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Guidance documents of the European Commission in the Dutch legal order

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Guidance documents of the European Commission in the Dutch legal order

J.C.A. VAN DAM

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in the Dutch legal order

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Preface

This PhD thesis studies how guidance documents of the European Commission come to play a role in the implementation process in the Dutch legal order. It is the product, or symbiosis of two different perspectives taken in the two master's theses I wrote before writing the research proposal for the current research. Europeanisation theory took centre stage in the master's thesis I wrote at the College of Europe in Bruges and which sought to explain and measure the impact of 'governance through European administrative soft law'. The master's thesis I wrote a year earlier in Leiden as part of the master's programme Constitutional and Administrative Law took a different view: it studied, from a legal perspective, the relationship between 'soft law' and the Dutch principle of legality.

During the writing of this PhD thesis, I balanced on the edge of different worlds. With a background in both Dutch administrative law and political science and a strong interest in European Union law, I have been able to explore each of these three worlds.

I operated in 'the world of EU law' in various ways: I attended a summer course at the European University Institute in Florence and conducted a five-month internship at the European Commission where I witnessed the issuing of numerous guidance documents and drafted a 'guide for guidance'. Since November 2015 I am a member of the board of the Dutch Association for European Union Law where I work with enthusiastic EU lawyers, and since October 2019 I am exploring the world of EU law as a member of the editorial board of the Dutch Journal for European Union Law. These experiences have allowed me to study, discuss and advance my knowledge of EU law.

My background in political science has helped me to explore the world of studying law in practice, whilst using insights from literature on Europeanisation. This led me to various courses on empirical research methods. I followed an ECPR summer course in Ljubljana on process tracing, as well as courses organised by Leiden University on qualitative interviewing and on qualitative empirical research methods. These courses and the many conversations on how to conduct qualitative research provided me with the tools to eventually make my own decisions on the methods that best suited the research question in this thesis.

Based at the Department of Constitutional and Administrative Law in Leiden, I have been able to explore the reception of EU law in the Dutch legal order from a 'bottom-up perspective'. I taught courses on Dutch administrative law and European administrative law and was given the opportunity to be involved in developing and coordinating the Summer Course on the Europeanisation of administrative law in the Member States.

Abbreviations

ABRvS	Afdeling Bestuursrechtspraak Raad van State
AG	Advocate General
CBB	College van Beroep voor het Bedrijfsleven
CJEU	Court of Justice of the European Union
DG	Directorate-General
DG AGRI	Directorate-General for Agriculture and Rural Development
EFA	Ecological Focus Area
FMP	Free Movement of Persons
GALA	General Administrative Law Act
IACS	Integrated Administration and Control System
IND	Immigratie- en Naturalisatiedienst
IP	Implementation Plan
LPIS	Land Parcel Identification System
LTO	Land- en tuinbouworganisatie
MN2000	Managing Natura 2000
JRC	Joint Research Centre
<i>PB.</i>	Provinciaal Blad
RVO	Rijksdienst voor Ondernemend Nederland
<i>Stcrt.</i>	Staatscourant
<i>Stb.</i>	Staatsblad
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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The European Union is built on the rule of law and governs through law. The EU legal framework, which has evolved and expanded over time, needs to be implemented at the level of the Member States.

In the shadows of the EU legal framework, non-binding and informal rules have emerged. Over the last decades, informal governance¹ has become increasingly important in addressing the many challenges the EU faces.² It is in the informal sphere that sometimes solutions can be found for problems that cannot be solved by law.³ Informal action may be needed when there is no or not yet sufficient political willingness for the adoption of legal rules, when events need quick actions or when technological or societal developments require for measures to be easily changeable.⁴ In the words of Christiansen, Føllesdal and Piattoni:

‘In many ways, informal governance can be seen as the glue that holds the cumbersome and contradictory system of EU governance together.’⁵

One of the institutionalised practices that has remained largely unregulated, is the issuing of non-binding instruments – often denoted as ‘soft law’ – that guide and assist the Member States in the implementation of EU law. Guidance documents are considered to play an important role in the effective functioning of the European Union.⁶ Without such guidance documents Member States would be ‘stumbling in the dark in their attempts to fulfil the demands of European law’.⁷

At the same time, ‘governance through guidance’ might also raise questions and concerns in light of legal principles that govern the implementation of EU law. The lack of a formal, principled approach towards the issuing and use of guidance documents carries the risk that the use of

1 Informal governance is understood as actions that have normative force but which are not governed by the formalities that characterise the adoption and enforcement of legally binding rules. See for a similar approach to identify informal international law making by contrasting it to traditional internal law making Pauwelyn 2012, p. 15.

2 Van Heumen & Roos 2019.

3 Mak & Van Tatenhove 2006, p. 3.

4 Compare Scott & Trubek 2002, p. 6,7; Kleine 2018, p. 884.

5 Christiansen, Føllesdal & Piattoni 2003, p. 5.

6 Senden 2013, p. 65; Hofmann, Rowe & Türk 2011, p. 570.

7 Hofmann, Rowe & Türk 2011, p. 570.

guidance documents may come to lead a life of its own, and escape the rules and procedures imposed by the law. The proliferation of guidance documents might then only add to the challenges to the rule of law the European Union already faces.

At this time, little empirical insight exists in the actual role that guidance documents have come to play in the implementation of EU law at the national level. This research seeks to empirically explore the roles of the European Commission's guidance documents in implementation processes and judicial decision-making practices in the Netherlands, and seeks to evaluate the effects in light of legal principles that govern the implementation of EU law. In this way, this research provides empirical insights for the academic debate on the legitimacy of guidance documents, and informs practice about the possible advantages, risks and consequences related to the issuing and use of guidance documents.

1.1 FIFTY TREES

The questions that might arise when guidance documents are used as an implementation tool can be illustrated by the following fifty trees case that was included in the proposal with which this research set out.

The on-the-spot check working document as binding rule

The non-legally binding working document AGRI/60363/2005-REV1 provides guidance for on-the-spot checks of area and area measurement and states in the introductory paragraph:

'This guidance is either derived directly from the mentioned legal provisions or, whilst not expressing straight-forward legal obligations, constitutes recommendations by the Commission services to the Member States.'

It makes clear that these guidelines are not legally binding:

'It should be emphasised that the considerations contained in this document are without prejudice to any further position taken by the Commission acting as a collegiate body, nor to any future judgment of the European Court of Justice, which alone is competent to hand down legally binding interpretations of Community law.'

The working document has not been published.

In the Netherlands, the Dutch paying agency *Rijksdienst voor Ondernemend Nederland* is responsible for the implementation of the EU regulations on direct payments, a 'species' of EU agricultural subsidies. The paying agency strictly adheres to the rule laid down in the Working Document that agri-

cultural parcels that contain more than fifty trees per hectare are considered ineligible for aid.⁸

The Dutch Trade and Industry Appeals Tribunal, one of the highest administrative courts in the Netherlands, does not accept this use of the fifty trees rule 'as a binding instruction'. By doing so, the Tribunal considers, the Dutch paying agency disregards the 'non-legally binding character' of the working document. According to the Tribunal the paying agency can, however, use the working document as a 'policy reference point' (in Dutch: *als beleidsuitgangspunt*) for the assessment of the eligibility of agricultural parcels containing trees.⁹ This means that even despite the presence of more than 50 trees, the paying agency needs to assess whether on the agricultural parcel 'agricultural activities can be carried out in the same way as on agricultural parcels without trees'. This is the criterion laid down in Article 8 of Regulation 796/2004, the regulation applicable at that time.

In 2009, the Dutch State Secretary transposes the fifty trees rule into the *Regeling GLB-inkomenssteun*, a Dutch Ministerial regulation with legally binding force. Applying this regulation in practice, the paying agency again considers agricultural parcels with more than fifty trees ineligible for aid; and again, without success. The Dutch Trade and Industry Appeals does not accept the strict adherence to the fifty trees rule, even when transposed into a Dutch Ministerial Regulation. The Tribunal requires that also in this situation, an individual assessment must be made.¹⁰

An invitation to study guidance

The fifty trees case shows how, despite its informal and non-binding character, the working document becomes of pivotal importance in the decision-making practices of the Dutch paying agency: it is indeed used as a binding instruction. How does this use of guidance relate to principles of legality, transparency and legal certainty? Does this use of guidance as a binding rule represent a general trend that can also be observed in other policy areas?

The Dutch Tribunal counterbalances this use as a binding rule, downplaying the role of the guidance documents in implementing practices whilst acknowledging that the working document documents can be used as an interpretation aid. What does this mean, the use of guidance as an 'interpretation aid'? Is a similar approach taken by other courts? Do national courts fulfil a regulatory function when it comes to the use and legal effects of guidance documents? Or, does the way the Dutch courts use guidance documents only exacerbate the legal problems surrounding the use of guidance?

8 AGRI/60363/2005-REV, p. 4.

9 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.6.

10 CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.5.2; 6.6.1.

The fifty trees case gives a first glimpse of the role that guidance documents can take in implementing and judicial decision-making practices. The case shows how an abstract phenomenon of informal governance through guidance can have concrete implications in practice, giving rise to questions in light of legal principles – questions that might invite us to rethink governance through guidance.

1.2 ‘GOVERNANCE THROUGH GUIDANCE’

The working document for ‘on-the-spot checks’ is just one of the many guidance documents that are issued by the European Commission. Guidance documents are non-legally binding documents that in various ways assist the Member States in their tasks to implement EU binding rules in the national legal order. The Commission, for instance, provides guidance in the form of interpretative rules that clarify openly formulated provisions, summarises and explains complex EU legislation and gives practical or even technical advice on how to implement EU legislative provisions at the national level. The documents containing guidance come in different forms and shapes. Guidance can be found, for instance, in interpretative notes, Communications, letters, handbooks, best practices, notifications, questions and answers, and, as seen above, working documents.¹¹

Although in practice the term ‘guidance’ is commonly used, in the literature guidance is often considered to be a form of ‘soft law’. Characteristic for such soft law instruments (to be discussed later in more detail) is that despite their lack of legally binding force, they can exert practical and legal effects in practice: soft law documents can change the behaviour of their addressees or other actors (practical effects) or indirectly, through their use in practice, affect the rights and obligations of third parties (legal effects). However, guidance is not only referred to as soft law (some even regard this concept ‘misleading’)¹². Guidance documents are also referred to as ‘unilateral rulemaking’ (in the sense that it is issued unilaterally by the Commission), as ‘informal rulemaking’¹³ or as ‘post-legislative rulemaking’ (emphasising that guidance documents complement EU legally binding acts).

In this research I use the term ‘guidance documents’ mainly for two reasons. First, by exploring the use of guidance documents, this research takes a broader scope than if it were to study ‘soft law’ instruments. Guidance not only encompasses rules of conduct (an element of soft law) but is also often of a highly informational or technical nature (as will be discussed later in section 2.1.2). The second reason is that the term ‘guidance documents’ links up with the ‘label’ that is often given to these documents in practice.

