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4 COMMISSION GUIDANCE AS INFORMAL IMPLEMENTATION TOOL: FIT FOR THE FUTURE?

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In many ways, informal governance can be seen as the glue that holds the cumbersome and contradictory system of EU governance together.¹

4.1 INTRODUCTION

Over time, the EU legal framework which governs the EU institutions, the Member States and the citizens has expanded, evolved, and gained in complexity.² This legal framework is the product of over sixty years of European integration, during which the European Union has developed into a system of 28 Member States, has been subject to processes of democratisation and has expanded its range of competences, going far beyond the regulation of economic issues.³

Throughout the European integration process, outside or in the shadow of the legal framework, non-binding and informal rules have come to play an important role.⁴ At some places such measures are mentioned in the EU treaties.⁵ Mostly, however, it concerns institutionalized practices that do not have an explicit basis in the legal text.⁶ One of these practices is the issuing of non-legally binding instruments that guide and assist the Member

* I would like to thank Professor Stefaan Van den Bogaert, Professor Wim Voermans and Nicolas Clisson for their valuable comments on earlier versions of this chapter.

1 T. Christiansen, A. Follesdal & S. Piattoni, 'Informal Governance in the European Union: An Introduction', in T. Christiansen & S. Piattoni (Eds.), *Informal Governance in the European Union*, Edward Elgar, Cheltenham, 2003, p. 5.

2 J. P. Jacqu , *Droit Institutionnel de l'Union Europ enne*, Dalloz, Paris, 2012, p. 1 and p. 24.

3 H. Hofmann, G. C. Rowe & A. T rk, *Administrative Law and Policy of the European Union*, Oxford University Press, Oxford, 2011, pp. 3-4.

4 Christiansen, Follesdal & Piattoni, 2003.

5 For instance, in the field of social policy, Art. 156 provides for the establishment of guidelines and indicators. A similar provision can be found in the area of public health (Art. 168(2)). Art. 288 makes explicit reference to recommendations and opinions. Although these instruments may have external effect, they are not legally binding. See Hofmann, Rowe & T rk, 2011, p. 549.

6 Cf. J. H. Jans, S. Prechal & R. Widdershoven, *Europeanisation of Public Law*, Europa Law Publishing, Groningen, 2015, p. 12.

States in the implementation of EU legislation,⁷ hereinafter referred to as ‘Commission guidance’.

This chapter explores the relationship between Commission guidance and the legal framework governing the implementation of EU law. What is the role of these documents in practice, and under what conditions can the use of guidance contribute to the implementation of EU legislation by the Member States? Is the use of guidance documents – in the current state of the European integration – fit for the future?

Raising these questions seems all the more relevant in the context of the discussions on better regulation that currently take centre stage in EU politics.⁸ At a time where discourse and perception prevails that the European Union is doing too much and unnecessarily meddles with Member States affairs,⁹ it seems appropriate to rethink the use of Commission guidance. On the one hand, the highly informal character makes guidance documents an appealing and effective implementation tool that facilitates implementation processes and promotes harmonized implementation practices. At the same time, the lack of a principled approach towards the issuing and use of guidance documents carries the risk that the use of guidance documents may come to lead a life of its own, raising questions and problems in light of principles of law and better regulation.

The question whether and to what extent Commission guidance should be made subject to regulatory standards thus seems pertinent and one that, moreover, deserves to be addressed in light of the important place of better regulation issues on the agenda of the Dutch presidency of the Council of the European Union.¹⁰ However, the answer to this question is not so straightforward. When the issuing and use of guidance documents becomes subject to regulatory controls or procedures, this might be to the detriment of the informal character of guidance documents. The existence of an informal sphere, even within formal structures, is of considerable or perhaps even vital importance in a rigid legal system such as that of the European Union. Striving for the situation in which there is room for informality whilst legal principles are respected is the ideal; in reality choices

7 This definition is based on the definition used by Senden. However, the definition I employ is more confined in the sense that it focuses on guidance documents that address the implementing powers of the Member States in the implementation of EU law. These guidance documents will mostly fall within the category of ‘interpretative guidance’ and the guidance documents that address the discretionary powers of the Member States in the implementation of EU law. See L. Senden, ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’, *European Law Journal*, Vol. 19, No. 1, 2013, pp. 59-61.

8 See European Commission, Better Regulation for better results – An EU agenda, COM(2015)215 final, 19 May 2015. See also European Commission, Better Regulation Guidelines SWD(2015)111 final, 19 May 2015.

9 See, e.g. D. Murray, ‘Euro-scepticism is Growing All over Europe. Europhiles May Find That Ever Looser Union Is the Only Future for the EU’, *The Spectator*, 3 October 2015, available at: <www.spectator.co.uk/2015/10/euro-scepticism-is-growing-all-over-europe/>.

