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Guidance documents of the European Commission: a typology to trace the effects in the national legal order

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Abstract

In the European Union the Member States are primarily responsible for the implementation of the EU legal framework. In many policy areas, the European Commission issues non legally binding guidance documents that aim to assist the Member States in the implementation process. These guidance documents take various forms, such as working documents, guidelines, interpretative notes, letters or Communications.

This article introduces five types of guidance provisions that can be discerned in the text of the guidance documents of the European Commission. The five types of guidance are 1) interpretative guidance, 2) implementing guidance, 3) explanatory guidance, 4) technical guidance and 5) the dissemination of good practices.

It is argued that this typology of guidance provisions could serve as an analytical framework to study the practical and legal effects of the use of guidance documents in the national legal order. Further research is needed to find out whether different types of guidance generate different practical and/or legal consequences in practice.

I. Introduction

In the European Union the Member States are primarily responsible for the implementation of legally binding rules that are adopted at the EU level.¹ Legally binding rules are laid down in primary legislation, the EU Treaties, as well as in secondary legislation which takes the form of regulations, directives and decisions.²

Complementary to these legally binding rules, the European Commission assists the Member States in the implementation of EU law through non legally

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¹ Article 291(1) TFEU.

² Article 288 TFEU.

binding guidance documents.³ Guidance documents feature in several policy areas, such as in the area of EU competition law,⁴ the area of environmental law,⁵ the area of EU subsidies⁶ and in the area of telecommunications law.⁷ Within the different policy areas, guidance documents are issued in different forms and under different names, such as working documents, guidelines, communications or even in the form of letters.⁸

Although the exact number of guidance documents is uncertain, there seems to be an increase in the number of guidance documents that address the implementing powers of the Member States.⁹ In view of the numerous guidance documents that are issued by the European Commission, it is not surprising that guidance documents also feature at the national level. Guidance documents may constitute a welcome implementation aid for national authorities when implementing EU legislative provisions.¹⁰ National courts may also use guidance documents of the European Commission when adjudicating on questions of EU law.¹¹

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- ³ L. Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control', *European Law Journal*, 19, 1, 2013, p. 61, H.C.H. Hofmann, G.C. Rowe and A. Türk, *Administrative law and policy of the European Union*, Oxford: Oxford University Press 2011, p. 544.
 - ⁴ See for the extensive research on the use of soft law documents in the area of competition by the EU Court of Justice O. Stefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union*, Alphen aan den Rijn: Wolters Kluwer 2013.
 - ⁵ See for a discussion of post-legislative guidance in the area of environmental law J. Scott, 'In legal limbo: post-legislative guidance as a challenge for European administrative law', *Common Market Law Review*, 48, 2011, p. 329-355.
 - ⁶ J.E. van den Brink, 'The Significance of European Administrative Soft Law for the Implementation of ESI Funds in the Member States', *European Structural and Investment Funds Journal* 4, 1 2016, p. 2-11.
 - ⁷ Recommendations are for instance issued in relation to the Telecommunications Framework Directive (Directive 2002/21/EC). See for a discussion on the legal effects of the recommendations in this policy area J.C.A. van Dam, 'Het Hof van Justitie spreekt zicht uit over de bindende werking van een aanbeveling van de Europese Commissie', *Nederlands tijdschrift voor Europees recht*, 4, 2017, p. 84-90.
 - ⁸ See for an overview Hofmann, Rowe and Türk 2011, 544-566.
 - ⁹ J. Luijendijk and L.A.J. Senden, 'De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', *Tijdschrift voor Europees en economisch recht*, 7, 2011, p. 317. Stefan shows that there has been an increase in references to soft law documents in the judgments of the Court of Justice in the area of state aid and competition law. She observes a 'boost' in the number of references at the of the 1990's. See Stefan 2013, p. 67, 68; However, it remains uncertain what percentage of these references relate to guidance documents that address the implementing powers of the Member States.
 - ¹⁰ Hofmann, Rowe & Türk 2011, 570; See for an explorative research on the use of European administrative soft law by the Dutch legislator Luijendijk and Senden 2011, p. 337-341.
 - ¹¹ The use of guidance documents by national courts is discussed in Luijendijk and Senden 2011; J.E. Van den Brink and J.C.A. Van Dam, 'Nederlandse bestuursrecht en unierechtelijke "beleidsregels"', *JBplus*, 1, 2014; Z. Georgieva, 'The judicial reception of competition soft law in the Netherlands and the UK', *European Competition Journal*, 12, 1, 2016, p. 54-86, J.C.A. van Dam, 'De doorwerking van Europese administratieve soft law: in strijd met Nederlandse legaliteit?', *Netherlands Administrative Law Library*, 2013.