11 See for the various types of ‘unilateral rulemaking’ Hofmann, Rowe & Türk 2011, p. 543.

12 Hofmann, Rowe & Türk 2011, p. 536.

13 Klabbers 1994.

Nonetheless, even if their name is debatable, what is certain is that the issuing of guidance documents is part of a broader trend reflecting an increase in the recourse of soft, regulatory instruments in the European Union.¹⁴ Soft law, in the words of Stefan, is 'booming in many policy fields'.¹⁵ This 'blossoming' of soft regulatory instruments not only encompasses guidance documents that are the focal point of this research, it extends to various other forms of administrative rulemaking practices. For instance, the Commission also issues decisional soft post-legislative instruments that indicate how the Commission will use its implementing, discretionary powers.¹⁶ What is more, as Senden and Van den Brink note, administrative rulemaking is no longer the prerogative of the European Commission. Various agencies of the European Union issue guidelines with a view to promoting effective supervisory practices and a uniform and consistent implementation of Union law.¹⁷

The proliferation of guidance documents, as well as other soft regulatory instruments issued by the Commission and EU agencies, contrasts with the silence on this phenomenon in the EU Treaties. Guidance documents are not included in the 'hierarchy of legal acts' introduced in the Treaty of Lisbon. This hierarchy consists of legislative acts, delegated acts and implementing acts that can each take the form of regulations, directives and decisions.¹⁸ Article 288 TEU grants these acts (regulations, directives, decisions) legally binding force. The same Article, however, only gives a glimpse of possible forms that other regulatory instruments can take, by mentioning that the EU institutions could (also) adopt recommendations and opinions and by mentioning that these documents shall have 'no binding force'. Guidance documents are nevertheless closely connected to their legally binding counterparts as they give further guidance on binding Union law – the documents thus can be said to operate in the 'shadows of hierarchy'.¹⁹

In light of the growing number of guidance documents issued at the EU level, it is not surprising that guidance documents also feature in implementing practices and processes at the national level. For national authorities, guidance documents can serve as an aid to draft implementing legislation and to take individualised decisions – as the fifty trees cases show. Guidance documents could also be used as an aid to decide on the form and shape of practical or technical implementing measures. Wise advice on implementing *practices* is given by the working document for on-the-spot checks, for instance, where it states that if the counting of 'nut

14 As is observed by advocate general Bobek in the opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, par. 82 (*Commission v Belgium*).

15 Stefan 2013, p. 1; Senden & Van den Brink 2012, p. 64.

16 Senden & Van den Brink 2012, p. 64.

17 Such as the guidelines issued by the European Securities and Markets Authority, as follows from Article 16 of Regulation 1095/2010 (EU).

18 Article 289, 290 and 291 TFEU; see for a discussion of these acts section 2.1.1 below.

19 Senden 2015.

trees' (orchards) cannot be done using an 'ortho-photo background', field visits should be organised to count the trees 'on-the-spot'.²⁰

What is more, guidance documents may also be used as a judicial decision-making aid by national courts when adjudicating on questions concerning the interpretation or application of EU law and when reviewing implementing practices. This is the case, as we will see,²¹ even for the Dutch Trade and Industry Appeals Tribunal which is reluctant about the use of guidance as a binding implementation tool. In more recent rulings, the Tribunal makes explicitly clear that it takes account of Commission guidance documents. One of these documents is the 'active farmer guidance document' which plays an important and visible role in the Tribunal's reasoning and that like the on-the-spot check working document for on-the-spot checks, has not been published.²²

Serving as an implementation aid or as a judicial decision-making aid, guidance documents have been considered an important and helpful tool in promoting smooth and effective implementation processes in the Member States.²³ Commission officials even consider 'guidelines' amongst the most effective compliance instruments,²⁴ and also in legal literature guidance documents are often associated with effective implementation of EU law.²⁵ With the aim of 'good implementation' of Union law in the Member States high on the 'better regulation agenda',²⁶ guidance documents can be expected to play an increasingly important role at the national level in implementation processes. The better regulation guidelines even stress the importance for the Commission services to assist the Member States in fulfilling their implementing responsibilities.²⁷

Governance through guidance thus derives its legitimacy from the effects, or output in practice. Guidance documents are considered to contribute 'measurably to the efficient functioning of the European Union',²⁸ enabling EU regulatory policies to achieve results in practice and to further the EU integration process.²⁹ The guidelines lessen the workload of the Court of Justice of the European Union (hereinafter: CJEU or Court of Justice) which alone could impossibly find to answer all questions on the interpretation of EU law.³⁰ In view of the assumed problem-solving character, guidance documents are associated with the notion of output

20 AGRI/60363/2005-REV, p. 6.

21 See section 2.1.1 below.

22 CBB 21 June 2017, ECLI:NL:CBB:2017:239.

23 Ballesteros et al. 2013, p. 46.

24 Ballesteros et al. 2013, p. 46.

25 Snyder 1995, p. 31-36.

26 SWD(2017)350 final, p. 33; See also for instance the results of the Fitness check of the Habitats Directive SWD(2016) 472 final, p. 8.

27 SWD(2017)350 final, p. 34.

28 Hofmann, Rowe & Türk 2011, p. 570.

29 Snyder 1995, p. 31-36.

30 Hofmann, Rowe & Türk 2011, p. 569.

legitimacy, which refers to the ability of regulatory processes to solve problems requiring collective solutions.³¹ It is the output, the effects that guidance documents achieve in practice that is an important parameter for their success as a governance tool.³²

1.3 CHALLENGING THE RULE OF LAW?

The European Union is based on the rule of law, as the Court of Justice acknowledged for the first time in the judgment *Les verts v Parliament* in 1986 and which nowadays is explicitly stated in Article 2 TEU.³³ The rule of law requires, in essence, that every action of the EU institutions has a basis in the Treaties, as well as that these actions are in accordance with the framework established by legislation and with legal principles that derive from the rule of law.³⁴ These legal principles also have to be observed by the Member States when implementing the binding Union rules at the national level.³⁵

The proliferation of guidance documents has encountered fierce criticism, both in legal literature as well as in practice,³⁶ which boils down to the concern that guidance documents will challenge, or even undermine, the rule of law.

One of the most of important drawbacks of guidance and soft law instruments is considered to be the low level of input, or democratic legitimacy.³⁷ Input legitimacy requires, as stated by Scharpf, that those affected by a decision have in some way been involved in the adoption process.³⁸ Guidance documents are not adopted following a Treaty based and ‘democratically anchored’ procedure, as is the case for their legally binding counterparts. In contrast, it has been argued that the issuing process of soft

31 Scharpf 1999, p. 11; See on the relationship between informal governance and output legitimacy Christiansen & Piattoni 2003, p. 13.

32 See also in a broader sense on the output orientedness of informal governance Christiansen, Follesdal & Piattoni 2003, p. 13.

33 CJEU 23 April 1986, C-294/83, ECLI:EU:C:1986:166, par. 23 (*Les Verts v Parliament*); Jacqué 2012, p. 51-54.

34 Compare Tridimas 2006, p. 4; Hofmann, Rowe & Türk 2011, p. 150, 151.

35 CJEU 25 November 1986, C-201 and 202/85, ECLI:EU:C:1986:439, par. 10-12 (*Klensch v Secrétaire d'État à l'Agriculture et à la Viticulture*); See also Tridimas 2006, p. 36-38; Hofmann et al. 2014, p. 144; compare Jans, Prechal & Widdershoven 2015, p. 135; Legal principles, for the purpose of this research, are defined as principles that derive from the rule of law and that need be respected when implementing EU law at the national level. See also section 2.5.1.

36 See for the contours of the academic debate Eliantonio 2018, p. 498 and for an example of a critical approach to soft law ‘in practice’ the resolution of the European Parliament of 4 September 2007 on institutional and legal implications of the use of “soft law” instruments (2007/2028(INI)).

37 Stefan 2013, p. 1

38 Scharpf 1999, p. 7.

post-legislative rulemaking is characterised by an '(extreme) absence of transparency,' whilst control and consultation mechanisms only occur on an ad hoc basis.³⁹ Consequently, the issuing of guidance documents risks escaping comitology controls, and the provisions in guidelines may go beyond what is contained in the regulation or directive that they complement.⁴⁰ Furthermore, as has been argued by several authors, guidance documents often escape the scope of judicial review (see Art. 263 TFEU) due to the fact that they exert no legal effects vis-à-vis third parties.⁴¹

Principles related to the rule of law not only come into play when guidance documents are issued or used by the Commission itself. The rule of law also governs the implementation of EU legally binding rules *at the national level*. However, when received in the national legal order, guidance documents risk taking on a life of their own, jeopardising legal principles entrenched in the rule of law. It has been argued, for instance, that a lack of clarity as to the role or status of guidance documents could hamper the ability of guidance documents to enhance certainty and predictability in implementing practices.⁴² Georgieva observes a varied use of certain competition soft law instruments by Dutch and British courts and considers this 'suboptimal' from a viewpoint of consistency and legal certainty.⁴³ Another risk is the lack of transparency that often surrounds the issuing⁴⁴ and, possibly, also the use of guidance documents.⁴⁵ Last but not least, governance through guidance has given rise to legality concerns. The practice of the issuing of guidance documents could overrule or jeopardise governance through 'real' hard law. Such a risk arises, for instance, when guidance documents provide for new rules or obligations for which no basis can be found in EU hard law.⁴⁶

One could, however, take a different perspective. Guidance documents could also be viewed as an instrument to *enhance* legal principles in the implementation of EU law. Stefan, for instance, considers 'fostering legal certainty, transparency, and the consistent application of rules in the EU multi-level governance system' amongst 'soft law's key objectives'.⁴⁷ In a similar way, Senden notes that the 'desire' that inspires the issuing of soft post legislative acts is to enhance transparency, legal certainty and the equal treatment of those concerned.⁴⁸ Hofmann, Rowe and Turk even go further and make clear that 'administrative rulemaking' contributes 'measurably to the efficient functioning of the European Union and to the achievement

39 Senden 2013, p. 65, 68.

40 Senden 2013, p. 65.

41 Scott 2011.

42 See for instance Stefan 2014, p. 365; Van den Brink 2016; Conseil D'État 2013, p. 98.

43 Georgieva 2016.

44 Senden 2013, p. 65.

45 Which may also leads to problems of accountability, see Van Dam 2016, p. 65.

46 Luijendijk & Senden 2011, p. 318.

47 Stefan 2014.

48 Senden 2013, p. 65.

of legal certainty'.⁴⁹ The rationales of the issuing of guidance documents thus link up with legal principles such as legal certainty, equal treatment and consistency, and the principle of transparency. The ability of guidance documents to enhance these legal principles can be considered part of their *raison d'être*.