10 Letter from Minister Koenders: ‘Agenda for the General Affairs Council during the Netherlands EU Presidency’, 15 January 2016, p. 2, available at: <<http://english.eu2016.nl/documents/letters/16/01/15/letter-from-minister-koenders-agenda-for-the-general-affairs-council-during-the-netherlands-eu-presidency>>.

need to be made and the more compelling question perhaps concerns where the right ‘balance’ can be found.

This chapter is structured as follows. The first part describes the main features of the EU legal system, and identifies some vulnerabilities related to it. The second part first explains why and in what ways guidance documents play an important complementary role – largely due to their informal character – to the legislative framework that governs the implementation of EU legislation. Subsequently, it outlines some of the unintended consequences or risks related to the use of guidance documents. Finally, the third part draws some concluding remarks and addresses EU policymakers by providing recommendations on how to make Commission guidance fit for the future.

4.2 THE FEATURES AND VULNERABILITIES OF THE EU LEGAL SYSTEM

Through the issuing of guidance documents the European Commission assists the Member States in the implementation of the EU legislation. What are the functions of guidance documents in relation to this legal framework? What explains and justifies the mere existence of guidance documents? And why is the informal character of guidance documents important for these functions to be fulfilled?

The answer to these questions is closely related to the character of the legislative framework as exposed in the EU treaties and secondary legislation that governs the implementation of EU policies. This paragraph therefore outlines the main features of the EU legislative framework and identifies some flaws or vulnerabilities which might hamper an effective implementation of EU legislation

4.2.1 *Member State Administrations: Distant, Complex and Heterogeneous Entities*

The implementation of the legislative rules that are adopted at the level of the European Union is the responsibility of the Member States.¹¹ Article 291 of the Treaty on the Functioning of the European Union (TFEU) provides that the Member States must adopt all measures of national law necessary to implement legally binding Union acts.¹² The implementation of EU law not only requires the adoption of national legislative measures, but also involves the adoption of individual decisions, actions of enforcement as well as factual conduct or measures.¹³

11 Article 291(1) TFEU; Hofmann, Rowe & Türk, 2011, p. 13.

12 See also Hofmann, Rowe & Türk, 2011, p. 13 and n. 39.

13 In this chapter the concept of implementation is understood in a broad manner, encompassing the transposition, interpretation, application and enforcement of EU law. Compare S. Prechal, *Directives in EC Law*,

This system encompassing a decentralized implementation of Union law as reflected in the EU treaties, does not mean that there is no role for the European Commission. In the first place, the European Commission itself disposes of implementing powers where these powers have been conferred by the Member States.¹⁴ Secondly, in its role as the guardian of the EU treaties, the European Commission acts as a watchdog over the day-to-day application of EU law at the level of the Member States.¹⁵ As *ultimum remedium* the European Commission disposes of the power to launch an infringement procedure.¹⁶ Thirdly, the European Commission is ultimately responsible for the implementation of the EU budget.¹⁷ To this end the European Commission also disposes of supervisory powers. For instance, where the EU budget is implemented under shared management by the Member States, the European Commission has the power to apply financial corrections when deficiencies in the implementation of the EU budget occur.¹⁸

Thus, despite the decentralized implementation of Union law, implementing responsibilities are attributed to the European Commission as well as to the Member State administrations.¹⁹ In this system of shared administration²⁰ a constructive cooperation, dialogue, communication, and exchange of information between the two administrative branches is necessary and even vital to the smooth functioning of the EU administrative system. However, in practice, a gap or distance may exist between the European Commission and national administrative authorities. According to Möllers, for the European Commission ‘the administrations of the member states are distant, complex, and very heterogeneous entities in a vast administrative space’.²¹ When monitoring Member States practices, the European Commission is largely dependent on the provision of information

Oxford University Press, Oxford, 2009, pp. 5-6; J. Luijendijk & L.A.J. Senden, ‘De Gelaagde Doorwerking van Europese Administratieve Soft Law in de Nationale Rechtsorde’, *SEW*, Vol. 59, 2011, p. 315.

- 14 See Article 291(2) TFEU. Where uniform implementing conditions for implementing legally binding Union acts are needed, implementing powers can be conferred upon the European Commission and exceptionally upon the Council.
- 15 Article 17(1) TEU; N. Nugent, *The government and politics of the European Union*, Palgrave Macmillan, Basingstoke, 2010, p. 130; See also Hofmann, Rowe & Türk, 2011, p. 709; B. Steunenbergh, ‘Is Big Brother Watching? Commission Oversight of the National Implementation of EU Directives’, *European Union Politics*, Vol. 11, 2010, p. 359-380.
- 16 Article 258 TFEU; M. Ballesteros *et al.*, Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness, European Parliament – Directorate General for Internal Policies – Policy Department C: Citizens’ Rights and Constitutional Affairs, 2013, p. 15; Jacqué, 2012, p. 387.
- 17 Article 317 TFEU; Article 53 of Regulation 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, OJ 2012 L 298/1.
- 18 See Article 59(6) of Regulation 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, OJ 2012 L 298/1; Hofmann, Rowe & Türk, 2011, p. 347.
- 19 C. Blumann & L. Dubouis, *Droit Institutionnel de l’Union Européenne*, LexisNexis, Paris, 2010, p. 482 and pp. 491-493.
- 20 Jans, Prechal & Widdershoven, 2015, p. 7.
- 21 C. Möllers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford University Press, Oxford, 2013, p. 188.

