "Bürokratieabbau. Bessere Rechtsetzung. Digitalisierung", p. 5, no. 10; publication available on: https://www.normenkontrollrat.bund.de/resource/blob/267760/444032/0277432480e047%20ede4%20be336b9fbf5f83/2017-07-12-nkr-jahresbericht-2017-data.pdf). In the case of regulatory proposals whose estimated annual cost of compliance with the laws in the whole of Europe exceeds EUR 35 million, the Federal Government must prepare its own estimation of follow-up costs for Germany in the future (after: https://www.normenkontrollrat.bund.de/nkr-de/ueber-uns/gesamtkonzept) […]". It seems, though, that the reply given by the Federal Government to question no. 3 below is crucial:

> "Does the Federal Government intend to introduce an «Anti-Gold-Plating Act» or a different Act with the same purpose (to eliminate regulations going beyond the minimum requirements of EU law and imposing excessive burdens on the economic operators in question)?".

The reply points that:

> "The coalition agreement between CDU, CSU and SPD provides that EU law shall be implemented on a 1:1 basis (line 2910). Therefore, a separate Anti-Gold-Plating Act is not anticipated."

The above means that the "copy out" method was adopted in Germany as the primary method of implementation of Directives. Gold-plating was not formally prohibited in Germany but it is eliminated in fact, by not going beyond the content of the Directives being implemented in the process of their implementation.

In addition, the information regarding the activities aiming to counteract gold-plating taken by Austria contained in the reply are also noteworthy.

> Namely, the reply points that: "(…) «Anti-Gold-Plating Act 2019» entered into force in Austria on 29 May 2019" (Federal Journal of Laws I no. 46/2019). The Anti-Gold-Plating Act intends to limit regulations that go beyond the minimum requirements of EU law and impose excessive burdens on the economic operators in question.
>
> This concerns, in particular, notification, reporting, authorization and control obligations. Thanks to that Federal Act, amendments for example to the company law and changes in the financial sector will be introduced. This way the legislature intends to prevent subsequent cases of gold-plating in the future. This way the item of the Austrian Government's agenda for the period 2017–2022 is implemented. In particular, the thematic area "Labour" provides that there will be no gold-plating during the upgrade of the labour law and the implementation of EU law (after: https://www.oeh.ac.at/sites/default/files/files/pages/regierungsprogramm_2017-2022.pdf, p. 146). Furthermore, the "Anti-Gold-Plating Act" constitutes the first step also in the process of preparation of a "Better Law-making Strategy", implemented by the Austrian Federal Government.

POLAND'S RELATION TO GOLD-PLATING

1. GOLD-PLATING AS A BARRIER TO DEVELOPMENT OF CAPITAL MARKET IN CAPITAL MARKET DEVELOPMENT STRATEGY

In November 2019, the Council of Ministers adopted the Capital Market Development Strategy ("Strategy"). The Strategy describes, among others, the present state of the capital market in Poland, the problems of this market and the barriers to its development. Moreover, measures aimed to eliminate the identified barriers and to develop the market were planned. Such measures were to be taken by the Finance Minister's Representative for the Implementation of the Capital Market Development Strategy appointed for this purpose, thematic working parties composed of organizations associating market participants in cooperation with the Ministry of Finance and the Polish Financial Supervision Authority (PFSA).

The Strategy points, among others, to gold-plating as one of the regulatory barriers to the capital market development.

The Strategy recommends taking remedial measures in the field of gold-plating by avoiding it:
"[…] Therefore, we should make all effort that the legislative solutions adopted in the Polish legislation do not impose an excessive burden on Polish entities, in particular in comparison to entities from other Member States, in which the corresponding transposition of the EU regulations into the national law is characterized by a literal approach to individual legal acts […]."

As regards the already transposed EU law acts, the Strategy recommends the identification of gold-plating cases and the elimination thereof from the Polish legal system, by stipulating the following:
"[…] Avoidance of gold-plating in national regulations. During the process of implementation of EU regulations into the national law, in certain cases stricter or farther-reaching solutions were adopted than resulting literally from the given EU legal act (so-called gold-plating), which led to occurrence of additional burdens on the part of stakeholders of the Polish market.
Thus, it seems reasonable that the Ministry of Finance together with the PFSA should establish a working party to conduct consultations with entities from all capital market sectors for the purpose of identifying the existing loopholes and gold-plated provisions. Any identified barriers should be eliminated or corrected in stages (the most important indicated barriers over the first 6 months from the establishment of the party, the remaining ones by the end of 2020) […]."

In addition, the Strategy contains guidance for implementation of EU law acts into the Polish law in the future:
"[…] Furthermore, each time when implementing new EU regulations into the Polish law or preparing national laws related to the capital market, an analysis of costs and benefits of the proposed amendments must be performed, while in the cases where the PFSA or the Government propose an implementation of stricter regulations than the EU norms, the proposed provisions shall be consulted with the entities which are to be bound by them [...]." (p. 39)

The establishment of a working party for gold-plating was indicated as the third, while avoidance of gold-plating as the twenty-second "most important measure planned as part of CMDS" (Appendix 8 to the Strategy).

2. GOLD-PLATING REGULATION IN THE POLISH LEGAL SYSTEM

The Act of 8 August 1996 on the Council of Ministers, which contains regulations concerning legislative initiative, does not include provisions concerning methods of implementation of EU law into the Polish legal system. Similar regulations are not included also in the Regulation, issued pursuant thereto, of the Prime Minister of 20 June 2002 on the "Principles of Legislative Technique", which specifies the manner of structuring of Polish law acts, in particular Acts and Regulations.

These topics were regulated in the Resolution no. 190 of the Council of Ministers – Rules of Procedure of the Council of Ministers of 29 October 2013 ("CM Rules of Procedure"), i.e. an act with a lower rank than an Act and a Regulation.

Pursuant to § 30 sec. 2 of the CM Rules of Procedure:
"A draft Act aiming to implement European Union law may contain provisions going beyond this purpose exclusively in particularly justified cases. In such an event, the requesting authority shall append the draft with a tabular statement of the proposed provisions of the Act that go beyond the aim of implementing the European Union law along with the explanation of the necessity to have them included in this draft, hereinafter referred to as the «reverse correlation table»."

The interpretation of this provision leads to the conclusion that gold-plating is permitted and acceptable in Poland. This assertion is not contradicted by the alleged limitation of its permissibility exclusively to "particularly justified cases." The concept of "particularly justified cases" is evaluative, extremely extensive and unspecific (general clause), which is the reason why it may cover a whole spectrum of various events depending on situation. In addition, it is not oriented towards achievement of a specific purpose. Such an approach means that the assessment whether going beyond the purpose of the Directive is "particularly justified" in specific circumstances is at the exclusive discretion of the regulator and supervisor, without any specific criteria and without the necessity to take into account purposes that are determined even generically, whose superiority or protection would justify going beyond the framework of EU regulations.

In our opinion, the limitation of permissibility of going beyond the purpose of a Directive exclusively to "particularly justified cases" is a purely theoretical, and consequently illusory, limitation.

In this context, it seems particularly important to extend the definition of gold-plating included in the Strategy. Its current material scope excludes the possibility to regard such provisions as gold-plating that go beyond the purpose of the Directive being implemented due the occurrence of "particularly justified cases", i.e. provisions of the Polish law implemented "on the occasion" of Directive implementation but without equivalents (legal bases) in its content.

To conclude, it must be stated that the issue of gold-plating in Poland is regulated at present in two acts issued by the Council of Ministers: the CM Rules of Procedure and the Strategy. Based on their literal content, an impression may be gained that the purposes of these regulations are inconsistent and can be even regarded as mutually exclusive to a certain extent. The CM Rules of Procedure permits

gold-plating (§ 30 sec. 2), while the Strategy orders to avoid and eliminate it (see Section III).

In order to present the full regulation concerning the methods of EU law implementation into the Polish law, we are drawing attention to the provision of § 30 sec. 1 of the CM Rules of Procedure, stipulating the following:

"Where a draft Act or a draft Regulation aims to implement a European Union law, the requesting authority shall additionally append the following to the draft:

1) a tabular statement of the provisions of the Directive or Directives the implementation whereof is the purpose of the draft, and the designed provisions of the Polish law, hereinafter referred to as «correlation table»;

2) an explanation specifying the causes of entry of the Act or Regulation or some of their provisions into force within the respective time-limit and containing information whether the proposed time-limit of entry into force takes into account the requirements for time-limits of implementation of a Directive or Directives, hereinafter referred to as «explanation for entry into force time-limit»."

Therefore, the aforementioned provisions cannot constitute clear and specific guidelines concerning methods of EU law implementation into the Polish law in terms of scope, content, manner or time-limit of implementation. They amount to the obligation to satisfy formal requirements being preparation of tables and submission of explanations, at the same time without developing the subject-matter rules of conduct of government officials involved in the implementation process.

IDENTIFIED EXAMPLES OF GOLD-PLATING

In cooperation with its members, CFA Society Poland has identified various cases of gold-plating in Polish capital market law. Due to their extensive nature, these identified examples of gold-plating are presented in a table forming an appendix to this report. The list included in the appendix is by no means exhaustive. It contains only a handful of examples of gold-plating, of which there are many more in Polish capital market regulations, let alone in the Polish legal system.

In identifying these examples, we applied the definition included in Section III. For the readers' convenience, here it is again: "Gold-plating describes a process by which a Member State which has to transpose EU Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation." Moreover, we adopted a broader understanding of gold-plating, like in the broadly construed definition included in the Strategy (p. 77) discussed herein, encompassing also gold-plating that arises not merely from the provisions of law but from the practice of the authorities in the application of the law.

The cases of gold-plating presented herein only form a list of examples and are by no means exhaustive. Nevertheless, these are examples that are often harsh for the market participants and result in their considerably smaller competitiveness and limited possibilities of action in comparison with their counterparts from other Member States. The appointment of a team dedicated to the identification, description, presentation of examples of gold-plating to legislators and market participants would make it easier to accurately determine the scale and essence of the phenomenon and to eliminate it.