Thus, for the legitimacy of 'governance through guidance' it is important not only that the documents achieve their effects in practice,⁵⁰ but also that they achieve these effects in a legitimate way, in line with legal principles. When guidance documents exert effects that are in line with legal principles, the documents are able to contribute to an effective *and* legitimate implementation of EU law.⁵¹ This is all the more important in light of the fact that guidance documents, as mentioned above, are not adopted following a Treaty based and democratically anchored procedure.⁵² If guidance documents exert effects that are not in line with or even jeopardise legal principles governing implementation processes, this not only affects the legitimacy of governance through guidance. The legitimacy problems surrounding governance through guidance would also add to the challenges to the rule of law that European governance is already facing. Therefore, it is even more pressing that the effects guidance documents entail in practice are demystified so that it is possible to make empirical-based claims about the role and effects of guidance documents in implementing processes.

1.4 RESEARCH DILEMMA AND QUESTION

The potential consequences of the increased recourse to guidance documents justify raising the question whether and under what conditions the use of guidance documents is in line with legal principles. Indeed, when legal problems arise, the use of guidance documents in implementing practices may in some way need to be regulated, whether by law or other means. However, regulating the use of guidance would also, to a larger or lesser extent, compromise the informal character of Commission guidance. When formalised, guidance documents may be less able to effectively address implementing problems due to the advantages related to the features of informality.

Therefore, ideally, guidance documents should be used in such a way that legal problems and issues do not arise, whilst leaving intact the informal and non-binding character of guidance documents.⁵³ In practice,

49 Hofmann, Rowe & Türk 2011, p. 570.

50 Conseil D'État 2013, p. 85.

51 Legitimate in the sense that it is in line with legal principles. Compare Christiansen, Follesdal & Piattoni 2003, p. 5.

52 Compare Conseil D'État 2013, p. 85.

53 Pauwelyn, Wessel & Wouters 2012, p. 14 raises a similar question as regards informal international lawmaking.

however, the perfect solution may be hard to find and perhaps choices may need to be made. Whether, and under what circumstances, the regulation of guidance documents could be considered appropriate or necessary depends on the intensity and the character of the legal problems that are the result of the issuing and use of guidance documents in practice.

By only studying the text of guidance documents, the effects in implementing practices will not become visible. Therefore, in order to be able to identify the consequences of the issuing of guidance documents, insights into the 'real world effects' of the recourse to Commission guidance should be provided.

For a few years now, the issuing of guidance documents at the EU level, their role and their effects in the national legal order has become the object of increasing scholarly attention. The research that has been conducted and that is being conducted⁵⁴ contributes to identifying the potential (unintended) consequences of the issuing of guidance documents in light of legal principles. Insights in the role and practical and legal implications of the use of guidance documents in national implementing and judicial practices nevertheless remain limited and are often sector specific.⁵⁵ Therefore, further, in-depth research is needed to unravel the role and effects of guidance documents addressing Member States' implementing powers, providing further insight into their effectiveness as well as their interaction with legal principles.

This research contributes to this task by exploring the role of guidance documents in implementation processes and by evaluating the relationship with legal principles governing the implementation of EU law.

In order to be able to conduct in-depth research into the role and legal implications of guidance documents, the decision was made to focus on one Member State: the Netherlands. Conducting overarching, cross-country research is valuable and interesting, particularly for providing comparative insights into the role of guidance. A focus on one Member State, however, also has advantages: it enables studying the use of guidance in more depth, analysing the role of guidance in light of the peculiarities of the legal system in question, and finding solutions that suit this legal system.⁵⁶ The choice for the Netherlands is then easily made: the author has a background in Dutch administrative law and is therefore able to identify and assess the role of guidance in this Member State better than in other EU Member States.

54 Such as for instance the research that is being conducted by the European Network on Soft Law Research.

55 See Luijendijk & Senden 2011; Van Dam 2013; Van den Brink & Van Dam 2014; Senden 2015; Van den Brink 2016; Georgieva 2016; Georgieva 2017; Devine & Eliantonio 2018 and with regard to guidelines of the European Security and Markets Authority: Van Rijsbergen 2018.

56 The way in which guidance documents are used in implementing and judicial practices may be different in different Member States. Indeed, in the European Union the administrative laws of the Member States still differ in many respects, and so does the administrative culture and practice. See Ruffert 2013a.

Within the Netherlands, this research focuses on the use of guidance documents by national authorities that have been designated to implement EU law. Furthermore, it also studies the use of guidance documents by national courts, as these courts can be expected to play an important role in shaping, or even regulating, the role of guidance documents in implementing processes. Now that the aim and scope of this research have been clarified, the central question that will guide this research can be formulated:

In what ways do authorities and courts in the Netherlands use guidance documents that are issued by the European Commission and what are the implications in light of legal principles governing the implementation of EU law?

1.5 DESIGN

This main research question consists of two parts. The first part of the research seeks to empirically explore in what ways Dutch authorities and courts use guidance documents of the European Commission. It seeks to identify the various roles guidance can take and to discern some contextual factors that shape this role in practice. The second part of the research seeks to identify the implications, or effects, of the use of guidance documents in light of legal principles governing the implementation of EU law. This introductory section formulates the sub-questions that relate to three research blocks that together form the research design.

1.5.1 Exploring the issuing and use of guidance at the EU level

The issuing of guidance documents at the EU level forms part of the context in which the use of guidance documents at the national level, in the Dutch legal order is studied. Therefore, in order to be able to understand the roles and effects of guidance at the national level, and in order to identify possible factors at the EU level that shape the roles and effects at the national level, the EU context forms an important part of this research. Several sub-questions will guide this analysis of the factors that shape the EU context (these questions form the basis of chapters 2 and 3):

1) *What are guidance documents issued by the European Commission?*

This first question – perhaps the elephant in the room – is an important question as it is, in fact, the main object of this research. Even though it might seem a very simple question, in practice it is not, for several reasons. First, the phenomenon of guidance has been developed and become institutionalised in the Commission's regulatory practices. As a result, guidance can be found in various documents and might not be easily 'detected' only on the basis of the title of the documents. Therefore, the concept of guidance

needs to be defined, regardless of the 'form' of the guidance documents. Second, guidance documents not only come in various forms and shapes, the documents are also often difficult to find as they are generally not published or even made available on the internet. Thirdly, the phenomenon of guidance documents also needs to be clarified in light of the many labels that soft instruments – including guidance – are given in legal literature. How does this research on guidance documents relate to other studies on soft (law) instruments?

- 2) *What guidance documents are issued at the European level; can different types of guidance be discerned?*

The high variety of forms of guidance and the lack of a clear typology of guidance documents, makes it difficult to provide 'systematic' insights into the role and effects of guidance.⁵⁷ Therefore, this research seeks to identify whether in the various guidance documents different 'types' of guidance provisions can be discerned in light of which the use of guidance documents at the national level can be studied (see chapter 3).

- 3) *What are the features of informality of guidance documents?*

In order to be able to understand and evaluate the legal effects of guidance documents, it is important to be aware of the characteristics that enable guidance documents to promote the adequate and effective implementation of Union law. Therefore, on the basis of the literature, the alleged functions of guidance documents, and the role that informality places in relation to this will be identified. On the other hand, it is also relevant to identify the possible risks of the features of informality for the legitimacy of governance through guidance. This research subsequently focuses on one of these risks in particular, as the features of informality might also influence the role and effects of guidance documents at the national level.

- 4) *What are the driving forces behind the issuing and use of guidance documents?*

The issuing and use of guidance documents at the EU level might be shaped by different driving forces, which could be defined as the rationales of the Commission services behind the use of guidance documents as a regulatory tool. These driving forces are part of the EU context that shapes and influences the use of guidance documents in the national legal order. Therefore, part of the empirical research will be to identify the driving forces behind the issuing of the Commission guidance documents in the three different policy areas that are included in this research.⁵⁸

57 Senden & Van den Brink 2012, p. 63; Stefan 2013, p. 7.

58 The three policy areas are introduced in section 1.6 below.

- 5) *What are the expectations formulated at the EU level on how guidance should be used by national authorities and courts?*

The third possible factor that might shape the use of guidance documents at the national level is the way in which guidance documents are used at the EU level. Indeed, by using guidance documents at the EU level, pressures could be constructed vis-à-vis national authorities and even towards national courts to act 'guidance-proof'.⁵⁹ Therefore, an important part of the EU context is the question whether and in what ways the European Commission as well as the Court of Justice expect national authorities and national courts to use the guidance documents of the Commission.

1.5.2 Exploring the use of guidance in the Netherlands

The main focus of this research is on the national level: in what ways are guidance documents used by authorities and courts in the implementation of EU law. This empirical research is conducted in three policy areas (see section 1.6 and chapters 5, 6 and 7)). For this part of the research, three sub-questions need to be answered.

- 6) *How to identify the use of guidance?*

In this research, the use of guidance documents refers to the situation where guidance documents or guidance provisions are used:

- 1) As an implementation aid by national authorities when implementing provisions of EU law. Guidance is used as an implementation aid where guidelines serve as help or support when taking decisions as to the implementation of EU law.
- 2) As a judicial decision-making aid by Dutch courts when adjudicating on questions of EU law. Guidance is used as a judicial decision-making aid where guidelines serve as help or support when taking decisions on how EU law should be interpreted or applied when assessing implementing practices.⁶⁰

In view of the above definitions, the question arises what is meant by guidelines serving as 'help or support'. This refers to the situation where national authorities or courts acknowledge the relevance of guidance for the decision-making process, be it in the context of the implementation of EU law or of the adjudication of questions on the interpretation or application of EU law.

59 I draw inspiration from Europeanisation literature which identifies adaptational pressures to act in conformity with the European demands. See for instance Börzel & Risse 2010, p. 492.

60 Cf. Luijendijk & Senden 2011, p. 332-344.

Within the two overarching notions of use of guidance as an implementation aid and use as a judicial decision-making aid, I seek to distinguish different uses. In order to be able to identify different uses, two questions will be explored:

- 1) Is it possible to analyse the use of guidance in light of the different types of guidance (see above question 2)?
- 2) Is it possible to distinguish different degrees of *de facto* or perceived binding force of guidance documents in the national legal order?

Taking these two questions as a starting point will lead to the development of a framework of 'two lenses' to analyse the use of guidance documents in the national legal order (see chapters 3 and 4).

- 7) *In what ways are guidance documents used by national authorities at the different stages of the implementation of EU law?*

In order to be able to provide in-depth insights into the use of guidance documents, this research studies the use of guidance at different stages of the implementation process (see chapter 4). It studies the use of guidance for the transposition and operationalisation of EU regulations and directives into Dutch implementing legislation, and traces the use of guidance documents in the subsequent 'implementation' of this legislation.⁶¹ Studying the use of guidance documents at different stages of the implementation process implies that the concept of national authorities is understood in a broad manner: I focus on the use of guidance by the Dutch legislature, as well as by the Ministries and decentralised authorities (such as the provinces) or agencies (such as the Immigration and Naturalisation Service) involved in the implementation of EU law.