by the Member States.²² Several factors might hamper the transfer of information from the Member States to Brussels. Indeed, the transfer of information not only depends on the knowledge of the Member States on implementation practices but largely also on their willingness to properly inform the European Commission on their implementation practices and the problems they encounter.²³ The lack of information on what implementing problems are encountered at the national level makes it difficult for the European Commission to adopt implementing measures that ‘fit’ within the administrative reality in the Member States. Conversely, at the national level the European Commission could be perceived as distanced and unaware of the implementation problems that are encountered at the national level. This potential gap or distance between the European Commission and Member State administrations could therefore be considered a vulnerability of the legal framework governing the implementation of Union law.

4.2.2 ‘What Does It Mean?’ The Lack of Clarity of EU Legislation

The EU legislative framework is composed of legislative acts (or ‘basic acts’) adopted according to the ordinary legislative procedure,²⁴ and of delegated and implementing acts that constitutes ‘non-legislative’ rulemaking or ‘subordinate legislation’.²⁵ In order for the EU legal framework to be correctly understood and implemented at the national level, the rules need to be comprehensible, clear and practical to implement.²⁶

However, in practice EU legislation²⁷ is often accused of having a vague, complex and ambiguous character. The lack of clarity of EU legislation is not surprising in light of the fact that EU legislation is often the result of political compromise. The process of enlargement towards nowadays 28 Member States and the process towards the European Parliament becoming a fully recognized co-legislator have largely influenced the character of EU legislative provisions.²⁸ Furthermore, jurisprudential guidance provided by the Court of Justice of the European Union is not available for any question, is often case specific or open to multiple interpretations. Questions on the interpretation of provisions in EU legislation inevitably arise.²⁹

22 Nugent, 2010, pp. 130-131.

23 Cf. Nugent 2010, p. 131.

24 See Article 289(1)(3) TFEU and Article 294 TFEU. As an exception legislative acts may also be the result of special legislative procedures (see article 289(2) TFEU). See also Hofmann, Rowe and Türk 2011, p. 94.

25 Article 290 and 291 TFEU; Hofmann, Rowe & Türk, 2011, p. 524; A. Alemanno & A. Meuwese. ‘Impact Assessment of EU Non-Legislative Rulemaking; The Missing Link in “New Comitology”’, *European Law Journal*, Vol. 19, 2013, pp. 76-92.

26 Cf. European Commission, Better Regulation Guidelines SWD(2015)111 final, 19 May 2015, p. 32.

27 In this article, the term ‘EU legislation’ is used both for basic acts as well as for delegated and implementing acts.

28 Cf. Jacqué 2012, p. 387.

29 Cf. Hofmann, Rowe & Türk, 2011, p. 570.

Thus, the lack of clarity and ensuing uncertainty as regards the proper implementation of EU legislation at the level of the Member States may be regarded as a second vulnerability inherent to the system of decentralized implementation. Despite the ‘better legislation’ agenda that seeks to achieve clear, simple and straightforward legislation, the process of democratisation is likely to be reflected in EU legislative acts in the future.

4.2.3 *United in Too Much Diversity?*

The decentralized implementation of Union law may be seen as an expression of the preserved sovereignty of the Member States.³⁰ It is for the Member States to choose the means and to designate the national competent authorities by which EU law is implemented.³¹ Furthermore, leaving room for manoeuvre allows for the implementing measures to be adjusted to suit the circumstances of a specific case and accordingly to ensure the optimum achievement of policy objectives.³² However, at the same time the room for manoeuvre left to the Member States may be regarded as a weakness or vulnerability that could raise uncertainty for administrative authorities and that jeopardizes consistent and harmonized implementation practices.

In the first place, the system whereby Union law is implemented by 28 different Member States with different administrative cultures, traditions and practices, may lead to unnecessary divergences in implementation practices and results.³³ Too many divergences in the implementation of EU law are generally considered to lead to disintegration and may hamper the achievement of policy objectives.³⁴ The harmonizing effect of EU legislation is considered necessary for greater integration and to strengthen the capacity of the European Union to govern, especially in competition driven areas where equal chances and opportunities for the addressees of EU laws are fundamental to the EU project.³⁵

Secondly, more flexibility and more room to manoeuvre for the Member States often implies more uncertainty for the administrative authorities charged with the implementation of EU legislation. Administrative authorities tend to prefer to have clear and straightforward rules on what is expected from the obligations laid down in EU legislation,

30 R. Mehdi, ‘L’Autonomie Institutionnelle et Procédurale et le Droit Administratif’, in J. B. Auby & J. Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, Bruylant, Bruxelles, 2007, p. 687.