The issuing of guidance documents complementary to the EU legislative rules is generally considered one of the tools that contributes to the correct and effective implementation of EU law.¹² European Commission officials consider guidance documents amongst the most effective compliance instruments,¹³ and also in legal literature guidance documents are often associated with the effective implementation of EU law.¹⁴

The use of guidance documents by national authorities and national courts is not only interesting from the viewpoint of effectiveness. The use of guidance documents by national authorities and national courts is also relevant in light of legal principles that govern the implementation of EU law.

On the one hand, the use of guidance documents in national implementing processes could positively interact with legal principles.¹⁵ For instance, when guidance documents are used by national authorities and national courts this could enhance predictability in the implementation of EU law, contributing to legal certainty in the interpretation and application of EU law.¹⁶ At the same time the use of guidance documents by national authorities and national courts could contribute to consistency in the implementation of EU law.¹⁷ When national authorities and national courts use guidance documents in an explicit and visible manner, this could enhance the transparency of the criteria that are used or that are expected to be used when implementing EU law.¹⁸

On the other hand, the use, or non-use of guidance documents by national authorities and national courts could also give rise to problems or concerns in light of legal principles that govern the implementation of EU law. For instance, inconsistencies in implementing processes might arise when a guidance provision is used differently by national authorities and national courts. Uncertainty with regard to the role or status of guidance documents could, for instance, make that guidance documents have the effect of undermining rather than

¹² M. Ballesteros, R. Mehdi at al., *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*, Brussels: European Parliament 2013, p. 46.

¹³ *Ibid.*, p. 46.

¹⁴ F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tool and Techniques', in: T. Daintith, *Implementing EC Law in the United Kingdom: Structures for Indirect Rule*, Chichester: John Wiley & Sons 1995, p. 31-36.

¹⁵ Stefan argues that courts should be willing to acknowledge the functions that soft law is meant to achieve. See O. Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as Tool of Multi-Level Governance', *Maastricht Journal of European and Comparative Law*, 21, 2, 2014, p. 359-379, p. 368.

¹⁶ Hofmann, Rowe & Türk 2011, 541.

¹⁷ Stefan 2014, p. 359.

¹⁸ The same reasoning can be made for the use of guidelines by the European Commission when using its discretionary powers. See S. Prechal & M. de Leeuw, 'Dimensions of Transparency: The Building Blocks for a new Legal Principle?', *Review of European Administrative Law*, 0, 1, 2007, p. 55, 56.

enhancing legal certainty in the application of EU law.¹⁹ Similarly, if the use of guidance documents remains implicit or invisible to the outside world, this could give rise to problems of transparency concerning the role of guidance documents in implementation processes.²⁰ Last but not least, the use of guidance documents in the national legal order might raise legality concerns. This might be the case, for instance, if guidance documents are used as a standard to take decisions or actions that affect the rights and obligations of citizens.²¹

If it appears that the use, or non-use, of guidance documents by national authorities and/or national courts raises problems in light of legal principles, the question arises whether and how these problems could be solved. Indeed, the respect for legal principles during implementation processes ultimately ensures that national authorities act in accordance with the rule of law.²² This is all the more important since the potential effect of guidance documents to enhance legal principles in the implementation process is considered part of the objectives or even the *raison d'être* of guidance documents.²³

The use and effects of guidance documents of the European Commission in the national legal order is increasingly subject to scholarly attention.²⁴ The research that has been conducted and that is being conducted on the use of guidance documents by national authorities and national courts contributes to identifying the legal implications of guidance documents in the national legal order. However, thus far, the use and effects of guidance documents have not been explored along the lines of different types of guidance provisions that address the implementing powers of the Member States.²⁵

¹⁹ Compare Conseil D'État, *Étude annuelle 2013: Le droit souple*, Paris: La documentation Française 2013, p. 97, 98.

²⁰ A 'silent use' of guidance document in implementation processes could also give rise to problems of accountability, see J.C.A. van Dam, 'Commission Guidance as Informal Implementation Tool: Fit for the Future?', in: B. Steunenberg, W. Voermans & S. Van den Bogaert, *Fit for the Future?: reflections from Leiden on the functioning of the EU*, The Hague: Eleven International Publishing 2016, p. 64, 65.

²¹ See for a discussion on the use of guidance documents in the area of EU subsidies in light of the Dutch principle of legality J.C.A. van Dam, 'De doorwerking van Europese administratieve soft law: in strijd met Nederlandse legaliteit?', *Netherlands Administrative Law Library*, 2013, January-March.

²² Cf. T. Tridimas, *The general principles of EU law*, Oxford: Oxford University Press 2006, p. 4, 5.

²³ Stefan 2014, p. 368, 379; Senden, 2013, p. 60, 61, 64; Conseil d'État – Étude annuelle 2013, p. 85.

²⁴ Luijendijk and Senden 2011; Van Dam 2013; Van den Brink and Van Dam 2014; Stefan 2014, p. 368; Georgieva 2016; L.A.J. Senden, 'Schaduwgebieden van Europese regulering', *RegelMaat* 30, 5, 2015, p. 338-353.