- 8) *In what ways are guidance documents used by national courts when adjudicating on questions on the interpretation and application of EU law?*

The next question that needs to be explored is how national courts use guidance documents of the Commission. This question leads us to identifying traces of the use of guidance documents by the different courts that are competent to review questions related to the implementation of EU law. Therefore, the role and organisation of national courts needs to be discussed (see chapter 4). In this regard, it will become clear that the main focus will be on the administrative courts that are the principle courts reviewing administrative decisions. Nevertheless, as we will see, civil courts might also use guidance documents as a decision-making aid in the context of the question whether the Dutch state conducted a wrongful act.

61 This is what Dimitrova and Steunenbergh call informal implementation Dimitrova & Steunenbergh 2017, p. 1215.

1.5.3 Analysing the use of guidance in light of legal principles

9) *What are the implications of the use of guidance documents in light of legal principles?*

Having identified the use of guidance documents by authorities and courts in the Netherlands, it is possible to consider the implications in light of legal principles that govern the implementation of EU law (see chapters 8 and 9). This analytical part of the research thus provides a legal evaluation of the roles that guidance documents take in the implementing and judicial decision-making processes. To this end, the question first arises which legal principles are selected in light of which the implications of guidance documents will be analysed. Subsequently, four promises will be formulated that represent the 'ideal effects' that guidance documents could exert in practice in order to be able to serve the legal principles in implementation processes. These 'promises' will subsequently be empirically tested: are guidance documents able to fulfil what they promise in practice?

1.6 THREE POLICY AREAS

Guidance documents feature in relation to regulations and directives that need to be implemented in the national legal order. Aiming to provide an in-depth insight into the roles guidance documents take in the implementation process, it is not possible – in view of the time and resources available – to include all policy areas in this project. Therefore, a selection needs to be made. In this regard, it is relevant that the aim of this project is to detect possible *different* roles that guidance documents can take in implementing processes. This means that at least some variety is needed: different policy areas need to be included where different roles can be expected to be found (thus adopting a diverse case study approach).⁶² With this aim in mind, three policy areas were selected where it was expected that different roles of guidance documents could possibly be identified. These three policy areas all concern areas where, at the time of writing, the issuing of guidance documents does not have a legal basis in secondary Union law. The decision to only include forms of 'unregulated guidance' was made in light of the aim to identify and trace the (possibly different) effects of guidance documents that are issued and governed in a highly informal sphere. This allows to better study the driving forces and effects of informal steering mechanisms and its relationship with legal principles. The three areas selected are:

62 Gerring 2017, par. 4.2.

1) *Direct payments*

The choice for an area where a strong role of guidance is expected to be found is the area of EU agricultural subsidies. The reason that in this policy area guidance documents might have strong effects on implementing policies is that the European Commission has relatively strong, far-reaching supervisory powers. There are, potentially, financial incentives for the Member States to actually follow the guidance documents. Indications for such a possible 'strong role' of 'direct payments guidance documents' were found in the research conducted by Van den Brink on the implementation of EU subsidy regulations in the Netherlands.⁶³ In addition to this, explorative research was conducted by the author. The preliminary results of this research suggested, not only that many guidance documents are issued in this field, but also, indeed, gave indications of a strong, binding effect of these documents of in practice.⁶⁴

2) *The Citizenship Directive*

Secondly, a policy area had to be selected where guidance documents could be expected to have a somewhat weaker role in implementing practices. Possible factors that, according to literature on Europeanisation, could play a role in this regard are the absence of strong pressure exerted at the EU level to act guidance-proof, or a 'misfit'⁶⁵ between the EU policies and policies at the national level. This led to the selection of the area of free movement of persons, for which Directive 2004/38/EC provides the rules and conditions. In this policy area, the Commission does not have the power to impose financial corrections on the Member States (as is the case in the area of direct payments). Moreover, in this politicised policy area the tendency towards a restrictive immigration policy in the Netherlands has clashed on several occasions with the EU free movement rules. Explorative research revealed some first signs of a role for these guidelines not as 'hard' as seemed to be the case in the area of direct payments.⁶⁶

3) *The Habitats Directive*

In the third place, I explored the possibility of studying the role of guidance documents issued in the area of environmental law. In 2010 a study was published on the implementation of EU environmental legislation in, amongst others, the Netherlands. This research notes that soft law documents could play a role in solving the problems that were experienced with

⁶³ Van den Brink 2012, p. 289.

⁶⁴ Van Dam 2013; Van den Brink 2012, p. 289.

⁶⁵ See on the concept of a misfit Börzel & Risse 2000.

⁶⁶ I conducted this research in the context of master thesis on 'Europeanisation through administrative soft law', (College of Europe, Bruges, 2013).

the implementation of EU environmental directives.⁶⁷ Could guidance documents be expected to play a helpful role in this policy area, perhaps also leading to a strong role for guidance in the implementation process? The Habitats Directive appears to be a potentially interesting case for this research, in light of the problematic implementation process at the national level,⁶⁸ and in light of the fact that various 'Habitat guidance documents' have been issued without having a basis in the Habitats Directive itself. After conducting an explorative interview with an expert in this field – who confirmed the potential interest of this case for my research – the Habitats Directive was selected as the third policy area.

1.7 METHODS

One of the challenges of this research concerns the collection of information, or 'data' on the role of guidance documents. It might be difficult not only to 'find' guidance documents of the Commission (especially when they have not been published); another challenge is to provide in-depth insight into the use of guidance documents both at the EU level and national level. Indeed, the use of guidance documents is often merely practice: it takes place in the informal sphere and is not subject to the same regulatory standards as their counterparts, the legally binding rules that they complement. The issuing and use of guidance documents, in the words of Corkin, is part of the 'administrative underworld'.⁶⁹

Even though guidance documents or their use thereof often cannot be directly observed, it is still possible to identify 'traces' of the use of guidance documents.⁷⁰ Traces, or 'fingerprints', are a reflection of the use of guidance in a certain practice, document or discourse. These traces may be 'explicit' in the sense that they directly refer to a particular guidance document, or 'implicit' when the trace only resembles the text of wording used in guidance documents. Such implicit references take the form of 'linguistic similarities'.⁷¹ The aim of the empirical research is not to give an exhaustive overview of the use of guidance documents in the three policy areas; the aim, rather is to identify general trends or patterns.

67 Beijen 2010.

68 Van Keulen 2007.

69 Corkin 2013.

70 This search for and analysis of traces of the use of guidance is inspired by the method of finding 'evidence' using the method of process tracing. The objective of process tracing is to assess observations as to be evidence of a causal mechanism (see Beach & Pedersen 2013, p. 123). In this research, however, the question is whether observations (traces) give indications a certain use (or perspectives behind the use) of guidance documents.

71 Compare Sadl 2015.

In order to be able to identify traces of the issuing and use of guidance documents, different methods have been used.⁷² The main methods to find information on the use of guidance documents can be categorised in three main groups: 1) document analysis; 2) case law analysis; and 3) interviews (open and semi-structured). The remainder of this section describes how, and for which parts of this research, the three methods have been used. A detailed account of the data collection process can be found in the Annex to this research.

Document analysis

For this research I analysed various types of documents, including of course guidance documents. I also studied other documents published by the European Commission as well as documents of other EU institutions that provide information on the issuing and use of guidance documents. At the national level, I studied various implementing documents that provide insights into the use of guidance documents in national implementing practices. The main objects of study are implementing legislation (such as formal legislative acts, ministerial regulations and provincial regulations), policy rules as well as explanatory memoranda and notes. This search and its results are described in section 1.2 of the Annex.

Case law analysis

The case law analysis encompasses rulings of the Court of Justice as well as rulings of national courts.

The rulings of the Court of Justice are studied in order to identify in what ways the Court uses guidance documents and to provide insights into how, according to the Court, national authorities as well as national courts should use Commission guidance documents.⁷³

The rulings of Dutch courts could provide information on the use of guidance in judicial practices, but also potentially on the use of guidance in implementing practices. The research studies the rulings of the highest courts in the Netherlands, as well as the rulings of lower courts (both district courts as well as courts of appeal). Including different courts in this research corresponds with the aim of the research which is to identify possible different uses of guidance documents in implementing and judicial decision-making practices. The search for rulings of Dutch Courts was conducted on www.rechtspraak.nl, and is described in section 1.3 of the Annex.

⁷² Thus applying so-called triangulation, see Yin 2014, p. 119.

⁷³ The search for rulings of the CJEU was conducted at www.curia.europa.eu.

Interviews

The search for traces of the use of guidance documents in implementing documents and rulings of Dutch courts, does not always provide full insights into the use of guidance documents in implementing practices. Therefore, this search has been complemented with in-depth interviews with actors involved in the issuing and use of guidance documents in the three policy areas included in this research. Interviews were held with Commission officials, national officials involved in implementing processes, judges as well as officials working for Dutch courts and lawyers.

The interviews that have been conducted can be divided into informal interviews and formal interviews. The formal interviews are the interviews that are used as a direct source of information on the use of guidance documents, for which consent was given by the interviewees. Most of these formal interviews have been recorded, also with the consent of the interviewees, and subsequently transcribed. A list of these formal interviews has been included in section 1.4 of the Annex. The list has been anonymised.

The various informal interviews have also been conducted also with the aim of providing further insights into the use of guidance documents. These interviews differ from formal interviews in that they have not been used as a primary source of information. The informal interviews have been informative and useful for better understanding and testing the insights on the roles of guidance acquired on the basis of other sources than interviews.

1.8 OUTLINE

The next chapters of this research explore the roles of guidance documents in the Dutch legal order and assess the implications in light of legal principles, seeking to answer the questions set out in the above section. The different chapters together form three parts. The first part (chapters 2 – 4) provides the background and analytical framework. The second part (chapters 5 – 7) contains the empirical core of this study which explores the role of guidance documents in the three selected policy areas. The third part (chapters 8 and 9) provides the analysis in light of legal principles and draws conclusions.

Chapter 2 introduces the phenomenon and functions of guidance as an informal regulatory tool, and outlines why the features of informality could be the key to success of guidance documents, or its greatest danger. One of these dangers, or risks, is that guidance documents come to take on a life of their own in implementing practices, thus challenging legal principles governing the implementation of EU law. This then leads to the final part of chapter 2 that develops a framework of analysis to study the role of guidance in light of legal principles. It formulates four ‘promises’, or ideal effects, of guidance documents that subsequently will be tested in practice.