31 Blumann & Dubouis, 2010, p. 481.

32 This approach is reflected in European Commission, Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007, p. 20.

33 J. Schwarze, *European Administrative Law*, London: Office for Official Publications of the European Communities and Sweet and Maxwell, 2006, p. 56.

34 B.G. Peters & J. Pierre. ‘Governance Approaches’, in A. Wiener & T. Diez (Eds.), *European Integration Theory*, Oxford University Press, Oxford, 2009, p. 102.

35 Schwarze, 2006, p. 51.

not to run the risk of being confronted with an infringement procedure or, if applicable, sanctions or other corrective measures of the European Commission.

Thus, a tension exists between the flexibility and room for manoeuvre provided for in EU legislation, on the one hand, and the need for certainty and clarity for authorities charged with the implementation of EU legislation, on the other hand. In view of the political objectives to focus on the ‘big’ questions³⁶ as well as the increased heterogeneity in the European Union with 28 Member States, EU legislation is likely to increasingly provide for flexibility in the implementation of EU legislation.

4.2.4 Conclusion: An Effective Implementation at Risk?

The EU legal system reveals vulnerabilities and contradictions, a conclusion which is not surprising perhaps in light of the fact that today the European Union comprises 28 Member States. The distance between the Member States and the Commission services could hamper the exchange of information between the two administrative branches. Contrary to the principles of the better regulation agenda, EU legislation often contains vague and ambiguous provisions and/or is characterized by a high level of complexity. The increased room for divergence and flexibility contrasts with the need for clear and straightforward rules of administrative authorities and, moreover, might lead to unnecessary divergences in implementation practices.

These vulnerabilities inherent to the legal framework may lead to deficiencies in implementation processes and practices. In the EU legal system the smooth and effective implementation at the national level is of utmost importance for the perceived legitimacy of EU policies and processes.³⁷ Does Commission guidance constitute a welcoming implementing tool that could help to address and overcome the vulnerabilities to the EU legislative framework?

4.3 COMMISSION GUIDANCE AS INFORMAL IMPLEMENTATION TOOL: VICE OR VIRTUE?

The introduction of this chapter mentioned the informal character of guidance documents. Before reflecting on the importance of informality as well as the dangers related to it, I briefly discuss in the ways in which the informal character of guidance documents reveals

36 J.C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission*, 15 July 2014, available at: <http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf>.

37 Ballesteros *et al.*, 2013, p. 17.

itself by comparing guidance documents to their counterparts: the Union secondary law instruments provided for in the treaties of the European Union.³⁸

The formalities of EU legal acts are linked to the adoption process, the outcome, and the use in practice.³⁹ The informalities of Commission guidance become visible when one compares Commission guidance with legislative acts on these three aspects.⁴⁰ First, Commission guidance lacks a clear and explicit legal basis in the EU treaties, and is not adopted according to a fixed, treaty based adoption procedure.⁴¹ Secondly, in terms of ‘outcome’ Commission guidance is informal in the sense that it lacks legally binding force.⁴² This promise is often reflected in the text of the guidance documents. For instance, the guidance document on the concept of obvious error related to the granting of EU agricultural subsidies states:

This document constitutes an opinion given by the Commission services, and is intended for purposes of general guidance only and is not legally binding. (...) Furthermore, it is emphasised that Member States have a responsibility to properly apply agricultural legislation.⁴³

Furthermore, the EU treaties do not require the publication of Commission guidance documents in the *Official Journal of the European Union*.⁴⁴ In practice, Commission guidance documents are issued under different names, such as Communications, Staff Working Documents and Interpretative Notes.⁴⁵ Thirdly, the informal character of Commission guidance expresses itself through the absence of formal, written rules that prescribe how Commission guidance should be dealt with by governmental actors, among which are national courts and national authorities.⁴⁶

38 See for a discussion of these instruments Jans, Prechal & Widdershoven, 2015, p. 11.

39 Compare Pauwelyn who distinguishes among output informality, process informality and actor informality. Pauwelyn, 2012, pp. 15-22.

40 See for a similar approach to identify informal international law making J. Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in J. Pauwelyn, R. A. Wessel & J. Wouters (Eds.), *An Introduction to Informal International Lawmaking*, Oxford University Press, Oxford, 2012, p. 15.