POSTULATES

The cases of excessive regulations specified in Section VII prove that gold-plating is present in the provisions of Polish capital market law. Similarly to the Strategy, CFA Society Poland supports the initiative to eliminate excessive regulations from the Polish law. However, the deregulation itself of the already existing cases of gold-plating is not sufficient for preventing the application of this practice in the future. Therefore, it is important to take up initiatives that would lead to the elimination of the practice of gold-plating in Poland in the future.

For this purpose, a uniform definition of gold-plating should be introduced in the first place. The definition used by the European Commission seems to be the most reasonable one:

> "Gold-plating describes a process by which a Member State which has to transpose EU Directives into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on the addresses of its national law that go beyond the requirements or standards foreseen in the transposed EU legislation."

We regard it desirable to introduce a general gold-plating prohibition together with a precise specification of exceptions that make it possible to depart therefrom. These exceptions should be specified on a directional basis, serve the achievement of specific goals, protection of specified (even generically) values, benefits for defined groups of stakeholders, e.g. reduction of regulatory and financial burdens, increase in competitiveness of Polish businesses, benefits for Polish businesses or Polish economic interests taking into account the necessity to ensure an appropriate level of protection to investors, or other transparent goals.

It is crucial that the information about the occurring exceptions and the application of gold-plating is publicly available in a clear and transparent manner along with the purposes they are supposed to serve. Such a situation would make it possible to perform a periodic assessment whether the application of gold-plating in a specific case was justified, whether it achieved the assumed goals and whether it is still necessary to maintain it.

For the purpose of preventing gold-plating, it would be reasonable to apply the already existing legal tools to a broader extent by their intensification or by the extension of their scope of application. In our opinion, for the purpose of diagnosing cases of excessive regulations already at an early stage of normative act preparation, the scope of the examination, as part of the regulatory impact assessment (RIA), of draft normative acts serving the purpose of implementing the EU legislation should be extended by issues related to the introduction of excessive regulations (introduction of provisions to an extent unrequired by the European Union or broader than required).

It would be also reasonable to perform a separate regulatory impact assessment with respect to excessive regulations in particular as regards the comparison to the solutions applied in other Member States, impact on entrepreneurship and competitiveness, introduction of administrative burdens and the

related costs, satisfaction of the prerequisites for introducing excessive regulations, purposes of their introduction, potential benefits from regulations.

For this purpose, it would be reasonable also to reinforce the RIA Coordinator by establishing a standing team of professional and experienced advisors on capital market whose role would be to participate in performing and preparing the regulatory impact assessment of the draft normative act at the assessment preparation stage (i.e. before including the act in the list of legislative works), in particular as regards the comparison to the solutions applied in other Member States, avoidance of excessive regulations, impact on entrepreneurship and competitiveness, introduction of administrative burdens and the related costs, satisfaction of the prerequisites for introducing excessive regulations, purposes of their introduction, potential benefits from regulations.

It seems necessary also to engage stakeholders in the process of assessing the effects of the planned regulations at a definitely earlier stage of the legislative process by conducting consultations of the regulatory impact assessment with the stakeholders already at the stage of RIA preparation by the RIA Coordinator before submitting the draft normative act to the list of legislative works.

The fact is that stakeholders are allowed to participate in public consultations of draft legal acts upon their submission for consultations. However, the practice shows that consultations concern legal acts with already developed assumptions and contents and are not very effective, basically due to the approval of the act's content by the supervisor and the necessity to finish the legislative works urgently. Such consultations also do not apply to all legal acts and in the case of some of them the time-limit for submitting comments is so short that it makes it difficult to do that. Shifting the burden of consultations and approvals to an earlier stage, being preparation of assumptions of a normative act and contents of legal norms, would result in the pre-approval of the acts published in the list.

In addition, not all stakeholders are informed about the pending works and the draft legal acts. It seems reasonable to inform them publicly about the pending works on the legal acts.

An approach that involves market professionals and practitioners in the law-making process ensures that the legal norms contain practical aspects related to their application, which undoubtedly exerts a positive influence not only on compliance with law and the degree of conformity with law in the process of its application but also on the uniformity of its application and interpretation. It makes it possible also to balance the interests of different groups of stakeholders, to avoid creating successive barriers to market development and to protect the Polish business. Last but not least, it efficiently increases the level of respect for the law created in such a manner.

Regardless of the foregoing, in order to eliminate gold-plating practices (including gold-plating resulting from the requirements and norms applied in real life to market participants), it would seem reasonable to introduce clear and binding guidelines for the public officials engaged in the EU law implementation process as regards the rules and methods of transposing the EU legislation to Polish law, with "copy and paste" introduced as the main implementation method.

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1 Reply submitted on behalf of the Federal Government by letter of the Federal Ministry of the Economy and Energy of 24 September 2020, no. 19/22840.

EXAMPLES OF GOLD-PLATING (PREPARED BY MEMBERS OF CFA SOCIETY POLAND)

I. Examples of gold-plating submitted to the Ministry of Finance

No.	Column I Wording of a provision of Polish law forming a manifestation of gold-plating (with an indication of the pertinent legal act and editorial unit).	Column II Wording of a provision of EU law with an indication of the pertinent legal act and editorial unit that has been transposed into the Polish legal system or interpreted in a manner resulting in gold-plating.	Column III Legal act by which the provision indicated in column I has been transposed into the Polish legal system.	Column IV Explanation of the manifestation of excessive regulation in the case at hand.
1	**Article 18(3)-(6) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "3. The amount of the company's remuneration for the management of an open-end investment fund or a specialized open-end investment fund depends on the type of the investment policy pursued by the fund or the sub-fund and the investment risk. 4. The amount of remuneration for the management of an open-end investment fund or a specialized open-end investment fund should be set in such a	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts, which: 1) within the scope of its regulation, implements Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.06.2014, p. 349, OJ L 257, 28.08.2014, p. 1, OJ L 175, 30.06.2016, p. 8, OJ L 188, 13.07.2016, p. 28, OJ L 273, 08.10.2016, p. 35, and OJ L 64, 10.03.2017, p. 116);	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented.

	manner as to ensure the protection of interests of investment fund participants and the competitiveness of investment funds. 5. The articles of association of an open-end investment fund or a specialized open-end investment fund may not provide for charging the fund's assets with costs associated with the sale and repurchase of participation units. 6. The minister in charge of financial institutions, having consulted the Authority, shall determine, by way of regulation, the maximum amount of the company's fixed remuneration for the management of an open-end investment fund or a specialized open-end investment fund, guided by the need to ensure the competitiveness of investment funds, in consideration of the financial standing of investment fund companies."		2) within the scope of its regulation, implements Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (OJ L 87, 31.03.2017, p. 500); 3) serves the application of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.06.2014, p. 84, OJ L 270, 15.10.2015, p. 4, and OJ L 175, 30.06.2016, p. 1); 4) serves the application of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending	

			Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1); 5) serves the application of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.06.2016, p. 1, and OJ L 137, 24.05.2017, p. 41).	
2	All provisions of the Regulation of the Minister of Finance of 13 December 2018 on the Maximum Amount of the Company's Fixed Remuneration for the Management of an Open-End Investment Fund or Specialized Open-End Investment Fund, issued on the basis of the statutory delegation provided for in Article 18(6) of the Act on Investment Funds and Management of Alternative Investment Funds.	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Regulation issued on the basis of the statutory delegation arising out of Article 18(6) of the Act on Investment Funds and Management of Alternative Investment Funds, which was added by the Polish regulator when MIFID II was implemented. There is no provision in MIFID II that would justify the need for the regulator to define the maximum amount of the management fee. The purpose of MIFID II is to ensure greater market transparency and to fully inform clients about

				the extent and amount of fees to be paid in connection with investing money in investment funds. Although the very idea of taking steps to reduce management fees seems justified and favourable for clients, imposing its amount in the form of a regulation is not justified in the light of MIFID II.
3	**Article 24(2b) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "Amendments to the articles of association of an open-end investment fund or a specialized open-end investment by adjusting the company's fixed remuneration for managing the fund to a maximum amount specified in accordance with regulations issued pursuant to Article 18(6) does not require obtaining a permit.	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented.
4	**Article 32a(7)(2)(b) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "7. The entity referred to in Article 32(2), in connection with the provision of brokerage services related to the sale and	Article 24(9) paragraph 3 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instrument amending Directive 2002/92/EC and Directive 2011/61/EU ("MIFID II"):	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	The provision of Article 32a(7)(2)(b) of the Act is an excessive regulation insofar as it requires that the source of the payment obligation or costs is a legal regulation in a situation where the pertinent provision of EU law does not introduce any such distinction.

	repurchase of units in investment funds or participation titles in foreign funds and open-end investment funds with their registered office in EEA countries or in connection with the provision of investment advisory services may not accept or transfer any cash benefits, including fees or commissions, or any non-monetary benefits, except for: 2) cash or non-cash benefits accepted or transferred to a third party that are necessary for the provision of the service to the client, in particular: b) taxes, public levies and other fees the payment of which arises out of legal regulations."	"The payment or benefit which enables or is necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which by its nature cannot give rise to conflicts with the investment firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients, is not subject to the requirements set out in the first subparagraph."		
5	**Article 32a(7)(3)(c) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "3) cash benefits and non-cash benefits other than those specified in items 1 and 2 if: a) they are accepted or transferred in order to improve the quality of the	Article 24(9) paragraphs 1 and 2 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instrument amending Directive 2002/92/EC and Directive 2011/61/EU ("MIFID II"): "Member States shall ensure that investment firms are regarded as not fulfilling their obligations under Article 23	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	The provision of Article 32(7)(3)(c) makes the fulfilment of the information obligation referred to in Article 24(9) paragraph 2 of MIFID II a necessary condition for the transfer or receipt of benefits other than those specified in items 1 and 2 of Article 24(9) paragraph 1 of MIFID II and items 1 and 2 of Article 32a(7) of the Act, in a situation where MIFID II does not make the fulfilment of such information obligation a condition for the

	service provided by the entity referred to in Article 32(2) in favour of the client, b) their acceptance or transfer does not exert an adverse impact on the operation of the entity referred to in Article 32(2), in a reliable and professional manner, in compliance with the principles of fair dealing and in accordance with the best interests of such entity's client, c) information about the benefits, including their essence and amount, or, if the amount of such benefits cannot be estimated, about the manner of determining their amount, has been provided to the client or prospective client in a reliable, accurate and comprehensible manner prior to the commencement of provision of the service; this condition shall be deemed satisfied also in the event of providing the client or potential client with information in standardized form."	or under paragraph 1 of this Article where they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit in connection with the provision of an investment service or an ancillary service, to or by any party except the client or a person on behalf of the client, other than where the payment or benefit: (a) is designed to enhance the quality of the relevant service to the client; and (b) does not impair compliance with the investment firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients. The existence, nature and amount of the payment or benefit referred to in the first subparagraph, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary		acceptance or transfer of the benefit, requiring only its provision in favour of the client.