²⁵ The study of Luyendijk and Senden is an exception in the sense that this study traces the effects of two types of 'European administrative soft law', namely of interpretative soft law instruments and of decisional soft law instruments. The study explores the references of Dutch courts in the areas of competition law, state aid and telecommunication along these two lines of soft law documents. Commission (see Luyendijk and Senden 2011, p. 342). As will be explained below, decisional documents in which the European Commission makes clear how it intends to use the room for discretion in principle do not fall into the category of guidance documents as

This article proposes a framework of five types of guidance documents that could be used in order to systematically trace the use of guidance documents in the national legal order. It might be possible that different types of guidance lead to different consequences in practice. Some types of guidance might appear more problematic than others, or some types of guidance might raise different legal problems compared to other types of guidance. Consequently, this might mean that for certain types of guidance different measures might need to be taken. This article first defines and delimits the scope of the phenomenon of guidance documents (paragraph 2). Subsequently it introduces the five types of guidance (paragraph 3) and thirdly it reflects on how these five types of guidance could be used to trace the effects of guidance documents at the national level (paragraph 4).

2. Guidance documents as informal regulatory tool

As explained above, the focal point of this article are guidance documents issued by the European Commission that seek to assist the Member States in the implementation of EU law. Implementation is understood in a broad manner, as encompassing the interpretation, transposition, application and enforcement of EU law.²⁶ The term guidance is also understood in a broad manner and could be defined as any written document of the European Commission which is aimed at providing assistance to the Member States in the implementation of EU law. Guidance documents are issued subsequent to the issuing of EU legislative rules, and therefore have a ‘post-law’ function.²⁷

Senden discerns between two categories of post-legislative acts.²⁸ The first category consists of interpretative acts, which are acts in which the European Commission makes clear how, according to the European Commission, a certain provision is to be interpreted and applied.²⁹ The second category consists of decisional acts that are issued in areas where implementing powers have been conferred upon the European Commission. In decisional acts the European Commission makes clear how it intends to apply EU law in individual cases.³⁰ Decisional acts can particularly be found in the area of competition law and

defined in this article. This article discerns among different types of guidance within the category of guidance documents that seek to assist the Member States in the implementation of EU law.

²⁶ See for the different phases of the implementation process J.H. Jans, S. Prechal & R. Widdershoven, *Europeanisation of Public Law* Groningen: Europa Law Publishing 2015, p. 13-18.

²⁷ L. Senden, *Soft Law in European Community Law*, Oxford: Hard Legal Publishing 2004, p. 120.

²⁸ See Senden 2013, p. 59-62.

²⁹ *Ibid.*, p. 60.

³⁰ *Ibid.*

state aid, but also, for instance, in the area of EU subsidies.³¹ Senden notes that recently a new sub category of decisional acts has emerged which consists of acts that seek ‘to guide the way in which Member States use their discretionary powers’ in the implementation of EU law.³²

Guidance documents of the European Commission may have an interpretative character, and might therefore fall into the category of interpretative acts. At the same time, guidance documents could fall within the sub category of decisional acts that address the discretionary powers of the Member States. In contrast, decisional acts in which the European Commission makes clear how it intends to use its implementing powers in principle fall outside the scope of guidance documents as defined above. These documents address the implementing powers of the European Commission, not those of the Member States.

A key characteristic of guidance documents is that the documents are to a larger or lesser degree characterised by features of informality. These features of informality become visible when comparing guidance documents to the features of formality that govern the issuing and use of legally binding rules.³³ In the EU Treaties these rules take the form of legislative acts, that are adopted following the ordinary legislative procedure,³⁴ or of delegated acts or implementing acts for which special legislative procedures are laid down in articles 190 and 191 TFEU.³⁵ Contrary to these legally binding acts, guidance documents are not issued following one of the legislative procedures spelled out in the EU Treaties. Not only the issuing process, but also the form of guidance documents is informal.³⁶ There is no general obligation that guidance documents should be published in the *Official Journal of the European Union*,³⁷ nor is there a general provision which prescribes in what form guidance documents should be issued.³⁸

As indicated above, despite the informal and non-binding character, guidance documents might have the effect of influencing the behaviour of authorities as

³¹ An example of a decisional act in the area of EU subsidies is the Communication containing guidelines on the calculation of the financial corrections in the framework of the conformity and financial clearance of accounts procedures, (C(2015)3675).

³² Senden 2013, p. 61; Luijendijk and Senden describe this recent phenomenon as a third category next to interpretative and decisional acts (Luijendijk and Senden 2011, p. 317).

³³ Compare J. Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in: J. Pauwelyn, R.A. Wessel & J. Wouters, *An Introduction to Informal International Lawmaking*, Oxford: Oxford University Press 2012, p. 15-22.

³⁴ Article 289 TFUE and article 294 TFEU.

³⁵ See for an overview Hofmann, Rowe & Türk 2011, p. 94-99.

³⁶ Pauwelyn 2012, p. 15-22 distinguishes among output informality, process informality and actor informality.