41 Luijendijk & Senden, 2011, pp. 319-320; Hofmann, Rowe & Türk, 2011, p. 543 and p. 549.

42 Soft law is not attributed legally binding force by the EU Treaties. See Article 288 TFEU; see also Senden, 2013, p. 62.

43 European Commission, Working Document AGR 49533/2002 on the concept of obvious error according to art. 12 of Commission Regulation (EC) 2419/2001, available at: <http://ies-webarchive-ext.jrc.it/mars/mars/content/download/805/5287/file/AGR495332002_obvious%20error.pdf> (last accessed on 29 January 2016).

44 Article 297 TFEU. Senden, 2013, p. 68.

45 See Hofmann, Rowe & Türk, 2011, pp. 544-566.

46 The absence of formal or written rules regulating the behaviour of political agents is considered a characteristic of informal governance. J. Mak & J. van Tatenhove, ‘Introduction: Informality in a Future EU’, *Perspectives on European Politics and Society*, Vol. 7, 2006, p. 3.

4.3.1 *Informality: The Key to the Success of Commission Guidance?*

The highly informal character makes guidance documents subject to controversy in legal literature. For instance, Commission guidance is criticized for the lack of an explicit legal basis,⁴⁷ the absence of a pre-established and transparent adoption procedure,⁴⁸ the limited judicial review by the Court of Justice of the European Union,⁴⁹ and the legal and practical effects and impacts that guidance can have in practice despite its non-legally binding character.⁵⁰

Yet it is the informal character that may be regarded as the key to the success of guidance documents in practice. It is the informal character that makes guidance documents an appreciated and appealing instrument, for the Member States as well as for the European Commission. This is witnessed by the fact that in several policy areas, such as the area of competition law and the area of EU agricultural subsidies, the issuing of guidance documents has come to be common practice.⁵¹ Furthermore, it is largely due to the informal and non-binding character that guidance documents are able to address the abovementioned vulnerabilities in the EU legislative framework.

In the first place, the exchange of views and discussions with experts from the Member States prior to the finalisation of guidance documents facilitates an informal dialogue between the services of the European Commission and the distanced national administrative authorities.⁵² These discussions often take place in the context of expert groups or committee meetings, where draft versions of the guidance documents are presented. These discussions enable dialogue and create a sphere of cooperation and trust rather than of conflict, especially when the European Commission services prove responsive to the problems encountered by the Member States and when the Member States deliberately share information on their experiences and questions. For instance, in the highly politicized area of free movement of persons, Commission guidelines were issued in 2009 in order to address implementation deficiencies, as a first step, through dialogue rather than through the opening of infringement procedures.⁵³ To conclude, the issuing of guidance documents

47 Luijendijk & Senden, 2011, p. 350; Hofmann, Rowe & Türk, 2011, p. 549.

48 Senden 2013, p. 65.

49 J. Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law', *Common Market Law Review*, Vol. 48, 2011, pp. 329-355.

50 Ștefan, 2013, p. 17.

51 See Ștefan, 2013, p. 67 on the role soft law in the area of competition law; For a discussion of soft law in the area of EU subsidies see J.E. van den Brink, *De uitvoering van Europese Subsidieregelingen in Nederland: Juridische Knelpunten en Uitdagingen*, Kluwer, Deventer, 2012, pp. 267-307.

52 Cf. Hofmann, Rowe and Türk according to whom '[t]he dialogic function of these various instruments is, without doubt, of great importance'. Hofmann, Rowe & Türk, 2011, p. 555.

53 European Commission, Communication from the European Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, (COM(2009)313 final), 2 July 2009.

can be considered a means to bridge or at least reduce the distance between the European Commission and the Member States, a distance which has been characterized as a vulnerability inherent to the legislative framework.

Secondly, the informal character of the process prior to the issuing of guidance documents can be considered suitable for addressing the need for clarification of provisions in EU legislation, the second vulnerability identified above. Despite prior consultation among national experts, it is eventually the European Commission who decides upon the content of the guidance documents. This enables the European Commission to take the remarks and comments of the Member States into account in so far as this contributes to the purposes of clarifying EU legislation; a formal vote on the final version is not required. Therefore, the text of guidance documents is less likely to reflect political compromises or to suffer from a lack of clarity than legislative texts. In this respect, the valuable role of guidance documents becomes clear in the area of agricultural subsidies and particularly in the area of direct payments. In this policy area, where legislative instruments have a highly technical and complex character, guidance documents provide the necessary clarity to administrative authorities that reduce the risk for financial corrections by following the guidelines.⁵⁴

Thirdly, guidance documents could also be considered the appropriate instrument for providing some coherence and uniformity when flexibility is left to the Member States.⁵⁵ In view of the political demand for more flexibility, the emphasis on the principles of subsidiarity and proportionality, as well as the increased heterogeneity in the European Union of 28 Member States, the issuing of a guidance document is in many situations preferable and more politically acceptable than the adoption of a legally binding act. Indeed, contrary to a legally binding act, the assumption underlying the issuing of the guidance documents is that the Member States still have the options of choosing their own path and of deviating from the guidance provided by the European Commission.⁵⁶ As a result, guidance documents are apt to address implementation questions even in areas with a highly heterogeneous character. For instance, the Species guidance document related to the Habitats Directive provides further guidance to the implementation of the requirements related to the protection of species, without imposing one size fits all solutions.⁵⁷ Thus, guidance documents also address the third vulnerability of the EU legislative framework: the increased room for flexibility left to the Member States in implementation practices.