		service. Where applicable, the investment firm shall also inform the client on mechanisms for transferring to the client the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service."		
6	**Article 32b(1) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "1. The entities referred to in Article 32(1)(2) and (3) and Article 32(2) are required to provide clients, prior to the acceptance of an order to purchase participation units in an open-end investment fund or a specialized open-end investment fund, or participation titles in a foreign fund or an open-end investment fund with its registered office in an EEA country, or prior to the provision of investment advisory services, with a list of investment funds with which they have entered into an agreement for the acceptance and forwarding of orders to purchase or sell participation units or titles, or an agreement for the	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented.

	intermediation in the sale or repurchase of participation units or titles."			
7	**Article 32b(2) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "2. The entities referred to in Article 32(1)(2) and (3) and Article 32(2), are required to provide the company, in the manner and within the timeframe agreed with the company, with information and documents specifying activities aimed at improving the quality of the service provided to the participant or potential participant, as respectively referred to in: 1) Article 83d(1)(3)(a) of the Act on Trading in Financial Instruments – in the case of entities referred to in Article 32(1)(2) and (3), 2) Article 32a(7)(3) – in the case of entities referred to in Article 32(2) – rendered by these entities in favour of participants or potential participants of a fund whose participation units are sold through such entities, along with an indication of the amount of costs	Article 11(4) of Commission Delegated Directive (EU) 2017/593: "4. Investment firms shall hold evidence that any fees, commissions or non-monetary benefits paid or received by the firm are designed to enhance the quality of the relevant service to the client: (a) by keeping an internal list of all fees, commissions and non-monetary benefits received by the investment firm from a third party in relation to the provision of investment or ancillary services; and (b) by recording how the fees, commissions and non-monetary benefits paid or received by the investment firm, or that it intends to use, enhance the quality of the services provided to the relevant clients and the steps taken in order not to impair the firm's duty to act honestly, fairly and professionally in accordance with the best interests of the client."	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	The provision of Article 32b(2) of the Act is an excessive regulation insofar as: It requires providing the investment fund management company with information and documents specifying activities aimed at improving the quality of the service provided to the participant or potential participant to a greater extent than the list referred to in Article 11(4)(a) of Commission Delegated Directive (EU) 2017/593; It assumes that payment for activities aimed at improving the quality of services will be made following their provision and on the basis of the costs already incurred, in a situation where Article 11(4)(b) of the Directive also mentions the benefits "that it [the company] intends to use."

	incurred in connection with the provision of such services in the respective period."			
8	**Article 32b(3) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "3. The company may, for the benefit of the entity referred to in Article 32(1)(2) or (3) or Article 32(2), effect payments to the extent that they constitute remuneration for the activities performed by such entities, as referred to in sec. 2, if the legitimacy of such payments has been verified by the company and confirmed on the basis of information and documents provided to the company in compliance with sec. 2."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented. MIFID II does not require the investment fund management company to verify and does not make the possibility of making a payment to a distributor contingent on the prior verification of evidence by the investment fund management company. In accordance with Article 11(4) of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits – payment is supposed to be made in order to improve the quality of services provided to the client, while investment firms

				are required to be in possession of evidence that payments have been made in fulfilment of such purpose; the types of evidence to demonstrate such purpose are specified in Article 11(4)(a) and (b) of the said Directive;
9	**Article 32b(4) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "4. The company's management board presents to the supervisory board, at least once per year, a report on the performance of the obligations referred to in sec. 3."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented.
10	**Article 83a(1)–(4) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "1. The articles of association of an open-end investment fund should specify the categories of participation units: 1) sold by the fund directly; 2) sold by the fund through the entities referred to in Article 32(1) and (2). 2. The articles of association of an open-end investment fund shall specify the	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing MIFID II. Provisions added by the Polish regulator when MIFID II was implemented.

	maximum amount of the company's fixed remuneration for the management of the fund in respect of the participation unit category referred to in Article 1. 3. The amounts transferred to the intermediaries in the sale or repurchase of participation units referred to in Article 32(1) and (2) in connection with the activities performed by such entities with a view to improving the quality of the service provided to a participant or potential participant in an open-end investment fund may be taken into account only when determining the company's fixed remuneration for managing the fund that is charged against the fund's assets allocated to the participation unit category referred to in sec. (1)(2). 4. The provisions of Article 158 shall apply accordingly to the participation unit categories referred to in sec. 1."			
11	**§ 24(1) and (4) of the Regulation of the Minister of Finance, Investment and Development of 3 October 2019 on the Conduct of Entities Acting as**	Article 16(6) and (7) (paragraphs 1–3) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instrument	ND.	The Polish legislature has extended the obligation to record telephone conversations and electronic communication with clients to all services provided by entities subject to the

	Intermediaries in Selling and Repurchasing Participation Units and Participation Titles and Providing Investment Advice on Such Instruments: "The entity shall record telephone conversations a client in connection with the services provided, and shall prepare reports or notes on, or recordings of, conversations conducted in the direct presence of a client or prospective client in connection with such services. […] 4. The obligation referred to in sec. 1 also includes recording telephone conversations and saving electronic correspondence related to activities that might result in the provision of a service by the entity, even if such service is not rendered as a result of such conversations or communication. The obligation to record telephone conversations and to save electronic communication applies to devices used by the entity and, provided that the entity has approved for use any personal	amending Directive 2002/92/EC and Directive 2011/61/EU (MIFID II): "6. An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation (EU) No 600/2014, Directive 2014/57/EU and Regulation (EU) No 596/2014, and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or prospective clients and to the integrity of the market. 7. Records shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders. Such telephone conversations and electronic communications shall also include those		requirements of the Regulation referred to in column I (including the investment advisory service that may be provided by such entities) in a situation where MIFID II permitted the limitation of this obligation only to the service of executing orders on own account, accepting and transmitting orders and executing client orders. Bearing in mind the fact that this legal regulation also includes the obligation to record conversations that might result in the provision of a service – in practice, it imposes an obligation on regulated entities to record all telephone conversations with clients. However, this may have been limited solely to the 3 services specified in MIFID II.

	devices used by persons employed by the entity, also such personal devices."	that are intended to result in transactions concluded when dealing on own account or in the provision of client order services that relate to the reception, transmission and execution of client orders, even if those conversations or communications do not result in the conclusion of such transactions or in the provision of client order services. For those purposes, an investment firm shall take all reasonable steps to record relevant telephone conversations and electronic communications, made with, sent from or received by equipment provided by the investment firm to an employee or contractor or the use of which by an employee or contractor has been accepted or permitted by the investment firm.		
12	**Article 4(1) in conjunction with Article 4(6) of the Act of 11 April 2003 on Agricultural System Formation:** "1. If an agricultural property is acquired as a result of: 1) the execution of an agreement other than a purchase agreement, or	NO LEGAL BASIS IN EU LAW.	NO IMPLEMENTING LEGISLATION.	Pursuant to Article 4(1) in conjunction with Article 4(6) of the Act of 11 April 2003 on Agricultural System Formation, if a commercial company that is the owner or perpetual usufructuary of an agricultural property with an area of at least 5 ha intends to issue shares, the National Agricultural Support Centre (KOWR) is

	2) a unilateral legal transaction, or 3) a ruling of a court or public administration authority or a ruling of a court or enforcement authority issued on the basis of regulations on enforcement proceedings, or 4) any other legal transaction or legal event, in particular: a) usucaption of an agricultural property, inheritance or specific bequest the object of which is an agricultural property or a farm, b) demerger, transformation or merger of commercial companies – the National Centre acting for the benefit of the State Treasury may submit a declaration on the acquisition of such property for the payment of the price for such property. […] 6. The provisions of sec. 1–3, sec. 4(2)(b)–(g), Article 3(10) and (11) and Article 3a(3)–(6) shall apply accordingly to the acquisition of shares and stocks in a commercial law company that is the owner or perpetual usufructuary of an			entitled to purchase the Offered Shares for a price equal to the issue price. This means that the issuer, having completed the Public Offering, having collected the interest of institutional investors (book-building), having collected subscriptions for its shares by retail investors and having accepted payments from investors, must apply to the KOWR for a decision regarding the exercise of its right of first refusal. In this situation, it is impossible to market allotment certificates as their marketability would be limited. In accordance with the provisions of the Act on Agricultural System Formation, the company is required to notify the KOWR about the possibility of exercising its right to purchase the Offered Shares promptly after the registration by the district court of the share capital increase by way of an issue of the Offered Shares. This situation leads to the actual freezing of investors' funds for a period of several weeks until the court registers the increase in the share capital plus the 2 months resulting from the right granted to the KOWR.