³⁷ This follows from article 297 TFEU which requires publication in the *OJEU* for legally binding acts.

³⁸ Article 288 TFEU only refers to opinions and recommendations. See for an overview of the different forms that guidance documents take Hofmann, Rowe & Türk, p. 544-566.

well as of courts and other interested parties in the Member States as well as at the EU level.³⁹ These possible practical effects make that guidance documents could be considered a regulatory instrument.⁴⁰

Furthermore, guidance documents could also generate legal effects by which guidance documents, indirectly, affect the legal position of authorities and citizens.⁴¹ Legal effects might, for instance, arise when a national court uses a guidance provision as an aid to interpret EU legislative provisions.⁴² Due to the possibility of exerting practical and legal effects, guidance documents that contain rules of conduct could be considered a form of soft law. Senden defines soft law as ‘rules of conduct that have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’.⁴³

However, not all guidance documents could be considered a form of soft law. As indicated above, the provision of guidance is understood in a broad manner and could take any form of written assistance provided to the Member States in the implementation of EU law. As a consequence, guidance may be of an informational or technical character and is not limited to only encompassing rules of behaviour, which is essential to soft law documents.⁴⁴ Therefore, I choose to speak of guidance documents and to not to use the term ‘soft law’.

The features of informality give guidance documents advantages over the issuing of legislative, delegated and implementing acts.⁴⁵ Guidance documents can be relatively easily issued and revised or updated since a legislative process does not need to be followed.⁴⁶ Due to the lack of legally binding force, guidance documents do not, at least in theory, encroach upon the discretionary powers

³⁹ Compare Stefan 2013, p. 16.

⁴⁰ Senden refers to soft post legislative rulemaking as a ‘regulatory phenomenon’, see Senden 2013, p. 18. Due to the absence of legally binding force, guidance documents may also be considered a form of new governance as opposed to regulation through law. See on the phenomenon of new governance J. Scott and D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, *European Law Journal* 8, 1, 2002, p. 2.

⁴¹ See on the concept of legal effects T.C. Hartley, *The Foundations of European Community Law*, Oxford: Oxford University Press 2007, p. 326; See for a list of legal effects F. Snyder, ‘Inter-institutional Agreements: Forms and Constitutional Limitations’, in: G. Winter, *Sources and Categories of European Union Law: A Comparative and Reform Perspective* Baden-Baden: Nomos 1996, p. 463; See for a summarising discussion of legal and practical effects of soft law Stefan 2013, p. 16.

⁴² Stefan 2013, p. 16.

⁴³ Senden 2004, p. 112.

⁴⁴ The term soft law concerns rules of conduct and in principle exclude instruments that are of an informational character. Senden notes that the dividing line between a rule of conduct and the provisions of information may not always be clear. See Senden 2004, p. 112.

⁴⁵ Scott 2011, p. 330; See for a discussion on the ‘virtues of informality’ of guidance documents Van Dam 2016, p. 55-63.

⁴⁶ See for a discussion of ‘new governance’ J. Scott & D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, *European Law Journal* 8, 1, 2002, p. 5-6.

of the Member States and may therefore be considered an acceptable alternative over opening of the legislative process.⁴⁷ In brief, guidance documents are an appealing instrument, both for the European Commission and for the Member States.⁴⁸

The appealing character of guidance documents is reflected in the numerous guidance documents that are issued in several policy areas, and which, as said above, take many shapes and forms. This scattered landscape of guidance documents makes it difficult to systematically analyse the effects and consequences of issuing guidance documents. On the basis of the name and form of guidance documents it is difficult, if not impossible, to systematically analyse the use and effects of guidance documents.⁴⁹ The form that guidance documents take tells little about the effects the documents can have in practice.⁵⁰

3. A typology of guidance provisions

In order to be able to systematically analyse the use and effects of guidance documents it is necessary to go beyond the form of guidance documents and to look at the content of guidance documents. This paragraph describes different types of guidance provisions that reflect different ways in which the European Commission assists the Member States in the implementation of EU legislation. The five types of guidance provisions that could be identified in guidance documents are interpretative guidance, implementing guidance, explanatory guidance, technical guidance and the dissemination of best practices.

I identified these different types of guidance during an internship at the Directorate General for Agriculture and Rural Development (DG AGRI) of the European Commission.⁵¹ The different types of guidance documents were identified 1) by making an inventory and overview of the guidance documents issued in DG AGRI in the area of direct payments;⁵² 2) by reading through the

⁴⁷ Christiansen, Føllesdal and Piattoni consider informality 'a propensity of the EU legal system', see T. Christiansen, A. Føllesdal & S. Piattoni, 'Informal governance in the European Union: an introduction', in: T. Christiansen & S. Piattoni, *Informal Governance in the European Union*, Cheltenham, UK: Edward Elgar 2003, p. 5.

⁴⁸ See Van Dam 2016, p. 63.