54 Although of course the risk remains that the CJEU might eventually adopt a different interpretation.

55 Hofmann, Rowe and Türk emphasize that without Commission guidance 'there would be high level of unnecessary divergence in approach, technique, and organization (...) across the Member States'. Hofmann, Rowe & Türk, 2011, p. 570.

56 Eventually, the Member States may have this tested before the Court of Justice. *See also* Hofmann, Rowe & Türk, 2011, p. 570.

57 European Commission, Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007, and particularly p. 19 and 20.

In conclusion, for various reasons Commission guidance documents can be considered the appropriate instrument for providing the solution for the vulnerabilities inherent to the EU legislative framework. Commission guidance facilitates an informal dialogue between the European Commission and the Member States, is able to provide clarification on provisions of EU law and promotes a uniform implementation, whilst respecting the room for manoeuvre of the Member States. The informal and non-binding character of guidance documents plays an important role in this regard, and makes it an appealing alternative to the adoption or change of an implementing or delegated act for which the legislative procedure is to be followed.

4.4 THE USE OF COMMISSION GUIDANCE IN PRACTICE: GIVING RISE TO UNINTENDED CONSEQUENCES?

The previous paragraph outlines how Commission guidance is able to contribute to the smooth implementation of EU legislation. These promises of Commission guidance are often reflected in legal and political discourse justifying the issuing of guidance documents.⁵⁸ However, whilst acknowledging the importance of guidance documents for the functioning of the EU administrative system, does the use of guidance documents also entail some risks or give rise to potential unintended consequences that might be at odds with legal principles governing the implementation of EU legislation? And if so, what lessons can be drawn for the use of guidance documents in the future? These questions are addressed in this and the next paragraph.

In the first place, through the use of guidance documents in practice the room for manoeuvre that the Member States have been granted, may become redefined, confined or even illusory. An illustrative example can be found in the area of the Habitats Directive.⁵⁹ The District Court of The Hague uses the Species guidance document⁶⁰ for defining the scope of the obligation laid down in Article 12 of the Habitats Directive according to which the Member States have to set up a system of protection.⁶¹ By using the Species guidance document as an interpretation aid, the court in fact shapes the outer lines or the limits of this obligation that rests on The Netherlands.

58 See e.g. the introduction of European Commission, Working Document AGR 49533/2002 on the concept of obvious error according to art. 12 of Commission Regulation (EC) 2419/2001, available at: <http://ies-webarchive-ext.jrc.it/mars/mars/content/download/805/5287/file/AGR495332002_obvious%20error.pdf> (last accessed on 29 January 2016).

59 Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, (EEC) 92/43 OJ 1992 L 206/7.

60 European Commission, Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007, p. 4.

61 District Court of The Hague, 22 May 2013, ECLI:NL:RBDHA:2013:CA0593.

A second but different example can be found in the area of agricultural subsidies. In this situation, the Dutch administration strictly adheres to the ‘fifty trees criterion’ laid down in a Working Document issued by the Directorate General for Agriculture and Rural Development.⁶² In line with this criterion, the Dutch administration takes the view that an agricultural parcel containing more than fifty trees per hectare is, as a general rule, to be considered ineligible for an EU subsidy.⁶³ The criterion provides further guidance to a provision in a regulation which prescribes that a parcel that contains trees can be considered eligible for aid provided that agricultural activities can be carried out on the parcel in the same way as on parcels without trees in the same area.⁶⁴ By strictly adhering to the European Commission guidelines, the Dutch administration confines the discretion it has been granted in the implementation of EU direct payments legislation.⁶⁵

From these two examples it follows that, through the use of guidance by national courts and the national administrative authorities, the room for discretion granted by the underlying legal provision may become redefined or may even become illusory. The use of guidance documents does, however, not necessarily mean that the European Commission dictates the outcomes of implementing decisions. The effect of Commission guidance on the room for discretion of the Member States depends on the type of guidance and on the use of guidance documents in practice. Nevertheless, the conclusion may be drawn that the vertical division of competences in the implementation of EU legislation may become affected by the use of Commission guidance in practice.