Chapters 3 and 4 identify different elements of the context and framework in light of which the empirical research will be conducted. Chapter 3 distinguishes five different types of guidance, which will be used as the first lens of analysis to trace the role of guidance documents in the Dutch legal order. It subsequently describes the ‘plethora of expectations’ formulated at the EU level as to how guidance documents should be used by national authorities and courts. Chapter 4 turns to the national level, and describes the context of the implementation of EU law in the Dutch legal order: what instruments do national authorities have at their disposal when implementing EU law, which courts are competent to review the rulemaking and decision-making practices? Finally, this chapter introduces four ‘ideal perspectives’ of both national authorities and national courts towards the binding force of guidance documents. These perspectives form the second lens in light of which different uses of guidance by Dutch authorities and courts will be identified.

Chapters 5, 6 and 7 dive into practice and seek to unravel the role of guidance documents in the three policy areas that were introduced above. The case studies consist of two parts: an ‘EU part’ and a ‘Dutch part’. The EU part of the case studies reveals various dynamics that govern the issuing and use of guidance documents in the three policy areas. The Dutch part of the case studies explores how Commission guidance documents come to play a role in national implementing and judicial decision-making practices.

Chapter 8 discerns general trends on the basis of the case studies. It reveals a differentiated picture, with the use of different types of guidance scattered along the lines of the different perspectives on their binding nature. National courts, it shows, have a role in shaping these uses of guidance documents in practice by acting as facilitating or counterbalancing actors. It subsequently evaluates these findings in light of the four promises outlined in this introduction and again finds a mixed picture. Chapter 9, finally, answers the research question by distinguishing three different interactions between the use of guidance and legal principles that govern the implementation of EU law.

The implementation of EU law is conducted through a process of shared administration, in close cooperation between the Commission and the Member States.¹ This system of shared administration encompasses the situation, which is the general rule, where the Member States are responsible for the implementation of the EU legally binding rules (indirect administration).² It also encompasses the situation, which is the exception rather than the rule, where implementing or administrative responsibilities have been conferred upon the Commission (direct administration).³

Aiming to provide insights into the processes of governance through guidance, this research is conducted at the heart of the system of indirect and shared administration. This chapter explores the contours of the phenomenon of guidance and the competence of the Commission to issue guidance (sections 2.1 and 2.2). It identifies the functions of guidance in the context of shared administration (section 2.3) and finds that the features of informality could be the key to the success of guidance documents, whilst also giving rise to risks that affect the legitimacy of governance through guidance (section 2.4). One of these risks is that the issuing and use of guidance gives rise to problems in light of legal principles governing the implementation of EU law. The final section (section 2.5) selects four legal principles in light of which the use of guidance documents will be analysed and formulates four ‘promises’, or ideal effects, that will be empirically tested in the three policy areas.

2.1 THE PHENOMENON OF GUIDANCE

2.1.1 Guidance and hard law

Article 288 TEU grants legally binding force to regulations, directives and decisions. These forms of secondary EU law are often referred to as ‘hard law’ that distinguishes them from the various other non-binding instru-

1 Jans, Prechal & Widdershoven 2015, p. 7; Hofmann, Rowe & Türk 2011, p. 15-16.

2 See article 291(1) TFEU.

3 The area where the Commission has far reaching implementing powers is the field of state aid and competition policy. See for instance article 105 TFEU and article 108 TFEU.

ments issued by the EU institutions.⁴ Regulations, directives and decisions can each take the form of legislative acts, delegated acts or implementing acts.

Legislative acts (or basic acts) are at the top of the 'hierarchy of acts' introduced in the Treaty of Lisbon. They are adopted following the ordinary legislative procedure that can be found in Article 289 TFEU, the Council and the European Parliament acting as 'co-legislature'. Subordinate to these legislative acts are the delegated acts and the implementing acts. Delegated acts are adopted following the procedure laid down in Article 290 TFEU which empowers the Commission to supplement or amend 'certain non-essential elements of the legislative act'. The legislature is given control over the delegation and the adoption of the delegated act: there should be a basis for the delegation in the legislative act. What is more, the delegation can be made subject to conditions. The delegation may grant the right to the European Parliament or the Council to revoke the delegated act. Either of these institutions could also be given the power to object to the delegated act. Only in the absence of an objection, would the delegated act enter into force.⁵

Article 291 TFEU lays down the procedure for the adoption of implementing acts. This Article now expressly states that it is the task of the Member States to implement 'legally binding Union acts'. Implementing powers can be conferred on the Commission '[w]here uniform conditions for implementing legally binding Union acts are needed'. The issuing of implementing acts is not subject to the control of the EU legislature (the Parliament and the Council). Instead, Article 291 provides for control mechanisms by the Member States, which take the form of the so-called 'comitology procedures' (the advisory procedure or the examination procedure) laid down in Regulation 182/2011.

When looking at the text of the EU Treaties, there is no mention of the term 'guidance documents'. Article 288 TFEU only refers to 'recommendations' and 'opinions' and says that these documents do not have legally binding force. The Treaties also do not provide for a procedure to be followed for the issuing of guidance documents. The issuing of guidance documents, as already stated in the introduction, is an institutional practice that has been developed within the European Commission over time and that is not reflected in the EU Treaties nor in the hierarchy of acts introduced in the Treaty of Lisbon. In the words of Senden, the EU legal framework has not kept pace with this development.⁶

4 Stefan 2013, p. 11. See on the concept of hard and soft law Trubek, Cottrel & Nance 2006 and on the dividing line between legally binding force and legal effects Stefan 2014. The dividing line between hard law and soft law also touches on discussions between 'old' and 'new' governance, with the co-decision procedure (the ordinary legislative procedure) exemplifying 'old' governance: see Scott & Trubek 2002.

5 Article 290(2) TFEU and Hofmann, Rowe & Türk 2011, p. 528.

6 See Senden 2013.

2.1.2 Guidance and soft law

Guidance documents are not the only 'soft' instruments that are issued in the shadows of the EU legal framework.⁷ It is only one category among the various non-legally binding instruments with which the EU institutions seek to steer policy and implementing processes. Other examples of non-legally binding instruments are the guidelines issued by the European Supervisory Agencies, such as the European Security and Markets Authority and the European Banking Authority.⁸ Guidelines and recommendations are also issued, for instance, in the context of the open method of coordination that aims at promoting the convergence of national policies towards common policy objectives.⁹

The various non-legally binding instruments issued by the EU institutions are often referred to as 'soft law', as opposed to the EU hard law instruments that have been granted legally binding force. 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'.¹⁰ A similar, and according to Stefan most quoted definition of soft law is given by Snyder. He considers soft law to be 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects'¹¹ and 'also legal effects'.¹²

The question arises how guidance documents relate to this concept of 'soft law'. In the first place, as is suggested by the term *guidance*, the main aim of these documents is to influence the behaviour of their addressees: national authorities that are involved in the implementation of EU law. The influence of guidance documents may, however, also affect the practices of actors or institutions other than national authorities. Guidance documents may also become embedded in the judicial discourse of national courts, or influence the actions of individuals or other 'third parties'.¹³ What is more, guidance documents may affect practices of the Commission itself when acting as a supervisory actor, or leave traces in rulings of the Court of Justice when adjudicating on questions of EU law. In light of the possible practical

7 Korkea-Aho, p. 275; Senden 2015;

8 See Barkhuysen, Westendorp & Ramsanjhal 2017.

9 See for instance Stefan 2014, p. 363; Senden & Tahtah 2008; Lopez-Santana 2006.

10 Senden 2004, p. 112.

11 Snyder 1995, p. 32.

12 The element of soft law generating 'legal effects' was added to this definition, see Stefan 2013, p. 11.

13 Compare Stefan 2013, p. 16.

effects of guidance documents on both actors at the EU and national level, guidance documents can be considered to be a regulatory instrument.¹⁴

Furthermore, guidance documents can also generate legal effects, in the sense that they indirectly affect rights and obligations of their addressees or third parties.¹⁵ Just as practical effects, legal effects are the result of the use of guidance documents by actors both at the EU level and at the national level. Legal effects arise, for instance, when the Court of Justice uses guidance documents as an aid to interpret provisions in EU legislation. At the national level, legal effects arise, for instance, where a national court uses a guidance provision as an aid to interpret EU legislative provisions or when guidance documents serve as a basis for the adoption of national legislation or individualised decisions.¹⁶ Thus, in light of the possibility of exerting practical *and* legal effects, guidance documents that contain rules of conduct can be considered a form of 'soft law'.

However, not all guidance documents fall within the scope of the category of soft law instruments. The phenomenon of guidance is, in this research, understood in a broad manner, namely as any written document of the European Commission that is aimed at providing assistance to the Member States in the implementation of EU law. It is not limited to only encompassing rules of behaviour, which is essential to soft law instruments.¹⁷ Guidance documents do not necessarily include rules of a normative nature, prescribing or inviting national authorities to implement EU law in a certain manner. The Commission's guidance documents – as we will see in the next chapter – could also be of a highly informational or technical character.¹⁸

This broad understanding of guidance documents fits the purpose of this research to unravel the various ways in which the Commission guidelines are given a role in the implementing practices of the Member States. Moreover, the use of the term guidance documents links up with the term used in practice, as is witnessed by the better regulation guidelines that note that 'Commission documents often provide guidance to the Member States and/or stakeholders in applying and implementing EU law'.¹⁹

14 Senden refers to soft post legislative rulemaking as a 'regulatory phenomenon', see Senden 2004, 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 Scott & Trubek 2002p. 2.

15 Opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, (*Commission v Belgium*); Compare also Hartley 2014, p. 351; See for a list of soft law's possible legal effects Snyder 1996 p. 463 and Stefan 2013, p. 16.

16 Stefan 2013, p. 16.

17 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.

18 See below section 3.2.4.

19 SWD(2017)350 final, p. 43.

2.1.3 A post-law function

Characteristic of the Commission's guidance documents is that, despite their lack of legally binding force, they are closely connected to the legally binding rules as they seek to facilitate the implementation of the EU hard law rules. The documents thus come to play a role only after the legally binding acts have been adopted, which means that guidance documents have a 'post-law' function.²⁰ This post-law function distinguishes guidance documents from other atypical and non-legally binding instruments. In addition to acts having a post-law function, Senden distinguishes between acts that have a pre-law function (acts that are adopted as a preparation for legislative rules) and acts that have a para-law functions (acts that are adopted as an alternative to legislation).²¹

Within the category of post-legislative acts, Senden distinguishes two categories: decisional acts and interpretative acts.²² The first category of interpretative acts entails acts that make clear how, in the Commission's view, a certain provision is to be interpreted and applied. The second category consists of decisional acts that are issued in areas where discretionary, implementing powers have been conferred upon the European Commission. In those acts, the Commission makes clear how it intends to apply legislative provisions in individual cases. Decisional acts can be found in particular in the area of competition law and state aid but also, for instance, in the area of EU subsidies.²³

The issuing of non-binding documents that address the implementing powers of the Member States is considered to be a more recent development in addition to the already established and institutionalised practices of the issuing of decisional and interpretative acts.²⁴ How does the issuing of guidance documents relate to these two categories of 'post legislative rulemaking'?