⁴⁹ An overview of the different forms of documents that contain unilateral administrative rule-making and 'occasional observations' as regards their legal status and effect is given by Hofmann, 2011 #93, p. 544-566.

⁵⁰ Compare Hofmann, Rowe & Türk 2011, p. 544; Senden 2004, p. 115.

⁵¹ I conducted this internship at Unit D.3. Implementation support and IACS (October 2016-February 2016).

⁵² In this inventory I organised the guidance documents along the following categories: Guidelines on the calculation of financial corrections, Audit guidelines, Guidance documents related to Direct Payments, Letters providing answers to questions raised by the Member States related to IACS, Guidance documents issued by the Joint Research Centre (JR), JRC Questions and answers, Guidance provided during workshops, Rural development fiches related to the granting of direct payments.

different guidance documents and 3) by conducting informal interviews with officials working for DG AGRI who are involved in the elaboration of guidance documents.⁵³ Subsequently, I explored whether it was possible to transpose these types of guidance to guidance documents in other policy areas. To this end I mainly focused on the guidance documents related to Directive 92/43/EEC (the Habitats Directive)⁵⁴ and the guidance documents related to Directive 2004/38/EC (Citizenship Directive).⁵⁵

Discerning among these types of guidance provisions allows the systematisation of guidance documents that are issued by the European Commission. Furthermore, the types of guidance may help to identify and trace the ways in which guidance documents affect implementing practices in the national legal order. The purpose of outlining different types of guidance is not to make a clear-cut distinction between guidance documents that contain interpretative elements and guidance documents that do not. In practice, the line between interpretation and application is hard to draw.⁵⁶ The attempt to identify among different types of guidance in the first place serves analytical purposes.

3.1. Interpretative guidance: providing interpretative rules

The first type of guidance consists of provisions in guidance documents that take the form of interpretative rules that further clarify and give

⁵³ Eight interviews were conducted with officials working for DG AGRI. The interviews were conducted with four policy officers involved in the issuing of guidance documents, with three officials involved in auditing the implementing practices, and one official involved in the issuing of the guidance documents at the Joint Research Centre.

⁵⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (*OJEU*, 1992, L 206/7). I focused in particular on the two main guidance documents in this policy area: the Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 2007 and the guidance document 'Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2007/2012'. These and other guidance documents can be found at the website of the European Commission at http://ec.europa.eu/environment/nature/index_en.htm (last accessed at 20 September 2017).

⁵⁵ Directive 2004/38/EC of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States ((*OJEU* 2004, L 158/77). The two guidance documents related to this directive are the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC (COM(2009)313 final) and the 'Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non EU nationals in the context of EU law on free movement of EU citizens' (SWD(2014)284).

⁵⁶ According to van Harten the distinction between interpretation and application of European law is a 'legal fiction'. H. Van Harten, '(Re)search and Discover: Shared Judicial Authority in the European Union Legal Order', *Review of European Administrative Law*, 7, 1, 2014, p. 40; This fiction may be related to the inherent vagueness of language, see A.P. Klap, *Vage normen in het bestuursrecht*, Zwolle: W.E.J. Tjeenk Willink 1994, p. 7.

precision to underlying legal provisions.⁵⁷ These interpretative rules seek to operationalise legal provisions that, for instance, have a vague or ambiguous character or that are openly formulated.⁵⁸ This means that the interpretative rule that is given to some extent adds an interpretative element or rule to the underlying legal provision. The interpretative rule does not only capture or explain what already is in the law.⁵⁹ This element of interpretation makes interpretative guidance, probably, also the most controversial type of guidance. When does an interpretative rule impose a new obligation instead of clarifying an already existing hard law provision?⁶⁰

The character of the interpretative guidance given by the European Commission may differ in the extent to which interpretative guidance is given. In some situations, an interpretative guidance provision prescribes what should be decided in a specific case. An example is the fifty trees rule laid down in the working document that was adopted by the DG Agri services in the year 2005.⁶¹ This document prescribes that as a general rule, parcels that contain more than fifty trees per hectare, should be considered ineligible.⁶² In other guidance documents, the interpretative guidance only lists factors or gives general guidance that should be taken into account by national authorities. For instance, in the area of free movement of persons, guidance is given as to whether an individual can be considered a genuine, sufficiently serious threat by providing for factors that can be taken into account by national authorities.⁶³

⁵⁷ This first type of guidance falls into category of 'interpretative acts' that is defined by Senden as one category of administrative rule-making as opposed to decisional acts that make clear how the European Commission intends to use its implementing or discretionary powers. See Senden 2013, p. 60-61.

⁵⁸ According to Nicolaïdes this is the first step towards effective implementation. See P. Nicolaïdes, 'Administrative Capacity for Effective Implementation of EU Law', *Eipascopes* 1, 2012, p. 6.