	agricultural property with an area of at least 5 ha or of agricultural properties with a total area of at least 5 ha, except where the buyer of such shares or stocks is the State Treasury. In the event of the acquisition of shares or stocks in such company as a result of an increase in the share capital, the notification referred to in sec. 5 shall be made by the company following the entry of such increase in the register of commercial undertakings kept in compliance with the regulations on the National Court Register."			The KOWR may exercise its right to purchase the Offered Shares within two months from the date of receipt of such notification from the company. If the company fails to notify the KOWR, it runs a risk that the issue of the Offered Shares will be invalidated. If the KOWR, as a result of such notification, exercises its right to purchase all or only some of the Offered Shares in compliance with Article 4(1) in conjunction with Article 4(6) of the Act on Agricultural System Formation, then investors who will become the owners of the Offered Shares for which the KOWR has submitted a declaration of their purchase to the company will receive from the KOWR, in exchange for the transfer of such Offered Shares to the KOWR, an amount equal to the product of the issue price and the number of the Offered Shares in respect of which the KOWR has exercised its right of purchase. This amount may be lower than the investor's total expenses for the subscription for the Offered Shares, because such expenses may include, in addition to the issue price, also the purchase price for the Unit Subscription Rights, which applies, for instance, to investors who were not

				shareholders of the Company as at the Subscription Right Date and purchased their Unit Subscription Rights on the secondary market. Moreover, the Act on Agricultural System Formation does not specify the manner of identification of the shares or shareholders in respect of which the KOWR intends to partially exercise its right to purchase the shares. As a consequence, it is impossible to rule out that the adopted method of determining which of the Offered Shares have been purchased by the KOWR will be effectively challenged in the future. Among the large companies listed on the Warsaw Stock Exchange and companies that intend to apply for admission and introduction to trading, it would be very difficult to find any that do not own or hold in perpetual usufruct any agricultural property with an area of at least 5 ha. Managing this kind of risk before a Public Offering may be difficult due to the company's inability to sell agricultural land or because the process might take too long. It

				should be added that in the case of the sale of agricultural land, the KOWR also has the right of first refusal. As a consequence, companies listed on the Warsaw Stock Exchange and those considering a Public Offering assuming an increase in their capital have a limited possibility of obtaining it. The execution of such a transaction renders it less profitable than if it were executed on market terms and thus makes it difficult to accept, especially by foreign institutional investors who would lose the opportunity to trade in securities (allotment certificates) for approx. 3 months (the period necessary for the court of registration to make the entry plus by the maximum waiting period for the KOWR decision). Moreover, there are no guidelines regarding the interpretation of the provisions of the Act or the procedure to be applied for the execution of this type of project. Recently, a company has even decided to suspend the approval procedure for its prospectus by the Polish Financial Supervision Authority (KNF) pending regulatory amendments, see **Grupa Azoty Zakłady Chemiczne Police, Current Report No. 32/2019.** Ultimately, the company

				has decided to go ahead with the Public Offering, but the funds obtained from the issue were much lower than originally intended. The obligation to regulate this aspect does not arise from EU law.
13	**Article 8(1)-(4) of the Act of 15 January 2015 on Bonds:** "1. Bonds must be in book-entry form. 2. Bonds are subject to registration in the securities depository kept in compliance with the provisions of the Act of 29 July 2005 on Trading in Financial Instruments (Journal of Laws of 2020, items 89, 284, 288 and 568), hereinafter referred to as the "Act on Trading in Financial Instruments". 3. The provisions of the Act on Trading in Financial Instruments shall apply to the creation and transfer of rights attaching to bonds. 4. Once the entitlement to the benefits arising out of the redemption of the bonds has been determined, the rights attaching to such bonds may not be transferred."	NO LEGAL BASIS IN EU LAW.	NO IMPLEMENTING LEGISLATION, Amendment adopted: Article 14 of the Act of 9 November 2018 Amending Certain Acts in Connection with the Strengthening of Supervision over the Financial Market and Protection of Investors in such Market;	No such requirement regarding bonds in EU regulations (EU requirements apply only to shares). The need for book-entry form of all bond issues, even those performed within the framework of bilateral transactions, will lead to a reduced ability to use bonds as an enterprise financing instrument, especially by small and medium-sized enterprises (SMEs). It will also result in extending the duration of the process of obtaining capital from this source and increasing the costs of the issue itself. Amendments in this area should refer to all issues except for bilateral issues, i.e. those executed by an issuer and subscribed for by a single investor.

14	**Article 37b(1) of the Act of 29 July 2005 on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies:** "1. The publication of a prospectus, provided that an information memorandum has been published, is not required for a public offering of securities as a result of which the assumed gross proceeds to be generated by the issuer or the offeror in the territory of the European Union, calculated at the issue price or purchase price as at the date of its determination, are not less than EUR 1,000,000 and less than EUR 2,500,000, and together with the proceeds that the issuer or the offeror intended to obtain from such public offerings of such securities effected during the preceding 12 months, are not less than EUR 1,000,000 and less than EUR 2,500,000."	Article 3(2)(b) of Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC of 14 June 2017: "2. Without prejudice to Article 4, a Member State may decide to exempt offers of securities to the public from the obligation to publish a prospectus set out in paragraph 1 provided that: (a) such offers are not subject to notification in accordance with Article 25; and (b) the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months which shall not exceed EUR 8,000,000.	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies and Certain Other Acts of 16 October 2019	Limitation of the value of public offerings effected on the basis of an information memorandum not approved by the Polish Financial Supervision Authority to EUR 2.5 million in the last 12 months. EU regulations permit EUR 8 million in this respect.
15	**Article 3(1a) of the Act of 29 July 2005 on Public Offering and the Terms and Conditions for Introducing Financial**	Article 1(4)(b) of Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an	Limitation of the number of persons to whom the purchase offering may be addressed to 149 investors. EU regulations impose this limit per

	Instruments to an Organized Trading System and on Public Companies: "1a.[6)] The public offering of securities referred to in Article 1(4)(b) of Regulation 2017/1129 in respect of which the number of persons to whom such offering is addressed, along with the number of persons to whom the public offerings referred to in Article 1(4)(b) of Regulation 2017/1129 are addressed for the same type of securities, effected in the period of the previous 12 months, exceeds 149, requires the publication of the information memorandum referred to in Article 38b, which is subject to approval by the Authority."	be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC of 14 June 2017: "4. The obligation to publish a prospectus set out in Article 3(1) shall not apply to any of the following types of offers of securities to the public: (b) an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors."	Organized Trading System and on Public Companies and Certain Other Acts of 16 October 2019	issue, while the Polish legislature has extended this limit to all issues of the respective type effected by the issuer in the last 12 months.
16	**Article 7a of the Act of 29 July 2005 on Trading in Financial Instruments:** "1. In the case of bonds issued under the Act of 15 January 2015 on Bonds (Journal of Laws of 2018, items 483 and 2243, and of 2019, items 1572, 1655, 1798 and 2217) and covered bonds issued on the basis of the Act of 29 August 1997 on Covered Bonds and Mortgage Banks	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act referred to in column III.	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies and Certain Other Acts of 16 October 2019	No EU regulations that introduce the institution of the issuing agent.

	(Journal of Laws of 2016, item 1771, of 2018, item 2243, and of 2019, item 2217), subject to Article 5a(2) of this Act, for which the issuer does not intend to apply for admission to trading on a regulated market or for introduction to the ATS, and in the case of investment certificates issued by a closed-end investment fund that is not a public closed-end investment fund, prior to the execution of an agreement the subject matter of which is the registration of such securities in the depository for securities, the issuer shall enter into an agreement for the performance of the function of an agent for the issue of such securities with an investment firm authorized to keep securities accounts or with a custodian bank."			
17	**Article 3(1a) of the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies:** "1a. The public offering of securities referred to in Article 1(4)(b) of Regulation	Article 2 and Article 1(1) and (4) of Regulation 2017/1129: Article 2, definition: 'offer of securities to the public' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies and Certain Other Acts of 16 October 2019	In respect of offerings for which, in compliance with Regulation 2017/1129, a prospectus is not required, an information memorandum appears in Polish law, which does not exist in EU law.

	2017/1129 in respect of which the number of persons to whom such offering is addressed, along with the number of persons to whom the public offerings referred to in Article 1(4)(b) of Regulation 2017/1129 are addressed for the same type of securities, effected in the period of the previous 12 months, exceeds 149, requires the publication of the information memorandum referred to in Article 38b, which is subject to approval by the Authority."	the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries" Article 1(2): "2. This Regulation shall not apply to the following types of securities: [..] 4. The obligation to publish a prospectus set out in Article 3(1) shall not apply to any of the following types of offers of securities to the public: [...]."		
18	**Article 69(2) of the Act on Trading in Financial Instruments:** "2. Brokerage activities, subject to Article 16(3) and (5) and Article 70, includes the performance of activities consisting of the following: [...] 6) offering financial instruments."	Annex I SECTION A of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/67/EU.	Act of 1 March 2018 Amending the Act on Trading in Financial Instruments and Certain Other Acts.	The annex referred to in column II does not mention the financial service of offering financial instruments. "Offering financial instruments" has been added by the Polish legislature as an investment service.
19	**§ 5 of the Regulation of the Minister of Finance of 29 March 2018 on Current and Periodic Information Transmitted by Securities Issuers and the Conditions for Recognizing the Information Required by**	NO LEGAL BASIS IN EU LAW.		The whole paragraph 5 of the Regulation of the Minister of Finance may be treated as gold-plating, because in the provisions of the Act on Public Offering, references are made to confidential information according to the MAR, periodic reports (annual, semi-annual and

	the Regulations of a Non-Member State as Equivalent: "The issuer provides information in the form of a current report on: 1) registration or refusal to register by the court of amendments to the issuer's articles of association; 2) changes in the rights attaching to the issuer's securities; 3) termination by the issuer or the audit firm of a contract for the audit or review of financial statements or consolidated financial statements; 4) dismissal or resignation of a managing or supervising person or the issuer obtaining information about the decision of a managing or supervising person to opt out of applying for election in the next term of office; 5) appointment of a managing or supervising person; 6) placing of an entry regarding the issuer's enterprise in section 4 of the register of commercial undertakings referred to in the Act on the National Court Register; 7) court ruling declaring the issuer's bankruptcy becoming final non-appealable, dismissal of the petition to			quarterly) and current reports. The whole Regulation on Current and Periodic Reports with regard to current reports – par. 5 – is an instance of gold-plating. EU law does not provide for such regulations.

	declare its bankruptcy in a situation where the debtor's assets are insufficient to cover the costs of the proceedings or are only sufficient to cover such costs, change of a decision on opening restructuring proceedings to a decision declaring the issuer's bankruptcy; 8) issuance of share documents as part of a conditional increase in the issuer's share capital; 9) adoption by the issuer's management board of a resolution on the issue of shares as part of a target increase in the issuer's share capital; 10) change of the address of the issuer's registered office or website address; 11) posting on the issuer's website of a statement by its corporate group on non-financial information or a report of its corporate group on non-financial information prepared by a higher-level parent entity, in compliance with Article 69(5) of the Accounting Act."			
20	**§ 60(1) of the Regulation of the Minister of Finance of 29 March 2018 on Current and Periodic Information Transmitted by Securities Issuers and the Conditions for**	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public	The Directive referred to in column II does not require quarterly financial statements (periodic information) in Article 4. Quarterly reports may also be treated as gold-plating – they have