The issuing of guidance documents differs from decisional acts in the sense that the guidance documents address the implementing powers of the *Member States*, and not those of the European Commission.²⁵ The category of interpretative acts has more resemblance to guidance documents. Guidance documents also often include interpretative rules that make clear how the Member States could or should interpret EU legislative provisions. Nonetheless, as we will see, guidance documents often go beyond providing

20 Cf. Senden 2004, p. 120.

21 Senden 2004, p. 120.

22 See Senden 2013, p. 59-62 and Senden 2013, p. 118, 119.

23 An example are the guidelines on the calculation of the financial corrections in the framework of the conformity and financial clearance of accounts procedures laid down in C(2015)3675 final.

24 Senden 2013.

25 Senden 2013, p. 61.

for interpretative rules, thus falling outside the scope of this category of post-legislative acts.

Therefore, the phenomenon of guidance documents that address the implementing powers of the Member States can be considered a third category of post-legislative acts – within which different types of guidance can be discerned. These types will be introduced in section 3.2.

2.2 THE COMPETENCE OF THE COMMISSION TO ISSUE GUIDANCE DOCUMENTS

The phenomenon of post-legislative guidance described in the previous section, is not given an explicit legal basis in the text of the Treaties. This ‘silence’ of the Treaties raises the question on what basis the Commission issues the various and numerous guidance documents. Indeed, the principle of conferral requires that EU institutions can act only within the powers conferred upon them by the Member States. And, as said before, according to Article 291(1) TFEU the Member States are responsible for the implementation of EU law, not the Commission. What forms the basis for the ‘power’ of the Commission to give guidance to the Member States on the implementation of Union law?

2.2.1 The Commission as guardian of the Treaties

The general roles and responsibilities of the European Commission are outlined in Article 17 TEU. This Article refers to the Commission’s right of initiative, to its ‘executive and managerial functions as laid down in the Treaties’ as well as to its role as guardian of the Treaties: the Commission shall ‘ensure the application of the Treaties’ and ‘oversee the application of Union law under the control of the Court of Justice of the European Union’. Could the issuing of guidance documents be related to these responsibilities outlined in Article 17 TEU?

According to Luijendijk and Senden, decisional acts (in which the Commission makes clear how it will use its own discretionary powers) can be traced back to the executive and managerial functions to which Article 17 TEU also refers.²⁶ When issuing these acts, the Commission acts as the administrative authority responsible for the implementation of EU legally binding rules.²⁷ However, as said in section 2.1.3, decisional acts fall outside the scope of this research.

Guidance documents, that address the Member States’ implementing powers and that form the object of study in this research, could instead

26 Luijendijk & Senden 2011, p. 320. The decisional acts were introduced in section 2.1.3.

27 Luijendijk & Senden 2011, p. 320.

be linked to the Commission's role of 'guardian of the Treaties'.²⁸ Indeed, for the Commission, guidance documents are an instrument to enhance compliance with and to promote an effective implementation of EU law.²⁹ Hofmann Rowe and Türk, on the other hand, link the provision of administrative rules that address the Member States to the Commission's right of initiative.³⁰ This right of initiative, the authors argue, 'ought to allow the presumption of a certain authority in suggesting what the substance of such [legislative and regulatory] schemes is and how (at least broadly) they are to be implemented and administered'.³¹

When looking more closely at the role of the Commission as guardian of the Treaties, a dual role in relation to the issuing and use of guidance documents can be discerned. On the one hand, the Commission issues guidance to give implementation support, on the other hand the Commission also uses guidance documents as a supervisory instrument. What do these two roles entail?

In the first place, by issuing guidance documents the Commission acts as a partner to the Member States, supporting them in their implementing responsibilities. This supportive, facilitating role of the Commission is reflected in the better regulation guidelines. These guidelines, for instance, provide that the Commission shall issue implementation plans ('IPs') that assist Member States in the transposition of EU directives and regulations. According to the better regulation guidelines, 'the preparation of an IP aims at facilitating the timely and effective application of law, fully recognising the responsibility for the latter rests with the Member States'.³²

Second, as guardian of the Treaties the Commission also monitors and supervises the Member States' practices. It is in this context that guidelines issued by the Commission take the role of supervisory instrument.³³ As we will see, the Commission's guidelines may come to be used as an aid to assess whether, in the Commission's view, Member States have correctly implemented the EU legally binding rules. This also means that guidance documents might come to play a role in relation to the decision of whether to open an infringement procedure or to impose a financial correction. This role for guidelines as a supervisory tool will be explored below in section 3.3.3.

From the above, it follows that even though the Treaties do not provide for an explicit basis for the issuing of guidance documents, in Article 17 TEU a general basis for the competence of the Commission to issue guidance documents can be found.

28 Cf. Senden 2013, p. 63; Ballesteros et al. 2013, p. 15; Luijendijk & Senden 2011, p. 319, who find support of this view in case CJEU 15 September 1994, C-146/91, ECLI:EU:C:1994:329, par. 30 (*KYDEP/Council and Commission*).

29 Ballesteros et al. 2013, p. 15.

30 Hofmann, Rowe & Türk 2011, p. 570.

31 See Hofmann, Rowe & Türk 2011, p. 570.

32 SWD(2017)350 final, p. 34.

33 Hofmann, Rowe & Türk 2011, p. 756.

In contrast to the silence of the Treaties, provisions in secondary Union law sometimes explicitly provide that the Commission could or should issue guidance documents. For instance, the Directive establishing the European Electronic Communications Code states that the Commission ‘shall adopt a Recommendation to identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this Directive’.³⁴ There is, however, no general framework laid down in secondary law that provides rules for the issuing of guidance documents. The provisions that empower, or oblige the Commission to issue guidance documents appear in EU legislation on a rather ‘ad hoc’ basis.

Provisions that empower the Commission to issue guidelines do not feature in the regulations and directives adopted in the three policy areas included in this research. This research thus studies guidance documents that are issued ‘spontaneously’ by the Commission acting in its role as guardian of the Treaties.

2.2.2 Limits: no ‘new’ obligations

Even if the issuing and use of guidance documents can be traced back to the role of the Commission as guardian of the Treaties, this does not mean that the issuing and use of guidance documents by the Commission is not subject to legal limits. These legal limits also follow from the principle of conferral: the Commission cannot use guidance documents to act beyond the powers it has been granted by the Treaties. The question, then, is where do the ‘boundaries’ lie? In other words: when does the Commission go beyond its prerogative with the issuing of guidance documents?

According to the Court of Justice, the issuing of guidance documents or other ‘soft instruments’ cannot be used to impose new obligations on the Member States which are not already contained in the underlying EU legislative acts.³⁵ This line of case law set out with the ERTA judgment in 1971, in which the Court considers that any measures ‘whatever their nature or form’ and that are ‘intended to have legal effects’ are susceptible to judicial review.³⁶ In order to examine whether a non-legally binding measure ‘adds’ to the underlying legislative act, the EU Court examines the ‘wording and the context in which it appears, its content and the intention

34 Article 64 of Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code.

35 CJEU 20 March 1997, C-57/95, ECLI:EU:C:1997:164 (*France v Commission*); CJEU 16 June 1993, C-325/91, ECLI:EU:C:1993:245 (*France v Commission*); CJEU 9 October 1990, C-366/88, ECLI:EU:C:1990:348 (*France v Commission*). See Senden 2004, p. 283; 284.

36 ERTA judgment, CJEU 31 March 1971, C-22/70, ECLI:EU:C:1971:32 (*Commission v Council*).

of the institution which adopted it'.³⁷ If, in light of these elements the Court concludes that the act is intended to have binding legal effects,³⁸ the act is susceptible to judicial review under Article 263 TFEU. The Court then examines whether the act is adopted following the same conditions that need to be followed for the adoption of a 'real' hard law act. When there is no legal basis for the adoption of the act, and the required procedure has not been followed, the act will be annulled.³⁹ The act, in the words of Senden, constitutes 'unlawful hard law in the clothing of soft law'.⁴⁰

This ERTA test developed by the Court of Justice has been the subject of fierce criticism. The test, it has been argued, is too stringent, allowing for too little scope of non-legally binding acts to be reviewable and challenged before the Court.⁴¹ Noteworthy in this regard, is the opinion delivered by Advocate General Bobek to the case *Belgium v Commission*.⁴² Bobek argues that the scope of judicial review should be broadened in view of the proliferation of various soft law instruments in the EU regulatory landscape. In his view, the question should not be whether the measure generates *binding* legal effects. What is to be assessed is whether the act generates legal effects, and that to this end the question should be whether the act can be reasonably expected to induce compliance from its addressees.⁴³ The Advocate General advises the Court to attach less value to the wording of the act than is the case in the ERTA test. More attention should be paid to the text, context and purpose of the legislative act.⁴⁴

In its judgment in *Belgium v Commission*, the Court of Justice does not follow the route proposed by Advocate General Bobek.⁴⁵ The Court of Justice, instead, continues to apply the line set out in the ERTA judgment.

37 CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79, par. 33 (*Commission v Belgium*). This test has been developed in the *ERTA* judgment, CJEU 31 March 1971, C-22/70, ECLI:EU:C:1971:32 (*Commission v Council*). The language of the test has, however, not always been the same, as is noted by Bobek in his opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, (*Commission v Belgium*).

38 The initial ERTA judgment was concerned with the question whether the act produces intended to have legal effects. Only in later case law has the test been formulated as to whether the acts produces *binding* legal effects. See for instance CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79, par. 32 (*Commission v Belgium*).

39 Senden & Tahtah 2008, p. 48;

40 Senden 2004, p. 266.

41 Scott 2011

42 Opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, (*Commission v Belgium*).

43 Opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, par. 113 (*Commission v Belgium*).

44 The advocate general proposes three factors to be taken into account in order to examine these two elements: 1) the formalisation and definitiveness of the act – does the actor appear to be to finalised legislation; 2) the preciseness of the obligations contained in that act and 3) whether the acts contain compliance or enforcement mechanisms. Opinion to the judgment of the CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, par. 114 (*Commission v Belgium*).

45 CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79 (*Commission v Belgium*).

‘Challengeable acts’, according to the Court, are acts that are ‘intended to have binding legal effects’.⁴⁶ Thus, the line set out in the ERTA case law still governs the reviewability of non-legally binding acts and therefore continues to define the limits within which the Commission can lawfully issue such acts, among which are the guidance documents studied in this research.