⁵⁹ Lefèvre discerns among 'passive' and 'active' interpretation. The act of passive interpretation occurs when the Commission provides its own interpretation of EU law, whereas in the case of passive interpretation the European Commission limits itself to codifying an area of EU law. S. Lefèvre, 'Interpretative communications and the implementation of Community law at national level', *European Law Review*, 29, 6, 2004, p. 812, 813. A similar distinction is made by Groenewegen between a broad and narrow interpretation of the law, see T. Groenewegen, *Wetsinterpretatie en rechtsvorming*, Boom Juridische uitgevers 2006, p. 7, 8.

⁶⁰ This question also is reflected in the criterion used by the EU Court of Justice when deciding on whether guidance intends to exert legal effects. See for instance Judgment of the CJEU 20 March 1997 in Case C-57/95, ECLI:EU:C:1997:164 (*France v. Commission*), par. 13. The vague and undefined character of this question has been discussed by Scott 2011, p. 342.

⁶¹ European Commission, On-the-spot checks of area according to articles 23-32 of Commission Regulation (EC) 796/2004 (Working Document AGRI/60363/2005-REV1), p. 4.

⁶² *Ibid.*, p. 4.

⁶³ Communication on guidance for better transposition and application of Directive 2004/38/EC, (COM(2009)313 final), p. 11, 12.

3.2. Implementing guidance: recommendations on implementing measures

When the objectives or provisions laid down in EU legislation are clear, guidance may still be given as to what instruments could be used in order to effectively implement the EU legislative requirements.⁶⁴ National authorities need to make choices on the form and content of implementing measures, and to this end often need to acquire knowledge as to the risks and pitfalls of specific decisions or instruments.⁶⁵ However, the options and the expected effects of the different modes or methods as to how to implement EU legislation may not be clear to the national authorities that are involved in the implementation of EU legislation.

In this situation, the European Commission could provide recommendations to the Member States as to what implementing measures can be considered appropriate in order to achieve the effective implementation of the legally binding rules. This type of implementing guidance spells out possible paths that could be chosen in order to achieve the objectives laid down in the EU legislation, and/or identifies the consequences or risks related to implementing decisions. The main purpose of implementing guidance is not to give further interpretative rules. Nevertheless, behind the implementing guidance is an understanding of the European Commission as to the objectives and requirements laid down in the EU legislative act, and therefore the presence of some interpretative elements cannot be ruled out.

Examples of implementing guidance can be found in the area of EU agricultural subsidies concerning the implementation of the integrated administration and control system.⁶⁶ For instance, the 'guidance for on-the-spot checks and area measurement' spells out possible definitions that can be chosen as to how to demarcate an agricultural parcel for the purpose of on-the-spot checks.⁶⁷ Provisions of implementing guidance also feature in the guidance documents related to the Habitats Directive. For instance, the guidance document 'Managing Natura 2000 sites' outlines the possible methodology that could be applied when conducting an 'appropriate assessment' in order to assess whether the plan or project will adversely affect the integrity of a Natura 2000 site.⁶⁸ In this respect, the guidance document also recommends that alternative solutions

⁶⁴ Compare Nicolaidis 2012, p. 6.

⁶⁵ Ibid., p. 7, 8.

⁶⁶ The integrated administration and controls system needs to be set up by the Member States in order to ensure that the EU direct payments legislation is implemented correctly. See chapter II of Regulation 1306/2013/EU of 17 December 2013 on the financing, management and monitoring of the common agricultural policy (*OJEU*, 2013, L 347/549).

⁶⁷ DSCG/2014/32 FINAL REV 1, p. 12.

⁶⁸ Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, p. 36, 37.

and mitigation measures can be taken into account when examining the implications for the site.⁶⁹

3.3. Explanatory guidance: explaining and providing an overview of legislation and case law

In addition to interpretative guidelines and recommendations on implementing measures, the guidance documents that are issued by the European Commission may also have an explanatory character. A guidance document has an explanatory character when it summarises legislative provisions or where it explains the rationales or logic behind the legislative provisions. The purpose of explanatory guidance is not to add further interpretative rules to the legislative act. Explanatory guidance seeks to capture or explain what already is in the law.⁷⁰

The explanation of the rationale for legislative provisions or of the logic behind the legal framework, could help Member States to understand and thus better implement the requirements laid down at the European level.⁷¹ Explanatory guidance can be found in many different policy areas where guidance documents give an overview or explanation of the relevant provisions or summarise the relationship between different legal acts.⁷²

There may be different reasons for providing explanatory guidance complementary to the legislative provisions that were adopted by the EU legislator. One of these reasons could be that the EU legal framework is characterised by a high level of complexity,⁷³ which certainly is the case for explanatory guidance documents issued in relation to the complex EU direct payments legal framework.⁷⁴ An example is the guidance on the purpose and content of on-the-spot checks⁷⁵ as well as the guidance which explains what information should be

⁶⁹ Ibid., p. 37, 38.

⁷⁰ The exercise of explaining EU legislative provisions comes close to what Lefèvre considers 'passive interpretation'. See Lefèvre 2004, p. 813.