Secondly, the use of Commission guidance when implementing EU legislation might render indiscernible the division of competences between the European Commission and national authorities. Commission guidance often indirectly and silently influences the way in which EU law is transposed, interpreted, and applied. As a consequence, there is no clear, dividing line between the responsibilities of the Member States and those of the

62 See European Commission, Working Document on On-the-spot checks of area according to articles 23-32 of Commission Regulation (EC) 796/2004 (AGRI/60363/2005-REV1), 2005. The document (p. 4) states: ‘In accordance with Art. 8(1) of R.796/2004, (forage) areas of trees inside an agricultural parcel with density of more than 50 trees/ha should, as a general rule, be considered as ineligible.’

63 Trade and Industry Appeals Tribunal, 27 October 2010, ECLI:NL:CBB:2010:BO2425, Para. 2.6; Trade and Industry Appeals Tribunal, 21 September 2011, Para. 2.3.1. In 2009 the fifty tree criterion was transposed into a ministerial decree, *the Regeling GLB-inkomenssteun 2009*. The act was repealed on 1 January 2015, see *Staatscourant* 2014, 36127.

64 See Article 8(1) of Regulation (EC) 796/2004 of 21 April 2004, OJ 2004 L 141/18, which was later replaced by Article 34(4) of Commission Regulation (EC) 1122/2009 of 30 November 2009, OJ 2009 L 316/65 (repealed).

65 The Dutch Trade and Industry Appeals Tribunal does not accept this practice. The highest administrative courts consider this practice to be unacceptable for the reason that it runs counter to the very nature of this working document. The court requires that an individual assessment is made as prescribed by the underlying EU subsidy regulation. See Trade and Industry Appeals Tribunal 27 October 2010, ECLI:NL:CBB:2010:BO2425, Para. 2.6; Trade and Industry Appeals Tribunal, 21 September 2011, ECLI:NL:CBB:2011:BU1249, Para. 2.3.3.

European Commission. This is problematic from a viewpoint of accountability.⁶⁶ The example on the use of the fifty tree criterion by Dutch administrative authorities is, again, illustrative. By using this criterion when deciding upon the eligibility of an agricultural parcel, the guidance issued by the European Commission influences the decision taken by the Dutch administrative authority. The final beneficiary is only confronted with the decision taken by the national administrative authority. The guidelines upon which the decisions are based remain invisible, hidden behind the administrative practices of national authorities. Although the issuing of the guidelines can be understood and explained in light of the final responsibility of the European Commission for the implementation of the EU budget,⁶⁷ it is the national authorities that will be held responsible for the decision when challenged before a national court. The symbiosis of European and national practices in the implementation and application of Union legislation contrasts with the principle of accountability, according to which it should be clear which measures are the result of European obligations and which measures are national measures.⁶⁸

Thirdly and finally, the issuing of Commission guidance might also raise questions about rather than provide answers to the proper interpretation and implementation of EU legislation. This unintended consequence could arise for multiple reasons. In the first place, when drafted in a vague or unclear manner, Commission guidance does not achieve the objective of ‘clarifying’ the underlying legal provisions. In contrast, it probably raises questions on the side of national authorities when implementing EU legislation, or might even invite them to disregard the guidance document in question. Secondly, questions may also arise when national courts or the Court of Justice of the European Union adopt a different interpretation than the interpretation provided for in Commission guidance documents. Although this ‘risk’ on the proper interpretation of EU legislation is inherent to the implementation and application of EU law in day-to-day practices, the existence of multiple interpretations could raise confusion and uncertainty as regards of the status of guidance documents. Thirdly, uncertainty might arise when too many or contradictory guidance documents are adopted. This risk particularly arises in areas where guidance documents are used often and in different forms. For instance in the area of EU subsidies, guidance is provided for in letters to the Member States, working documents, interpretative notes, guidance documents, technical guidance documents as well as on the Wikicap website. These multiple sources of guidance may render it impossible for actors to have

66 Möllers distinguishes between, on the one hand, democratic accountability, meaning that citizens can hold the public authority politically responsible for decisions that affect them, and, on the other hand, legal accountability, which requires that decisions of public authority can be challenged in court. Möllers, 2013, p. 191.

67 See Article 317 TFEU. See section 4.2.1 above.

68 This principle is also reflected in the better regulation objectives. See for instance, the European Commission Proposal for an Interinstitutional Agreement on Better Regulation. Communication from the Commission to the European Parliament and the Council, COM(2015) 216 final, 19 May 2015, p. 8.

an overview of, let alone consult, the various guidance documents provided by the European Commission and may have a confusing rather than clarifying effect on implementation processes. Moreover, in this way the use of guidance documents may add to the image of the European Union being responsible for producing administrative burden and overregulation.

To conclude, the issuing of guidance documents may trigger unintended consequences that could affect the legitimacy of the use of guidance documents. Although this conclusion does not call into question the valuable role of Commission guidance as informal implementation tool, it calls for a further exploration of how the use of Commission guidance could be optimized in the future.