	Recognizing the Information Required by the Regulations of a Non-Member State as Equivalent: "1. The issuer submits, subject to § 62, periodic reports: 1) quarterly; 2) semi-annually; 3) annually."	to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.	Companies and Certain Other Acts of 4 September 2008.	been introduced into Polish regulations in a situation where there is no such obligation in EU law.
21	**Article 69(1) of the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies:** "1. Whoever: 1) has reached or exceeded 5%, 10%, 15%, 20%, 25%, 33%, 33⅓%, 50%, 75% or 90% of the total number of votes in a public company, or 2) used to hold at least 5%, 10%, 15%, 20%, 25%, 33%, 33⅓%, 50%, 75% or 90% of the total number of votes in such company, but as a result of a reduction in his/her/its shareholding, has reached 5%, 10%, 15%, 20%, 25%, 33%, 33⅓%, 50%, 75% or 90%, respectively, or less of the total number of votes – is required to promptly notify the Authority and the company about this fact."	Article 9(3) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC: "The home Member State need not apply: (a) the 30 % threshold, where it applies a threshold of one-third; (b) the 75 % threshold, where it applies a threshold of two-thirds."	Act Amending the Act on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized Trading System and on Public Companies and Certain Other Acts of 4 September 2008.	The Directive referred to in column II stipulates that the shareholder is required to notify the company of exceeding the 30% and 75% threshold, but these thresholds need not be applied if the respective Member State applies a threshold of 1/3 or 2/3. The Polish Act on Trading (Article 69) contains both 30% and 33 1/3%, but also 90%.

22	**Article 172(1) of the Act of 16 July 2004 entitled Telecommunications Law:** "1. It is prohibited to use telecommunications terminal devices and automatic calling systems for the purposes of direct marketing unless the subscriber or end-user has previously given their consent to such use."	Article 13(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications): "1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.		The exclusion of faxes and e-mails from Polish law in practice prevents the use of such solutions for direct marketing in the manner described in Article 172(1) of the Telecommunications Law.
23	**Article 48c(3) of the Act of 27 May 2014 on Investment Funds and Management of Alternative Investment Funds:** "The minister in charge of financial institutions shall define, by way of a regulation, the maximum exposure limit of the AIF of a specialized open-end investment fund that applies the investment rules and limits specified for an open-end investment fund, a specialized open-end investment fund	Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositories, leverage, transparency and supervision (in particular, Articles 6-11).	Act of 31 March 2016 Amending the Act on Investment Funds and Certain Other Acts (Journal of Laws of 2016, item 615).	Commission Delegated Regulation (EU) No 231/2013 has introduced the concept of the exposure of an AIF, but did has not introduced the obligation or the possibility of its top-down limitation by the regulator. In this respect, the said provision and the delegated Polish regulation which introduces a top-down AIF exposure limit are examples of gold-plating, because they impose an additional requirement on investment fund management

	that applies the investment rules and limits specified for a closed-end investment fund and a closed-end investment fund, bearing in mind the need to ensure the protection of interests of the participants in the investment fund." and issued based on the statutory delegation under the above provision of the **Regulation of the Minister of Finance of 20 July 2017 on the Maximum AIF Exposure Limit – all provisions.**			companies that does not arise out of the transposed regulations.
24	**§ 9(2) and (3) of the Regulation of the Minister of Finance of 2 July 2019 on the Manner, Procedure and Conditions for Conducting Business Activity by Investment Fund Management Companies** "2. In the organizational structure of the company, a separate and independent internal audit unit must exist, headed by an internal auditor. If justified by the type and scope of business conducted by the	Article 1(1) and Article 24 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive: Article 1(1): "Chapter II, and Sections 1 to 4, Articles 59(4) and 60 and Sections 6 and 8 of	Regulation of the Minister of Finance of 2 July 2019 on the Manner, Procedure and Conditions for Conducting Business Activity by Investment Fund Management Companies, the content of which differs from the provisions of Regulation 2017/565 in column II.	It follows from Article 1(1) of the Regulation referred to in column II that the whole Chapter II of this Regulation applies to investment fund management companies, including Article 24. Prohibition of outsourcing internal audit and supervision of compliance in investment fund management companies.

	company and unless the interests of clients and fund participants are threatened, internal audit activities may be performed by a one-person internal auditor position; the provisions on the internal audit unit apply to such one-person positions. No member of the company's management board may simultaneously discharge the function of an internal auditor or perform internal audit tasks. 3. The company shall ensure that persons performing internal audit tasks: 1) do not combine them with the function of supervising compliance or the function of risk management; 2) do not participate in the performance of operational activities pertaining to the determination of the level or type of risk incurred by the open-end investment fund – if this leads to a situation where such persons simultaneously supervise the activities performed by themselves;	Chapter III and, to the extent they relate to those provisions, Chapter I and Section 9 of Chapter III and Chapter IV of this Regulation shall apply to management companies in accordance with Article 6(4) of Directive 2009/65/EC and Article 6(6) of Directive 2011/61/EU of the European Parliament and of the Council." Article 24: Investment firms shall, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the investment firm and which has the following responsibilities: (a) establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the		

		investment firm's systems, internal control mechanisms and arrangements; (b) issue recommendations based on the result of work carried out in accordance with point (a) and verify compliance with those recommendations; (c) report in relation to internal audit matters in accordance with Article 25(2).		
25	**Article 42b(1)–(3) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** 1. The appointment of: 1) a member of the management board supervising the risk management system in the company, 2) a member of the management board supervising investment decisions pertaining to investment portfolios of funds managed by the company or portfolios which include one or more	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.	Act Amending the Act on Trading in Financial Instruments and Certain Other Acts of 4 September 2008 (Journal of Laws 2009 No. 165, item 1316), which has implemented the following Directives in its content: 1) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council	An excessively restrictive solution requiring the consent of the Polish Financial Supervision Authority (KNF) for each appointment, in an investment fund management company, of a management board member supervising the risk management system or in charge of investments is not justified by either MIFID or MIFID II in the capital sector. The issuance of personnel decisions by the KNF is very often discretionary and based on unclear grounds, documents or clarifications the scope of which is delineated by the KNF in an unconstrained manner.

	financial instruments managed by the company, – requires the consent of the Authority, subject to Article 61(1e). 2. The request for the consent referred to in sec. 1 shall be submitted by the company's supervisory board, attaching to such request information on and statements by the persons indicated in the said provision, regarding: 1) personal data of such persons; 2) knowledge, skills and experience of such persons, in particular their education, professional career and completed professional training; 3) functions performed in the corporate bodies of other entities; 4) criminal record of such persons, criminal proceedings pending against them or proceedings in cases involving fiscal offenses, including information from the National Criminal Register; 5) administrative sanctions imposed on such persons or other entities in relation to the scope of their responsibilities;		and repealing Council Directive 93/22/EEC (OJ L 145, 30.04.2004, p. 1; OJ, Polish special edition, chapter 6, vol. 7, p. 263, as amended); 2) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.06.2006, p. 1); 3) Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ L 177, 30.06.2006, p. 201); 4) Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 02.09.2006, p. 26).	

	6) potentially sanctioned administrative or disciplinary proceedings in which such persons have acted or are acting as a party; 7) other circumstances that may affect the assessment of such persons' compliance with the requirements laid down in Article 42(2)–(4) and (6). 3. The Authority shall refuses to grant the consent referred to in sec. 1 if the person for whom such consent is requested fails to satisfy the requirements laid down in Article 42(2)–(4), (6) and (7). **– which has replaced the originally implemented and amended provision of Article 42 of the Act of 27 May 2004 on Investment Funds (Journal of Laws of 2004 No. 146, item 1546), reading as follows:** 1. The company's management board shall consist of at least two members. 2. The Authority's consent shall be required for the appointment of two members of the management board, including the president of the company's management board.			

	3. A member of the company's management board may be a person who satisfies all of the following conditions: 1) has full capacity to enter into legal transactions; 2) has not been penalized for a deliberate crime or a tax-related crime. 4. A management board member whose appointment requires the Authority's consent, including the president of the company's management board, may be a person who, in addition to the requirements referred to in sec. 3, satisfies the following conditions: 1) has a higher education or the right to practice the profession of an investment advisor referred to in Article 22(2) of the Act on Trading in Financial Instruments; 2) has professional experience of not less than 3 years in a managerial or independent position in financial institutions or has discharged functions in the corporate bodies of such institutions during this period. 5. A 'financial institution' is construed as a domestic bank, foreign bank, credit			

	institution, brokerage house, investment company, company operating a stock exchange or an over-the-counter market in the field of trading in securities, management company, entity conducting insurance activity, entity managing entrusted assets, investment fund management company, universal pension fund management company, employee pension fund management company, foreign fund, the National Depository for Securities [Krajowy Depozyt Papierów Wartościowych Spółka Akcyjna] or the National Clearing House [Krajowa Izba Rozliczeniową Spółka Akcyjna]. 6. In the event that a supervisory board member is seconded to temporarily perform the duties of a management board member, if such delegated person is to perform the activities of a management board member approved by the Authority, the Authority may object to the secondment of such person within 14 days from the date of receipt of the respective notification. Such notification shall be accompanied by the			

	personal data of this person together with the description of his/her qualifications and professional experience as well as information from the National Criminal Register. 7. From the date of the objection referred to in sec. 6, the person against whom the Authority has raised an objection may not perform the activities of a management board member.			
26	**Article 102a(1) of the Act of 29 July 2005 on Trading in Financial Instruments:** The appointment of the president of the management board of a brokerage house or of a member of the management board of a brokerage house who will be responsible for overseeing the risk management system shall be made, subject to Article 84(1a), with the consent of the Authority. The request for such consent shall be submitted by the supervisory board.	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.	Act Amending the Act on Trading in Financial Instruments and Certain Other Acts of 4 September 2008 (Journal of Laws 2009 No. 165, item 1316)	An excessively restrictive solution requiring the consent of the Polish Financial Supervision Authority (KNF) for each appointment, in an investment fund management company, of the president of the management board and the management board member in charge of risk management is not justified by either MIFID or MIFID II in the capital sector. The issuance of personnel decisions by the KNF is very often discretionary and based on unclear grounds, documents or clarifications the scope of which is delineated by the KNF in an unconstrained manner.
27	§ 14. Regulation of the Minister of Finance and Development of 25 April 2017 on Detailed Technical and	Article 23(1) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive	Regulation of the Minister of Finance and Development of 25 April 2017 on Detailed Technical and Organizational Conditions for	Prohibition on outsourcing the function of supervising compliance in investment firms.