2.3 FUNCTIONS OF GUIDANCE IN A SHARED AND INTEGRATED LEGAL ORDER

The above sections outlined the contours of the phenomenon of guidance, and in doing so also revealed the complexity of the legal context in which guidance documents operate. The EU legal framework comprises of different layers of legally binding rules (legislative acts, delegated acts and implementing acts) that need to be implemented at the level of the Member States. The Commission supports the Member States in their tasks, yet also takes the role of ‘guardian of the Treaties’, and is itself ‘subordinate’ to the Court of Justice who has the final say on the interpretation of EU law.⁴⁷

Over time, this system of shared administration has appeared vulnerable to implementation deficiencies and problems. Implementation, according to Voermans, is the ‘Achilles heel of European integration’.⁴⁸ Provisions in EU legislation may be openly formulated, may have an ambiguous character due to political compromises and often form a complex myriad of legal rules.⁴⁹ As a result, questions on the correct interpretation of Union law might arise, as well as ‘too much divergence’ in the way the Union rules are implemented at the national level.⁵⁰ In light of the system of shared administration a distance might exist between the Commission and national authorities, hampering a dialogue and the exchange of information between the two administrative branches.⁵¹

Guidance documents are considered to play an important role for the adequate functioning of this system of shared administration and, more specifically, for the effective implementation of EU law.^{52,53} This section explores, in light of the features and ‘vulnerabilities’ of the system of shared administration, in what ways guidance documents can contribute to the effective implementation of EU law.⁵⁴

46 CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79, par. 31 (*Commission v Belgium*).

47 See Article 17 TEU.

48 Voermans 2015a.

49 Baratta 2014.

50 Baratta 2014.

51 Möllers 2013, p. 187; Voermans 2015b, p. 349-351.

52 Snyder 1993.

53 Effectiveness, in this research, is understood as the implementation of EU law in line with the EU obligations, or put more simply: compliance with EU binding rules. Cf. Nicolaïdes 2012, p. 6.

54 This section builds on my contribution in ‘Fit for the Future? Reflections from Leiden on the functioning of the EU’, see Van Dam 2016.

2.3.1 What Does it Mean? Clarifying EU Legislation

The main function of guidance documents is to provide clarity on how to interpret and apply the often complex, or openly formulated provisions in EU legislation. Guidance documents assist the Member States in several ways to fulfil their tasks. This clarifying role of guidance could relate to the explanation or interpretation of EU legislative provisions, but could also go beyond interpretation, for instance by giving practical advice or even technical guidance.

The ‘clarifying function’ of guidance documents is important for several reasons. First, the issuing of guidance can simply help the Member States to develop good implementing practices, leading to smooth implementation processes at the national level. Second, by issuing guidance the Commission also gives the Member States, at least to a certain extent, the certainty that they are acting in line with the expectations of the European Commission (see on these expectations section 3.3 below). By following guidance documents, the Member States reduce the risk of being confronted with concerns and critical remarks from the Commission and, eventually, could prevent corrective measures being imposed or an infringement procedure being started.⁵⁵ Thirdly, with the issuing of guidance documents the Commission allegedly reduces the ‘workload’ of the Court of Justice. Hofmann, Rowe and Türk note that it would be ‘highly undesirable for reasons of efficiency (...) were every issue of interpretation and application of European law to be resolved purely through legislation’.⁵⁶

2.3.2 United in too much diversity? Harmonising effects of guidance

EU legislative rules that are to be implemented at the level of the Member States often leave, to a lesser or larger extent, flexibility⁵⁷ or discretion⁵⁸ to the Member States in the implementation of EU law. For instance, EU legislative rules could provide for a certain margin of appreciation⁵⁹ or leave it up to the Member States to choose the form of implementing methods or measures.⁶⁰ What is more, EU legislative provisions also often include

55 Hofmann, Rowe & Türk 2011, p. 570; Senden 2013, p. 64.

56 Hofmann, Rowe & Türk 2011, p. 569.

57 This flexibility/room for manoeuvre is a more neutral concepts then the concept of discretion, which is highly debated in both EU law and national administrative law.

58 Brand describes the concept of discretion as ‘a certain amount of freedom, occurring in the adjudication of disputes or in the creation/application/interpretation of legal rules, that must remain within certain (legal judicial, and political) margins’. See Brand 2008, 219;

59 See for instance CJEU 7 July 2016, C-111/15, ECLI:EU:C:2016:532 (*Občina Gorje v Republika Slovenija*); See also Van den Brink 2012, p. 208; Jans, Prechal & Widdershoven 2015, p. 97, 98.

60 Such as is the case for transposition of Directives, see Article 288 TFEU.

open norms, which require some further interpretation when applied in practice.⁶¹

On the one hand, this flexibility and room for discretion is considered vital for the effective implementation of EU law.⁶² It allows legal rules to be implemented in the way that best fits the circumstances and context at the national level.⁶³ The other side of the coin, though, is that the system of decentralised implementation of EU law could jeopardise consistent and harmonised implementation practices. This risk of too much diversity is considered problematic as it can impede effective implementation processes, especially in competition-driven areas where equal opportunities for the addressees of EU laws are fundamental to the EU project.⁶⁴ Uniformity and consistency in implementing practices is considered key to advancing the European integration process.⁶⁵

The second function that is often associated with the issuing of post-legislative guidance documents is the aim to provide for uniformity and consistency in the implementation of EU law.⁶⁶ Without Commission guidance, it has been argued, 'there would be a high level of unnecessary divergence in approach, technique, and organization (...) across the Member States'.⁶⁷ 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 deemed necessary in many situations to ascertain a minimum level of convergence in implementing practices.

2.3.3 Dialogic function of guidance documents

Dialogue, cooperation and exchange of information between the two levels (the Commission and the Member States) is necessary for the adequate functioning of the system of shared administration.⁶⁸ In practice, however, there is a risk of a gap or distance between those levels. According to Möllers, to the European Commission 'the administrations of the member states are distant, complex, and very heterogeneous entities in a vast administrative space'.⁶⁹ Conversely, at the national level, the European Commission could be perceived as being distanced and unaware of the implementation problems that are encountered at the national level.⁷⁰

61 Compare Bröring et al. 2016, p. 38; Better Regulation Toolbox accompanying SWD(2017)350, p. 294.

62 Brand 2008, p. 218.

63 Brand 2008, p. 218;

64 Schwarze 2006, p. 51.

65 Tridimas 2006, p. 76.

66 Senden 2013, p. 64; Georgieva 2017, p. 176.

67 Hofmann, Rowe & Türk 2011, p. 570.

68 Compare Voermans 2015a.

69 Möllers 2013, p. 188.

70 Voermans 2015b, p. 348; See also Van Keulen 2007 for the case of the Habitats Directive.

The issuing of guidance documents could facilitate a dialogue and exchange of information between the Commission and Member States.⁷¹ A dialogue could be enabled, first, in the situation where guidelines are prepared and drafted in collaboration with national experts in the Member States.⁷² Second, also *after* guidance documents have been issued, this dialogic process can be continued if national authorities report to the Commission whether the guidelines ‘fit’ the circumstances at the national level (as frequently happens in the area of direct payments). In response, the Commission services could revise the guidelines in line with the remarks made by the Member States, thus allowing for an evaluative process that is necessary for the guidelines to remain effective as an implementation tool.⁷³

2.4 INFORMALITY: THE KEY TO SUCCESS?

From the above, it follows that guidance documents could play an important role for the adequate functioning of the system of shared administration. The effectiveness of guidance documents as an implementation tool might be related to the features of informality that govern the issuing of guidance documents.⁷⁴ At the same time, however, the features of informality also make guidance documents susceptible to legal criticism. Indeed, due to the features of informality, the issuing and use of guidance documents might escape legal controls and safeguards. This section explores the phenomenon of informality and how it relates to guidance documents. In what ways, and to what extent, are guidance documents governed by informality; what are the alleged advantages of informality, and what are the risks?

2.4.1 Features of informality

The phenomenon of informality or informal governance has been studied in relation to international law,⁷⁵ and is, increasingly it seems, also being studied in relation to European Union law.⁷⁶ According to Pauwelyn ‘informal international law making’ is informal in the sense that ‘it dispenses with certain formalities traditionally linked to international law’.⁷⁷

71 Compare Hofmann, Rowe & Türk 2011, p. 570; Van Dam 2016

72 See on the ‘dialogical’ function of consultation and the potential role of the Court of Justice. Senden 2013, p. 73-74. Scott and Trubek refer to ‘participation and power sharing’ and ‘deliberation’ as features of ‘new governance’. See Scott & Trubek 2002, p. 5,6.

73 This dialogical function of the guidelines resembles what is in the better regulation guidelines is referred to as ‘evaluation’, see SWD(2017)350 final, p. 50.

74 The (empirical) relationship between the informal character and the effectiveness of guidance documents could be examined in further research.

75 See on ‘informal international lawmaking’ Pauwelyn, Wessel & Wouters 2012.

76 See for instance Christiansen, Follesdal & Piattoni 2003; Mak & Van Tatenhove 2006; Kleine 2014; Kleine 2018; Van Heumen & Roos 2019.

77 Pauwelyn 2012, p. 15.

In light of the formalities linked to (international) law, Pauwelyn differentiates among actor informality, process informality and output informality.⁷⁸ Below, I distinguish different features of informality that govern the issuing and use of guidance documents, using the three types of informality introduced by Pauwelyn.⁷⁹

Process informality

The first feature of informality that characterises guidance documents, is that their issuing process does not follow a standardised Treaty based procedure. The Treaties do not lay down a procedure that needs to be followed for the adoption of guidance documents, nor is there a provision that requires guidance documents to be published in the *Official Journal of the European Union*.⁸⁰

For a long time, Commission guidelines have also not been subject to the principles set out in the – non-legally binding – better regulation guidelines of the European Commission.⁸¹ This changed, however, in 2017 with the inclusion of a paragraph on the Commission's 'guidance documents containing legal interpretation of EU law'.⁸² The better regulation guidelines mention that such guidance documents may, according to the case law of the Court of Justice, 'legally bind the Commission'. Therefore, endorsement of the College of Commissioners is needed for the interpretative guidance documents, unless the guidance documents are part of the Commission's 'normal administrative operations'.⁸³ The toolbox #39 that accompanies the better regulation guidelines, elaborates on what can be understood as falling in the category of interpretative guidance documents.⁸⁴ Approval is considered necessary, for example, for guidance documents 'through which the Commission uses its political discretion' (...) or 'in which the Commission gives a legal interpretation of significant importance that results in new or modified policy developments'. The toolbox also mentions that

78 Pauwelyn 2012, p. 15.

79 Pauwelyn 2012, 15-22. When describing the features of informality of guidance documents I consider it possible to discern among degrees as to which guidance documents are governed by informality. The reason for doing so, is that I regard informality and formality not as mutually excluding categories but rather as a continuum. Indeed, legislative rules having a legally binding character can be more or less formalised, depending on the 'heaviness' of the procedure that needs to be followed. Similarly, guidance documents can be less or more informal, depending on whether and what (informal) rules govern the process by which they are issued or used. The concepts of informality and formality thus refer to the (meta)rules that govern the issuing and use of guidance documents.