4.5 CONCLUSION AND RECOMMENDATIONS

This chapter reveals the dilemma of EU policymakers when faced with the question of whether or not to provide further guidance to the Member States for the implementation of EU legislation. On the one hand, the use of Commission guidance may have unintended consequences. The issuing of guidance may affect the room of manoeuvre granted to the Member States, could render indiscernible the division of competences between the European Commission and national authorities, and may sometimes lead to confusion and to a complexification rather than to a clarification of EU legislation. On the other hand, Commission guidance is an appealing implementation tool that enables the European Commission to address problems related to the implementation of EU legislation. In the rigid and cumbersome EU legislative system, Commission guidance constitutes an important instrument that simply makes the EU legal system work. The informal, non-binding character of Commission guidance can be considered key to its success.

What is more, Commission guidance is likely to become more and more important in the future. Several factors can be identified that invite policymakers to increasingly have recourse to the issuing of guidance documents. In the first place, due to the democratisation of legislative processes and despite the better regulation agenda, political compromises are likely to remain reflected in EU legislative acts. This stresses the need for clarification through guidance documents. Secondly, the tendency and the political desirability for more flexibility for the Member States and for a European Union which acts upon 'big' rather than on 'small' matters is likely to lead to a greater demand for guidance from the European Commission. In practice, public authorities involved in the implementation of EU law need rules and benchmarks. Often, flexibility and frameworks do not provide the certainty and predictability that is desired in practice. Thirdly, an increase in the use of guidance documents is to be expected due to the proactive attitude of the European Commission regarding the amelioration of the implementation of EU legislation 'on the

ground', and regarding the promotion of the exchange and dissemination of best practices. Indeed, the use of guidance documents enables the European Commission to show that it is involved with the problems encountered at the national level, and to avoid being accused of leaving the Member States 'stumbling in the dark'. This proactive attitude is, moreover, likely to trigger more requests for guidance from the Member States.

This development, suggesting the growing importance of guidance documents, raises some legal questions. What does the increase in the use of informal rules mean for the character of the EU legal order? Does the increase of Commission guidance trigger a 'guidance culture', and how does this culture relate to the rule of law that is fundamental to the EU project? Where to find the right balance between the informal and the formal sphere, whilst acknowledging the importance of the coexistence of both worlds?

The growing importance of guidance documents is not only challenging and relevant from a theoretical point of view, but also and perhaps all the more from a practical and empirical point of view. In the first place, it points to the need to have further insights into the actual role played by guidance documents in practice in various policy areas. Therefore, in order to unravel the role of guidance documents in practice, it is worth considering whether guidance documents need to be subjected to the Fitness Check.⁶⁹ The Fitness Check involves an evaluation of existing EU interventions, and assesses whether the interventions brought about the expected changes or whether there are unintended effects or consequences.⁷⁰ Existing guidance documents should be identified and analyzed to see whether they are 'fit for purpose', especially in policy areas where guidance documents play an important but often 'invisible' role.

Secondly, the proliferation of guidance documents invites a rethink of their usage in the future. Indeed, it is EU policymakers who ultimately face the question of whether and how to act.⁷¹ A more thought through and principled approach towards the use of guidance documents could 'guide' policymakers when facing this question. Furthermore, such a principled approach could enhance the legitimacy of the use of guidance documents.

In order for criteria and principles to be developed, inspiration could be drawn from the better regulation agenda and principles. However, this does not necessarily mean that guidance documents should be subjected to the requirements of the better legislation agenda, such as the obligation to conduct an impact assessment. Making guidance documents subject to heavy better regulation requirements risks adding to the already rigid character of the EU legal framework, whilst downplaying the informal character of guidance documents. Due to this informal nature guidance documents have an important role to

⁶⁹ The better regulation guidelines provide for the possibility to include Commission guidance in the Fitness Check. See European Commission, Better Regulation Guidelines, SWD(2015)111 final, 19 May 2015, p. 50 and n. 59.

⁷⁰ *Id.*, p. 49 and p. 50

⁷¹ *Id.*, p. 4.

play in holding together the EU legal system. An ‘impact assessment light’ approach, whereby the advantages and the potential risks of guidance are identified and balanced on a case-by-case basis, could strike the right balance and lead to the ‘smart’ use of guidance documents without imposing overly stringent procedural requirements.

In conclusion, despite the potential unintended consequences that perhaps cannot be fully ruled out, Commission guidance documents can be considered an important and necessary informal implementation tool that complements the EU legislative framework. What is more, in view of the Dutch presidency’s priority of promoting the simplification of EU legislation,⁷² issuing guidance documents in line with the principled approach outlined here, could even be encouraged in order to enable an informal dialogue and to provide for the necessary clarity and uniformity in implementation processes.

72 See for instance the letter from Minister Koenders, *supra* n. 10, p. 2.