	Organizational Conditions for Investment Companies, the Banks Referred to in Article 70(2) of the Act on Trading in Financial Instruments and Custodian Banks: 4. The investment firm shall have a separate unit for the supervision of compliance and shall ensure the independence of such unit in order to enable the proper and continuous performance of its duties. If justified by the type and scope of business conducted by the investment firm, activities of the function of supervising compliance may be performed within the framework of a one-person position. In such case, the provisions of the Regulation regarding the function of supervising compliance shall apply to such position of supervising compliance.	2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive: 1. Investment firms shall take the following actions relating to risk management: (a) establish, implement and maintain adequate risk management policies and procedures which identify the risks relating to the firm's activities, processes and systems, and where appropriate, set the level of risk tolerated by the firm; (b) adopt effective arrangements, processes and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of that level of risk tolerance;	Investment Companies, the Banks Referred to in Article 70(2) of the Act on Trading in Financial Instruments and Custodian Banks.	

		(c)monitor the following: (i) the adequacy and effectiveness of the investment firm's risk management policies and procedures; (ii) the level of compliance by the investment firm and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with point (b); (iii) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the relevant persons to comply with such arrangements, processes and mechanisms or follow such policies and procedures.		
28	Article 87(4) of the Act of 29 July 2005 on Public Offering and the Terms and Conditions for Introducing Financial	Article 2(1)(d) and (2) of Directive 2004/25/EC of the European Parliament	Act of 29 July 2005 on Public Offering and the Terms and Conditions for Introducing Financial Instruments to an Organized	The introduction of presumptions which are not included in the provisions of the Directive and which necessitate the announcement of a

	Instruments to an Organized Trading System and on Public Companies: 4. The existence of the agreement referred to in sec. 1(5) is presumed in the case of holding shares in a public company by: 1) spouses, their ascendants, descendants, siblings or relatives in the same line or degree as well as persons in a relationship of adoption, custody or guardianship; 2) persons remaining in a common household; 3) (repealed), 4) related parties within the meaning of the Accounting Act of 29 September 1994.	and of the Council of 21 April 2004 on takeover bids: Article 2(1)(d): 'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid; Article 2(2): 2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC (12) shall be deemed to be persons acting in concert with that other person and with each other.	Trading System and on Public Companies in the wording announced in Journal of Laws 2005 No. 184, item 1539.	tender offer (including the presumption that shares held by spouses should be treated as held jointly).
29	**Article 72 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** 1. The depositary's obligations arising out of an agreement for the performance of	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and	Act of 31 March 2016 Amending the Act on Investment Funds and Certain Other Acts (Journal of Laws of 2016, item 615).	The imposition of the de facto requirement on the depositary to supervise the fund to an extent that does not exist in other EU countries.

	the function of the depositary of an investment fund, in consideration of Article 83, Articles 85–90 and Articles 92–97 of Regulation 231/2013 – in the case of a specialized open-end investment fund or a closed-end investment fund include: 1) keeping the assets of the investment fund; 2) keeping a register of all assets of the investment fund; 3) ensuring that the cash held by the investment fund is kept in cash accounts and bank accounts maintained by entities authorized to keep such accounts in compliance with the provisions of Polish law or satisfying the requirements laid down in Community law or equivalent to such requirements; 4) ensuring the monitoring of cash flows of the investment fund; 5) ensuring that the sale and repurchase of participation units as well as the issuance, delivery and repurchase of investment certificates takes place in accordance with the applicable laws and	Regulations (EC) No 1060/2009 and (EU) No 1095/2010.		

	the investment fund's articles of association; 6) ensuring that the settlement of agreement pertaining to the assets of the investment fund takes place without undue delay, and controlling the timeliness of the settlement of agreements with fund participants; 7) ensuring that the value of the investment fund's net assets and the value of net assets per participation unit or investment certificate are calculated in compliance with the applicable laws and the investment fund's articles of association; 8) ensuring that the income of the investment fund is used in a manner consistent with the applicable laws and the investment fund's articles of association; 9) executing the investment fund's orders unless out of compliance with the law or the investment fund's articles of association; 10) verifying compliance of the investment fund's activities with the			

	applicable laws governing the business of investment funds or with the articles of association outside the scope specified in items 5–8 and in consideration of the interests of participants. 2. In the case of the fund referred to in Article 159, the custodian, in addition to the fund's asset register, shall keep sub-registers of the assets of each sub-fund. 3. The depositary shall ensure that the fund's obligations referred to in sec. 1(3)–(8) are fulfilled, at least by exercising continuous control over the actual activities and legal transactions executed by the fund and supervising the bringing of such activities and legal transactions into compliance with the applicable laws and the fund's articles of association. 4. The entity discharging the function of the depositary of an investment fund may not perform any other activities in respect of such fund or management company that might cause a conflict of interest between it, the investment fund, the management company or the participants of the investment fund, in			

	particular, by acting as a prime broker, unless: 1) it carves out, in organizational and technical terms, the discharge of the function of the depositary of the investment fund, from the performance of other activities that may result in a conflict of interest, and 2) it ensures proper identification, monitoring and management of conflicts of interest as well as mechanisms of informing fund participants about any identified cases of such conflict.			

II. Other examples of gold-plating

30	**Article 22(1)(12) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The management company's application for a permit to establish an investment fund shall be accompanied by: a statement by the audit firm on compliance of the methods and principles of valuation of the fund's assets described in its articles of	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

	association with the laws governing the accounting in investment funds and on compliance and completeness of such principles with the fund's investment policy – in the case of a closed-end investment fund."			
31	**Article 22(1)(13) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The management company's application for a permit to establish an investment fund shall be accompanied by: a statement by the statutory auditor on the correctness and compliance of the investment fund's risk management system with the fund's investment risk profile and investment policy, the adopted risk measurement and monitoring methods, determination of the total exposure or exposure of the AIF, and the system of internal limits adopted for the investment fund, in a situation where the management company does not manage an investment fund with an investment risk	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act Amending the Act on Investment Funds and Certain Other Acts of 31 March 2016 (Journal of Laws 2016, item 615)	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

	profile and investment policy of the kind as the fund covered by the application, or the management company's statement that the company manages an investment fund with such an investment risk profile and investment policy."			
32	**Article 36a(5) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "An external valuation entity must not be the audit firm that audits the financial statements of the designating fund, the management company forming its governing body or EU-based manager, the depositary of that fund or any other entity whose interests may conflict the interests of that fund, management company or the EU-based manager, or the interests of fund participants."	Article 19(4) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 – hereinafter: "AIFMD": The depositary appointed for an AIF shall not be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.	Act of 31 March 2016 Amending the Act on Investment Funds and Certain Other Acts.	Extending the group of entities that are prohibited from providing the services of an external valuer by excluding the possibility of separating the performance of their function from the tasks as an external valuer.

33	**Article 46(9)(2) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The management company may not order the management of the fund's investment portfolio or any part thereof to any entity whose interests may conflict with the interests of the management company or the interests of participants in the investment fund."	Article 20(2)(b) of AIFMD: No delegation of portfolio management or risk management shall be conferred on any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.	Act Amending the Act on Investment Funds and Certain Other Acts of 31 March 2016 (Journal of Laws 2016, item 615)	Extending the group of entities that are prohibited from providing the management company with investment portfolio management services by excluding the possibility of separating the performance of their function from the performance of other, potentially conflicting tasks.
34	**Article 46(10) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The provisions of sec. 1-3a and sec. 9 shall apply accordingly to the transfer referred to in Article 45a(4b) and the further transfer referred to in Article 45a(4c), to the performance of activities related to the management of the investment portfolio of a specialized open-end investment fund or a closed-end investment fund, or a portion of	Article 20(5)(b) of AIFMD: No sub-delegation of portfolio management or risk management shall be conferred on any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly	Sec. 10 has been added by the Act Amending the Act on Investment Funds and Certain Other Acts of 31 March 2016. (Journal of Laws 2016, item 615)	Extending the group of entities that are prohibited from providing investment portfolio management or risk management services by excluding the possibility of separating the performance of the portfolio or risk management function from the performance of other, potentially conflicting functions.

	such portfolio, or the activities referred to in Article 2."	identified, managed, monitored and disclosed to the investors of the AIF.		
35	**Article 72(1)(10) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The depositary's duties include verifying compliance of the investment fund's activities with the applicable laws governing the business of investment funds or with the articles of association outside the scope specified in Article 72(1)(5)–(8) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds and in consideration of the interests of participants."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 31 March 2016 Amending the Act on Investment Funds and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.
36	**Article 72a of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "1. The depositary shall bring legal action on behalf of the fund's participants against the management company for damage caused by the non-performance or improper performance of obligations in the area	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 31 March 2016 Amending the Act on Investment Funds and Certain Other Acts.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

	of management and representation of the fund; in a situation where, based on the agreement referred to in Article 4(1a) or (1b), the investment fund is managed and its affairs are conducted by a management company or an EU-based manager, against such management company or against such EU-based manager for damage caused by the non-performance or improper performance of obligations in the area of management of such fund and the conduct of its affairs remaining within the scope of duties of the management company or the EU-based manager, as the case may be, in compliance with Article 272c(1) or Article 276e(1)."			
37	**Article 73(3) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "If investment fund participants have suffered losses caused by the non-performance or improper performance of the company' s fund management and representation duties, it shall be presumed that the depositary being a	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

	member of the company's corporate group has consciously breached its duties arising out of the Act and the agreement to perform the function of the investment fund's depositary."			
38	**Article 107(2)(1) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds in conjunction with Article 145(9) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "A closed-end investment fund may not invest the fund's assets in securities or receivables of the management company that manages the fund and conducts its affairs or their shareholders or entities that are parent entities or subsidiaries of such management company or the company managing their or their shareholders' affairs."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.
39	**Article 131 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "A closed-end investment fund shall measure the fund's assets and	Article 19(3) of AIFMD: The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year. If the AIF	Act of 27 May 2004 on Investment Funds.	Obligation to perform more frequent valuations of fund assets and determine the net asset value more frequently than provided for in AIFMD.