⁷¹ According to the annual report of the French Council of State one of the functions of soft law is to make known the law to the public and in this way plays a 'un rôle de médiation entre la règle du droit et les personnes auxquelles elle s'applique'. See Conseil d'État – Étude annuelle 2013, p. 98.

⁷² See for instance 'Guidance document on wind energy development in accordance with the EU nature legislation' issued in 2011 which gives an overview of objectives of the Habitats and Birds Directive, p. 17-22.

⁷³ R. Baratta, 'Complexity of EU Law in the Domestic Implementing Process', *The Theory and Practice of Legislation*, 2, 3, 2014, p. 293-298.

⁷⁴ Kranenborg notes that after the 2013 reform the direct payments legal framework still maintains its complex character, see H. Kranenborg, 'Hervorming rechtstreekse steun voor boeren in Europa: de niet zo nieuwe "new deal"', *Tijdschrift voor Europees en economisch recht*, 3, 2016, p. 117.

⁷⁵ Guidance for on-the-spot checks and area measurement. DSCG/2014/32 FINAL REV 1, p. 11.

included in the 'pre-established form' for aid applications.⁷⁶ The issuing of explanatory guidance documents by the European Commission may also be explained in view of the absence of explanatory memoranda to the EU legislative acts adopted at the European level.⁷⁷ A guidance document that seems to fill this gap is for instance the Managing Natura 2000 guidance document which in many places explains the logic behind article 6 of the Habitats Directive.⁷⁸

As said above, explanatory guidance gives an explanation of the logic or the rationales behind legislative rules, but does not seek to add interpretative rules to the legislative text. Despite this codifying character of explanatory guidance some interpretative elements, although hard to discern, might be present.⁷⁹ Indeed, even the explanation of legislative rules could reflect a normative view of the Commission services as to the interpretation of legislative provisions. As a consequence, explanatory guidance may also guide implementing practices at the national level in a certain direction. However, this influence might be difficult to identify since it is likely to not to be readily visible in the implementing practices.⁸⁰

3.4. Technical guidance: providing for technical modalities

More easily identifiable perhaps than explanatory guidance is the provision of technical assistance to Member States. This type of guidance complements the EU legislative acts that require the adoption of technical measures. In several policy areas EU legislative rules lay down technical standards that need to be achieved or outline technical measures that may be adopted in order to comply with the legislative requirements.⁸¹ It is then up to the national authorities to choose the technical modalities in order to comply with the EU legal standards.

⁷⁶ Guidance document on aid applications and payment claims referred to in article 72 of Regulation 1306/2013. DSCG/2014/39 FINAL – REV 1.

⁷⁷ The better regulation guidelines of May 2015 provide for the issuing of explanatory memoranda to the legislative initiatives of the European Commission (SWD(2015)11 final p. 37, 38). These explanatory memoranda are however not part of the act adopted, and just as guidance documents only reflect the views of the European Commission.

⁷⁸ Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, p. 36, 37.

⁷⁹ This is also reflected in the notion of passive interpretation, see Lefèvre 2004, p. 813.

⁸⁰ Europeanisation processes as a result of explanatory guidance might (also) take place at the level of discourse. See on the Europeanisation of public discourse T.A. Börzel & T. Risse, 'Europeanization: The Domestic Impact of European Union Politics', in: K.E. Jørgensen, M.A. Pollack & B. Rosamond, *Handbook of European Union Politics*, London: Sage Publications 2010, p. 488.

⁸¹ See for instance article 70 of Regulation 1306/2013 which gives a general outline of the technical modalities and the technical standards to be met for the setting up of the identification system for agricultural parcels.

Technical guidance is used to spell out the technical modalities or minimum standards that the Member States could apply in order to comply with the requirements laid down in EU legislation. Underlying this technical guidance is, as for implementing guidance, a view of what is necessary to achieve compliance with the requirements set out by the EU legislator. Technical guidance documents generally do not contain interpretative elements, although in practice the line between interpretation and technical rules may be hard to draw.⁸²

The European Commission provides for technical assistance to the Member States in several policy areas. Guidance with a technical nature is for instance issued in relation to the Water Framework Directive⁸³ and in relation to the Industrial Emissions Directive.⁸⁴ Technical guidance also represents a considerable part of the guidance documents that are issued in the area of EU agricultural subsidies. Due to the technical character of the rules, it is not the DG AGRI Commission services but the Joint Research Centre that prepares the largest part of the technical guidance.⁸⁵ The Joint Research Centre, which is the European Commission's scientific and knowledge service, also provides for technical guidance documents in other policy areas.⁸⁶

3.5. The dissemination of good practices

The fifth type of guidance that can be discerned is that of facilitating an exchange of good practices and communicating the good practices to the Member States. These practices can, for instance, be presented during a workshop where officials from the Member States are present. Following the exchange of experiences, the good practices that were identified by the European Commission can be communicated to the Member States. These practices reflect

⁸² See for instance Technical guidance for the On-The-Spot checks of Crop Diversification, DS-CDP-2015-08–Rev5 DS-CDP-2015-08–FINAL, p. 4, 5.