	determine the net asset value and net asset value per investment certificate with the frequency specified in the articles of association, but not less frequently than once every 3 months and 7 days prior to the commencement of subscriptions for subsequent issue certificates, and on the day such certificates are repurchased."	is of the closed-ended type, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the relevant AIF. The investors shall be informed of the valuations and calculations as set out in the relevant AIF rules or instruments of incorporation.		
40	**Article 134 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** 1. The issue of investment certificates shall be closed after the completion of payments for the certificates in the amounts and within the time limit specified in the articles of association and the prospectus or information memorandum, or the terms of issue. Such time limit may not be longer than 2 months from the date of commencement of the subscription. 2. Another issue of investment certificates shall be possible after the closing of the previous issue, subject to Article 127, or after the refund of	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

	payments to the fund in the case referred to in sec. 4. 3. The second and subsequent issues of investment certificates shall not come into effect unless the payments for the certificates have been collected in the amounts and within the time limit referred to in sec. 1. 4. In the event of failure of the second and subsequent issues of investment certificates, the fund, within 14 days from the date referred to in sec. 1, shall refund payments to the fund, shall transfer the rights to securities and shares in limited liability companies, and shall transfer the rights referred to in Article 147(1)(1)(a) and (b) and Article 147(1)(2), along with the value of the benefits received and interest accrued by the depositary for the period from the date of payment to the account kept by the depositary until the date referred to in sec. 1 as well as any handling fees collected. 5. In the case of the second and subsequent issues, the management			

	company may not make use of the payments to the fund for the certificates of the respective issue, the handling fees charged or the amounts of accrued interest on such payments, or any benefits that these payments have brought, prior to the allocation of the investment certificates of the respective issue. 6. In the event of the execution of the agreement referred to in Article 4(1b), the provision of sec. 5 shall also apply to an EU-based manager.			
41	**Articles 140, 141, 142, 143, 144 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds.** The full text of the provision is presented on p. 90.	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.
42	**Article 145(2) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The closed-end investment fund referred to in Article 183 and Article 196	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation.

	may invest its assets in transferable receivables from natural persons."			Provisions added by the Polish regulator when AIFMD was implemented.
43	**Article 145(3) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "Money market securities or instruments issued by a single entity, receivables from that entity and participations in that entity may not constitute, subject to sec. 4, a total of more than 20% of the fund's asset value, or, in the event that a securitization fund enters into the agreement referred to in this section, the same shall apply to each receivable forming the subject matter of the securitization."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.
44	**Article 145(4) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "Covered bonds issued by a single mortgage bank may not account for more than 25% of the fund's asset value."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

45	**Article 145(6) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "Deposits in a single domestic bank, foreign bank or credit institution may not account for more than 20% of the fund's assets, excluding deposits held by the depositary."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.
46	**Article 145(7) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "No foreign currency of any single country or euro may account for more than 20% of the fund's asset value."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
47	**Article 146(6) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "Investment certificates of any other closed-end investment fund managed by the same management company may not account for more than 20% of the fund's asset value."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
48	**Article 145(9) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:**	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by	Act of 29 July 2005 (Journal of Laws No. 183, item 1537).	No similar limit in AIFMD or other European regulations.

	The provisions of Article 107(2)–(6) shall apply to deposits of a closed-end investment fund.	the Act prior to the transposition) referred to in column III.		
49	**Article 148(4) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "4. The fund may not allocate more than 25% of the value of its assets in aggregate for the acquisition of any single one of its investment targets referred to in Article 147(1) or for investments in such target."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
50	**Article 149 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "A closed-end investment fund may establish encumbrances on the assets specified in Article 147(1) and (2) with a total amount not exceeding 50% of the fund's net asset value at the time of establishment of such encumbrance, with the consent of the depositary and under on the terms laid down in the articles of association."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.

51	**Article 151(2) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "The total value of borrowed securities and securities of the same issuer held in the investment portfolio of a closed-end investment fund must not exceed the limit referred to in Article 145(3) and (4)."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
52	**Article 152(1) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "A closed-end investment fund may take out, only from domestic banks, credit institutions or foreign banks, loans or borrowings with the total value not greater than 75% of the fund's net assets as at the time of execution the loan or borrowing agreement."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
53	**Article 152(2) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "If the fund's articles of association so provide, a closed-end investment fund that has an investors' meeting may issue bonds in an amount not greater than	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.

	15% of the fund's net asset value as at the date preceding the date of the resolution on the issue of bonds by the investors' meeting."			
54	**Article 152(3) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "If an investment fund issues bonds, the total value of loans, borrowings and bond issues may not be greater than 75% of the fund's net asset value."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
55	**Article 153(1)(1) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:** "A closed-end investment fund may grant cash loans up to an amount not greater than 50% of the fund's asset value, provided that the amount of cash loans granted to any single entity is not greater than 20% of the fund's asset value."	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by the Act prior to the transposition) referred to in column III.	Act of 27 May 2004 on Investment Funds.	No similar limit in AIFMD or other European regulations.
56	**Article 248(1) of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds:**	NO LEGAL BASIS IN EU LEGISLATION TRANSPOSED by the Act (or regulated by	Act of 27 May 2004 on Investment Funds.	No legal basis for introducing these provisions in EU legislation transposed into the Polish legal system by the Act referred to

	"The liquidator of an investment fund is its depositary."	the Act prior to the transposition) referred to in column III.		in column III, implementing AMIFID or enacted prior to its implementation. Provisions added by the Polish regulator when AIFMD was implemented.

III. Examples of gold-plating based on the practice of law enforcement authorities

No.	Column I Wording of a provision of Polish law forming a manifestation of gold-plating (with an indication of the pertinent legal act and editorial unit).	Column II Wording of a provision of EU law with an indication of the pertinent legal act and editorial unit that has been transposed into the Polish legal system or interpreted in a manner resulting in gold-plating.	Column III Interpretation of the provision if gold-plating is manifested in its interpretation rather than literal wording.	Column IV Legal act by which the provision indicated in column I has been transposed into the Polish legal system.	Column V Explanation of the manifestation of excessive regulation in the case at hand.
57	NONE	Article 74(1) of MIFID/MIFID 2	ND	This provision has not been transposed.	Inability to appeal against the supervisor's decision to the court. Article 74(1) of MIFID grants the right to appeal to a court against any decision made under Regulation (EU) No 600/2014 or under a statute, regulation or administrative provision enacted in compliance with MIFID. The right to appeal to a court also applies in

					situations where, in respect of an application for a permit containing all required information, no decision has been made within six months of its submission. The extent of such appeal is not limited to any specific grounds. However, this Article does not specify to what extent such appeal should apply. Assuming that the absence of specification of the extent or any limitation of the scope of such appeal, it should apply to the whole decision, yet Polish law does not provide for this possibility. Polish law does not provide for the possibility of appealing against an administrative decision of the regulator made on the basis of either European or domestic laws. It is only possible to file a complaint against an administrative decision limited solely to formal grounds. Accordingly, within the meaning of Article 74(1) of the Directive, such complaint does not constitute an 'appeal' against the

					decision, contrary to the provisions of the Directive.
58	**Article 35 of the Code of Administrative Procedure and special provisions**	-	Interpretation of the provision of Article 35 of the Code of Administrative Procedure by the authority, considering the time limit specified in paragraphs 2 and 3 not as an instructional time limit for the resolution of the case in accordance with the provisions of the Code of Administrative Procedure but as the time limit within which the authority should send another letter to the party concerning the case.	-	In a large portion of the proceedings pending before the authority, both the time limits laid down in the Code of Administrative Procedure and the specific provisions are significantly exceeded, and the authority does not take any action with a view to completing such proceedings within the statutory time limits.
59	**Article 36 of the Code of Administrative Procedure**	-	Interpretation of the provision of Article 36(1) of the Code of Administrative Procedure by the authority treating this provision as an authorization for the authority to extend the resolution of the case indefinitely, as long as the extensions are made at monthly intervals. Failure to state the reasons for the delay in resolving	-	Article 36(1) of the Code of Administrative Procedure, in all situations where a case has not been resolved in a timely manner by a public administration authority, requires proper notification of the party, stating the reasons for the delay, indicating a new date for resolving the case and providing information on the right to file a reminder. This provision requires

			the case. Failure to provide information on the right to file a reminder.		the authority which fails to resolve the case within the prescribed time limit: 1. To set a new time limit by which, as expected by the authority, the case will be resolved, 2. To informing the party about such time limit, 3. To inform the party about the reason for the delay. 4. To inform the party about the right to file a reminder. The purpose of these provisions is the achievement of a situation where, if the authority is unable to resolve the case/issue a decision within the time limit provided for in the Code of Administrative Procedure or special provisions, the authority should set a new time limit for resolving the case and actually resolving the case within this time limit or at least take steps aimed at resolving the case within this time limit in accordance with the authority's best knowledge. In a large portion of proceedings conducted before the authority, no reasonable time limit for the completion of the case is set, and the authority normally 'extends the

					examination of the case' by a month or a similar period without taking any actions that might result in such proceedings being completed within the time limit specified in the letter informing the party about such 'extension'. When such time limit expires, the authority effects another 'extension' of the proceedings, recognizing that the monthly time limit is, in fact, only the period by which the authority may extend the time limit for resolving the case at a time, but the number of such 'extensions' is in fact unlimited. Proceedings extended in this manner may last up to 8 years, during which the authority keeps sending letters 'extending the proceedings' at monthly intervals. Thus, the authority does not actually provide the time limit for resolving the case, contrary to Article 36 of the Code of Administrative Procedure, but 'extends the proceedings' for a specified period without statutory grounds, and the period necessary for resolving the case

					provided in the authority's letter is in fact only the date by which the authority sends the next letter in the case. In accordance with Article 36, the authority, when notifying the party about its failure to resolve the case in a timely manner, is required to state the reason for the delay. In a large number of cases, the authority does not state the reason for the delay in resolving the case, limiting itself to justifying the 'extension of the resolution of the case' with the need for further analysis of the documents. This justification is sometimes repeated in several or more than a dozen consecutive 'extension' letters. According to the case-law, the reasons for such delay should be specified in detail rather than by way of a general statement. They should also be true. However, in many cases, no new documents or circumstances appear within 1 month of sending the letter by the authority. Very often, such extension letters fail to contain

					information about the right to file a reminder.