⁸³ Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy (*OJEU* 2000, L 327/1); See http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm (last accessed at 20 September 2017).

⁸⁴ Directive 2010/75/EU of 24 November 2010 on industrial emissions (*OJEU* 2010, L 334/17); The so-called 'BREF documents' provide for the Best Available Techniques (BAT). See: <http://eippcb.jrc.ec.europa.eu/reference/> (last accessed at 20 September 2017).

⁸⁵ In the area of direct payments the drafting process of the technical guidance documents occurs in collaboration with technical experts from the Member States.

⁸⁶ For instance, the JRC also provides for the BREF documents related to the Industrial Emissions Directive. Technical guidance documents may also be issued by agencies. For instance, the European Chemicals Agency issues guidance documents that facilitate the implementation of the REACH Regulation (Regulation 1907/2006/EC). See <https://echa.europa.eu/guidance-documents/guidance-on-reach> (last accessed at 20 September 2017).

appropriate ways or practices that are expected to lead to compliance with the requirements of EU legislation.⁸⁷

Similar to implementing guidance, the communication of good implementing practices increases the insights and knowledge of the Member States as to what implementing choices are available. In this way informed decisions can be made as to what measure to take when implementing the EU legislative requirements.⁸⁸

The exchange of good practices can for instance be found in the area of free movement of persons, in the Handbook on marriages of conveniences. This Handbook provides a toolkit for the member states to assist Member States in detecting whether a marriage is one of convenience.⁸⁹ The Handbook is issued by the European Commission though prepared in close cooperation with the Member States.⁹⁰ An overview of good practices can also be found in the guidance document on the Management of Natura 2000 sites in relation to the methodology that could be followed when elaborating so called 'management plans' mentioned in article 6(1) of the Habitats Directive.⁹¹ Recently, also in the area of EU agricultural subsidies workshops have been organised in order to facilitate the exchange of good practices and to disseminate these good practices to the Member States.⁹²

⁸⁷ This is already reflected in the name 'good practices', which implies that a selection is made between 'good practices' as opposed to 'bad practices'.

⁸⁸ According to Nicolaides a 'comparison of decisions made by similar authorities provides guidance not only in cases of vague policy objectives, but also in cases where the effects of policy instruments are uncertain'. What is more, he considers that continues benchmarking of performance is indispensable for the effective implementation of EU law. See Nicolaides 2012, p. 6.

⁸⁹ Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, SWD (2014)284 final, Brussels, 2014.

⁹⁰ Ibid., p. 3, 4.

⁹¹ Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, p. 53.

⁹² An example is the workshop on the Active Farmer's provisions held on 27 October 2015, see <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail-Doc&id=20934&no=3> (last accessed at 20 September 2017).

The types of guidance provisions described above are summarised in the table below.

Table 3.1. Types of guidance

Interpretative guidance (INT)	How are legislative provisions, according to the Commission's view, to be interpreted?
Implementing guidance (IMP)	What implementation practices are expected to be successful, what practices should be avoided?
Explanatory guidance (EXP)	What is the logic behind or the purpose of legislative provisions?
Technical guidance (TECH)	What technical modalities could be used in order to implement the legislative requirements?
Dissemination of good practices (GP)	What good practices could be used to implement the legislative requirements?

4. Final remarks: different types of guidance, different (legal) consequences?

The issuing of guidance documents by the European Commission has become an institutionalised practice in many policy areas. The features of informality that govern the issuing of guidance documents make it an appealing, and assumingly also effective, implementation tool complementary to EU legislative acts. The way in which guidance documents come to be used, or not to be used, by national authorities and national courts also matters from a legal perspective. Guidance documents might enhance consistency, transparency and legal certainty in implementation processes. The question is whether in practice the issuing of guidance documents indeed serves these legal principles or whether it, instead, undermines these and other legal principles that are fundamental to the legitimacy of EU and national governance.

Whether and how the use of guidance documents interacts with legal principles in the implementation of EU law depends on how these documents find their way in the national legal order. In order to gain an insight into the effects of guidance documents in implementation processes, the practices of national authorities and national courts need to be empirically explored.

This article proposes five different types of guidance provisions that can be discerned in the various guidance documents that are issued by the European Commission. The use of guidance documents by national authorities and national courts could be analysed along the lines of the five types of guidance provisions that have been identified in this article. Using these types of guidance as reference points might reveal that some types are used in a different manner by national authorities or by national courts than other types of guidance.

Accordingly, when studying the real-world effects of the different types of guidance provisions it might be concluded that the types of guidance have different practical and legal consequences in practice. Perhaps, eventually, some or different measures might need be taken that particularly focus on one or several types of guidance, bringing the effects of guidance documents in line with legal principles governing the implementation of EU law.