Full text of the footnote in item 41. To: Articles 140, 141, 142, 143, 144 of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds.

Article 140 [Investors' board]

1. In a closed-end investment fund, an investor's board shall operate as a controlling body or an investors' meeting.

2. The manner of operation of the investors' board shall be specified in the articles of association of a closed-end investment fund and the rules and regulations adopted by the board.

2a. Participation in meetings of the investors' board may take place via electronic means of communication in accordance with the terms referred to in Article 114(2b)–(2c) unless the fund's articles of association provide otherwise. The person convening the meeting shall decide about participation in the meeting of the investors' board in the manner referred to in the first sentence.

3. The investors' board monitors the pursuit of the investment objective and investment policy of a closed-end investment fund and compliance with investment limits. To ensure this, members of the investors' board may review the fund's ledgers and documents and request clarifications from the management company, and, in the event of the execution of the agreement referred to in Article 4(1b), may also request clarifications from an EU-based manager.

4. The articles of association of a closed-end investment fund may extend the powers of the investors' board and may grant the investors' board the right to affect the fund's investment policy, including, in particular, the right to object to any presented investment projects binding on the fund manager or EU-based manager if the investors' board consists of participants holding at least 50% of the total number of the fund's investment certificates.

4a. The articles of association of a closed-end investment fund which is not a public closed-end investment fund may extend the powers of the investors' board by granting it the powers of the investors' meeting if the investors' board consists of participants holding a total of at least 50% of the total number of the fund's investment certificates. In such case, participants representing in aggregate more than 5% of the total number of the fund's investment certificates shall have the right to select their joint representative to the investors' board.

4b. In the case referred to in sec. 4a, for the adoption of resolutions by the investors' board, the conditions laid down in the statute or in the investment fund's articles of association regarding the adoption of resolutions by the investors' meeting by participants representing the required minimum number of investment certificates shall apply.

5. Should the investors' meeting ascertain any irregularities in the pursuit of the investment objective or investment policy or compliance with the investment limits, the investor's meeting shall call on the management company and, in the event of execution of the agreement referred to in Article 4(1b), also on the EU-based manager to promptly remove such irregularities and shall notifies the Authority thereof.

6. The investors' board may decide to dissolve a closed-end investment fund. A resolution on the dissolution of the fund shall be adopted if the votes in favour of the dissolution of the fund are cast by participants representing jointly at least 2/3 of the total number of investment certificates of the respective fund.

7. The articles of association of the fund referred to in Article 196:

1) which is not a public closed-end investment fund, or

2) which is a public closed-end investment fund issuing investment certificates with the issue price per certificate not lower than the PLN equivalent of EUR 40,000,

may stipulate that in the case referred to in sec. 6, the fund's management company and, in the event of execution of the agreement referred to in Article 4(1b), also the EU-based manager, shall be entitled to charge an additional fee to cover the costs of arranging the fund and lost profits, except that, if such right is vested in both these entities, this shall be pro rata to the costs of arranging the fund and lost profits incurred by each of these entities.

8. If, in order to effect a legal transaction, the statute requires the consent of the investors' board or the investors' meeting, any legal transaction effected without the required consent shall be invalid. Such consent may be expressed before or after the legal transaction is effected, but not later than within 2 months from the date of such legal transaction. Confirmation expressed after the legal transaction has been performed shall have retroactive effect from the time of performance of such legal transaction.

9. A legal transaction effected without the consent of the investors' board or the investors' meeting, if required only by the articles of association of the closed-end investment fund, shall be valid, but this fact shall not exclude the liability of the management company or EU-based manager for a breach of the fund's articles of association.

Article 141 [Membership in the investors' board]

1. A member of the investors' board may only be a participant of a closed-end investment fund representing more than 5% of the total number of investment certificates in the respective fund, who has consented in writing to his/her participation in the board and frozen his/her investment certificates in the number representing more than 5% of the total number of certificates in a securities account or in a collective account, or in the records of persons entitled to benefits arising out of securities kept by the issue agent, as referred to in Article 7a of the Act on Trading in Financial Instruments.

1a. In the case referred to in sec. 1, each frozen investment certificate shall carry the right to one vote in the investors' board.

2. The investors' board shall start to operate when at least three participants fulfil the conditions referred to in Article 1.

3. Membership in the investors' board shall cease on the date when the respective member of the investors' board resigns or on the date when the freeze referred to in sec. 1 is released.

4. The investors' board shall suspend its activity if fewer than three members of the investors' board fulfil the conditions referred to in sec. 1.

5. The investors' board shall resume its operations when at least three participants fulfil the conditions referred to in Article 1.

6. Each participant shall perform the rights and obligations resulting from his or her membership in the investors' board:

1) in person or via no more than a single representative – for participants who are natural persons;

2) via persons authorized to represent the participant or no more than a single representative – for participants who are not natural persons.

Article 142 [Investors' meeting]

1. The investors' meeting shall take place in the fund's registered office or in any other place in the territory of the Republic of Poland, as specified in the fund's articles of association.

1a. Participation in the investors' meeting may also take place via electronic means of communication unless the fund's articles of association provide otherwise. The person convening the meeting shall decide about participation in the meeting of the investors' board in the manner referred to in the first sentence.

1b. Participation in the investors' meeting via means of electronic communication shall consist of the following in particular:

1) real-time two-way communication between all persons participating in the investors' meeting as part of which the participants may take the floor during the investors' meeting from a location other than the place of the investors' meeting;

2) exercise of the voting rights before or during the meeting in person or via a proxy.

1c. Participation in the investors' meeting via means of electronic communication may be subject only to such requirements and limitations as are necessary for the identification of participants and the assurance of secure electronic communication.

1d. The minutes of the investors' meeting shall be signed by the chairperson of the investors' meeting and the minute taker. Such minutes shall be accompanied by the attendance list with the signatures of the participants of the investors' meeting and the list of participants voting via means of electronic communication.

2. The investors' meeting shall be convened by the fund management company or, in the event of execution of the agreement referred to in Article 4(1b), if such agreement so provides, by the EU-based manager, in the form of an announcement made at least 21 days before the planned date of the meeting.

2a. If the articles of association of a closed-end fund which is not a public closed-end investment fund so stipulate, the investors' meeting may adopt resolutions despite not having been formally convened if all investment certificates of the respective fund are represented at the meeting and no one present has objected to holding the investors' meeting or putting any items on the agenda.

3. Fund participants holding at least 10% of the investment certificates issued by the fund may request the convening of the investors' meeting by submitting a request to such effect in writing to the company's management board or, in the event of execution the agreement referred to in Article 4(1b), if such agreement so provides, to the EU-based manager.

4. Should the management company or the EU-based manager fail to convene such meeting within 14 days from the date of the request referred to in sec. 3, the court of registration may authorize the participants submitting such request to convene the meeting at the expense of the management company or the EU-based manager, as the case may be.

Article 143 [Persons entitled to participate in the meeting]

1. Persons entitled to participate in the investors' meeting shall be those fund participants who, no later than 7 days before the meeting or, in the case referred to in Article 142(2a), no later than on the date of its holding, submit to the management company a certificate of deposit issued in compliance with the provisions of the Act on Trading in Financial Instruments or a certificate

issued by the issue agent referred to in Article 7a of the Act on Trading in Financial Instruments keeping a record of persons entitled to investment certificates, confirming the freezing of the participant's investment certificates in such record and indicating the number, type and class of such certificates.

1a. (repealed)

2. The manner and conditions for convening the meeting and adopting resolutions shall be specified in the fund's articles of association.

3. (repealed)

4. (repealed)

Article 144 [Resolution on the dissolution of the fund]

1. The investors' board may adopt a resolution to dissolve a closed-end investment fund. A resolution on the dissolution of the fund shall be adopted if the votes in favour of the dissolution of the fund are cast by participants representing jointly at least 2/3 of the total number of investment certificates of the respective fund.

2. The articles of association of the fund referred to in Article 196:

1) which is not a public closed-end investment fund, or

2) which is a public closed-end investment fund issuing investment certificates with the issue price per certificate not lower than the PLN equivalent of EUR 40,000,

may stipulate that in the case referred to in sec. 1, the fund's management company and, in the event of execution of the agreement referred to in Article 4(1b), also the EU-based manager, shall be entitled to charge an additional fee to cover the costs of arranging the fund and lost profits, except that, if such right is vested in both these entities, this shall be pro rata to the costs of arranging the fund and lost profits incurred by each of these entities.

3. The investors' meeting shall express its consent to the following:

1) change of the depositary;

1a) taking over of the management of a closed-end investment fund by another management company;

1b) taking over of the management of a closed-end investment fund and the conduct of its affairs by an EU-based manager;

2) issue of new investment certificates;

3) amendments to the fund's articles of association with regard to exclusion of the priority right to purchase a new issue of investment certificates,

4) issue of bonds;

5) conversion of registered investment certificates into bearer certificates;

6) amendments to the articles of association of an investment fund, as referred to in Article 117a(1).

4. A resolution regarding the matters referred to in sec. 3(4)–(6) shall be adopted if the votes in favour of the issue of bonds, the conversion of investment certificates or the amendments to the articles of association of the investment fund have been cast by participants representing at least 2/3 of the total number of investment certificates of the respective fund.

5. Unless the fund's articles of association provide otherwise, an investment decision pertaining to the fund's assets the value of which is greater than 15% of the fund's asset value shall require the consent of the investors' meeting to become valid.

6. The investors' meeting, within 4 months following the end of each financial year, shall review and approve the fund's financial statements, the combined financial statements of the fund and the separate sub-funds referred to in Article 159, and the individual sub-fund financial statements for that year.

7. The fund's articles of association may extend the powers of the investors' meeting, and the articles of association of a closed-end investment fund which is not a public closed-end investment fund may grant the investors' meeting the powers of the investors' board.

8. Resolutions of the investors' meeting must be recorded in the minutes. Unless the fund's articles of association provide otherwise, the resolutions of the investors' meeting shall be recorded in the minutes by a notary.