80 Article 297 TFEU.

81 The previous better regulation guidelines only provided that for 'implementation plans' an inter service consultation must be conducted. final, p. 35.

82 SWD(2017)350 final, p. 43.

83 Toolbox # 39 (p. 294-297) that accompanies the better regulation guidelines.

84 See Toolbox # 39, (p. 294-297) that accompanies the better regulation guidelines.

for such interpretative documents an ‘interservice consultation’ needs to be conducted. The documents should take the form of an ‘interpretative Communication or Notice’ and shall be published in the C-series of the Official Journal in all languages.⁸⁵

This new section in the better regulation guidelines gives a first sign of, perhaps, a trend towards a ‘formalisation’ of the issuing of Commission guidance documents. Although the better regulation guidelines are not legally binding, they might nevertheless influence the Commission’s ‘guidance practices’ that until now have been shaped by the culture and practices in the individual directorate generals. What this influence will be remains to be seen. In any case, it is not unlikely that questions will arise as to which guidance documents fall within the category of ‘guidance containing legal interpretation’, and what guidance documents can be considered part of the Commission’s normal administrative operations. These questions did not arise during the course of this research, as most of the guidance documents studied in the context of this research had been issued before the introduction of these better regulation guidelines.

Actor informality

Related to ‘process informality’ is the feature ‘actor informality’, which concerns the absence of rules regulating which actors should be involved in the issuing process of guidance documents.⁸⁶ The silence of the Treaties on the issuing of guidance documents also extends to this aspect of informality: the Treaties do not lay down a consultation procedure that needs to be followed when issuing guidance documents. This is in contrast to the implementing acts, for which one of the so-called comitology procedures needs to be followed.⁸⁷ Even though there is not a general obligation to apply these comitology procedures to the issuing of Commission guidelines, comitology procedures could still be made applicable to the issuing of guidelines in secondary legislation.⁸⁸ What is more, directives or regulations could also include the obligation to consult national authorities prior to the adoption of guidance documents without rendering the comitology procedures applicable.⁸⁹

85 See Toolbox # 39, (p. 294-297) that accompanies the better regulation guidelines.

86 Compare Pauwelyn 2012, 19-20.

87 Article 291 TFEU and Regulation (EU) 182/2011. See also above section 2.1.1

88 An example is Article 9 of the Intelligent Transport Systems Directive 2010/40/EU which states the advisory procedure applicable to the ‘guidelines and other non-binding measures’ that – according to the same Article – may be adopted by the Commission. See also Senden 2013, p. 69.

89 For instance, the Directive on the European Electronic Communications Code requires the Commission to adopt recommendations only after consulting the national regulatory authorities. See Article 64 of Directive (EU) 2018/1972.

Finally, as mentioned above, the better regulation guidelines now also affect the actor informality of Commission guidelines. Indeed, the guidelines provide that the guidance documents containing legal interpretation must be approved by the College of Commissioners, and that such documents are normally subject to an interservice consultation.⁹⁰ The guideline-showever, do not provide for general rules concerning the consultation of national experts or stakeholders. This leads to the conclusion that general consultation rules or guidelines do not apply to the issuing of the Commission's guidance documents.

Output informality

In terms of 'output', Commission guidance is informal in the sense that there is little formalisation as regards the form of guidance documents. The TFEU does not prescribe what form guidance documents should take other than that – as Article 288 TFEU states – 'recommendations and opinions shall have no binding force'. As a result, in practice guidance documents take various forms and shapes, ranging from Communications, Notices and Recommendations to Staff Working Documents, letters, good practices and handbooks. It is likely that the better regulation toolbox will bring some alignment as to the form of the guidance documents, by prescribing that guidance documents containing legal interpretation are to take the form of a Communication or Notice.

Another, and perhaps the most important characteristic of output informality, is that guidance documents do not have legally-binding force. Nonetheless, the absence of legally-binding force does not mean that the use of guidance documents remains fully unregulated. In different ways 'expectations' are formulated as to how national authorities, as well as national courts, should use Commission guidance documents. These expectations can be found in provisions in secondary legislation,⁹¹ in rulings of the Court of Justice, as well as in monitoring practices of the Commission.⁹²

2.4.2 Advantages of informality

When studying the issuing and use of guidance documents from a legal, 'rule of law' perspective, one might be inclined towards pointing out the legal risks and pitfalls of informality. Nonetheless, seeing the possible advantages of informality is equally important as this allows a better understanding of the risks of regulating the issuing and use of guidance

90 Toolbox # 39, (p. 294-297) that accompanies SWD(2017)350 final, p. 43.

91 See for instance Article 38 of Directive (EU) 2018/1972 on the European Electronic Communications Code which says that national regulatory authorities shall 'take utmost account' of recommendations adopted by the European Commission.

92 The different expectations will be identified and discussed below in section 3.3 and section 3.4.

documents. Drawing on literature on informality as well as on literature on (EU) soft law⁹³ and governance,⁹⁴ this section identifies possible advantages of the informal character of guidance documents. Section 2.4.3 explores the risks of informality.

Speedily issued and revisability

The first advantage of a highly unregulated issuing process of guidance documents is that the documents can be issued and revised relatively easily compared to regulations, directives and decisions.⁹⁵ Indeed, there are no, or fewer, procedural hurdles that need to be taken during the issuing process. Consequently, guidance documents could be able to swiftly address changing circumstances or new insights on appropriate implementing practices.⁹⁶ How fast guidance documents can be issued or revised is dependent on what procedure is followed in practice; as mentioned above, some guidance documents have a more formalised character than others. Furthermore, as we will see, within the Commission the issuing of guidance documents follows different procedures depending on the culture and established practice within the Directorate General.⁹⁷

Less susceptible to compromises

The second advantage is that the informal character enables guidance documents to address the need for clarification of provisions in EU legislation. This is due to the actor informality that governs the issuing of guidance documents: there is no (general) obligation for the Commission to give Member States or other EU institutions a formal role in the issuing process. As a result, guidance documents are less likely to reflect political compromises than in the case their content had to be negotiated.⁹⁸ Even when in practice national authorities or other experts are consulted, it is still the Commission who decides on the content of guidance documents.

Facilitating dialogue and cooperation

The third advantage is that when consultations take place in an informal sphere, actors might be more willing to share information and cooperate.⁹⁹ A sphere of cooperation and trust is more likely to manifest itself when

93 Korkea-Aho 2009; Cini 2001; Stefan 2014, p. 363.

94 Trubek, Cottrel & Nance 2006; Scott & Trubek 2002.

95 Compare Scott & Trubek 2002, p. 6; Stefan 2014, p. 363.

96 Compare Scott & Trubek 2002, p. 6.

97 See section 8.1.

98 Compare Trubek, Cottrel and Nance who speak of a reduction of 'negotiation costs', Trubek, Cottrel & Nance 2006, p. 88. Cini notes that soft law 'can allow for regulation where no regulation would otherwise be possible, see Cini 2001, Cini 2001, p. 194.

99 Mak & Van Tatenhove 2006, p. 3; Christiansen, Follesdal & Piattoni 2003, p. 7.

the Commission makes clear that it will use information provided by the Member States for the drafting of guidance documents, though not for its monitoring tasks. Knowing that the information will be used to draft the Commission guidelines, Member States might be more willing to share information than at official consultations or formal meetings. This objective of creating a sphere that enables such a dialogue is demonstrated for instance by the organisation of ‘workshops’ where the Commission facilitates the exchange of good practices by the Member States.¹⁰⁰

Leaving room for manoeuvre and flexibility

A final and fourth advantage is related to the output informality of guidance documents. The fact that guidance documents are not legally binding, allows the Commission to give guidance to the Member States, whilst respecting their implementing responsibilities.¹⁰¹ Therefore, the guidance documents, at least in theory, respect the discretionary powers of the Member States in the implementation of EU law, and do not detract from the flexibility granted in EU legislative provisions. The guidance documents thus leave room for what has been called ‘implementing flexibility’¹⁰². It is likely that the absence of legally binding force makes guidance documents an acceptable implementation tool for the Member States: the documents – at least in theory – do not touch upon their discretionary powers.¹⁰³ As a result, guidance documents are able to address implementing questions even in areas with a highly heterogeneous character or in situations where implementing measures touch upon politically sensitive policy issues.¹⁰⁴

2.4.3 Risks of informality

As mentioned above, the features of informality not only make guidance documents a flexible implementation tool, but also give rise to risks that could affect the legitimacy of governance through guidance. In order for a political system to be legitimate, Scharpf distinguishes between two forms of legitimacy: input and output legitimacy.¹⁰⁵ Input legitimacy is concerned with the ‘participatory quality of the process leading to laws and rules’.¹⁰⁶ It requires sufficient possibilities for participation and control

100 See on guidance in the form of good practices below section 3.2.5.

101 Hofmann, Rowe & Türk 2011, p. 570; Korkea-Aho 2009, p. 272; Trubek, Cottrel & Nance 2006, p. 88.

102 Compare Trubek, Cottrel & Nance 2006, p. 88; Scott & Trubek 2002, p. 6 who speak of ‘diversity and decentralisation’.

103 Compare Hofmann, Rowe & Türk 2011, p. 570.

104 Compare Stefan 2014, p. 363 and Trubek, Cottrel & Nance 2006, p. 88.

105 These two dimensions both shed light on the concept of collective self-determination, which according to Scharpf legitimizes the exercise of governing authority. See Scharpf 1999, p. 6.

106 Schmidt 2013, p. 4.

mechanisms prior to the adoption of a legal rule.¹⁰⁷ Output legitimacy refers to the effectiveness of regulatory instruments to achieve policy objectives and to solve collective problems.¹⁰⁸ To these two dimensions of legitimacy, Schmidt added a third dimension: the notion of throughput legitimacy.¹⁰⁹ Throughput legitimacy refers to the procedural aspect of legitimacy and is concerned with the quality of governance processes.¹¹⁰

This section distinguishes three 'groups of risks' that reflect the concerns related to these three different dimensions of legitimacy of governance through guidance: 1) risks related to the issuing process of guidance documents; 2) risks related to their effectiveness as an implementation tool; and 3) risks related to the legal implications of guidance documents. This third group of risks forms the focal point of this research, and leads to the next section that develops a framework to analyse the use of guidance in light of four legal principles.

1) *The risk of an 'undemocratic' issuing process of guidance*

The first group of criticism relates to the absence of procedural controls and legal safeguards during the issuing process of guidance documents. These criticisms emphasise that guidance documents are insufficiently embedded in input legitimacy and, consequently, are characterised by a low level of democratic legitimacy. Senden, for instance, argues that the issuing process of soft administrative rulemaking is insufficiently governed by rules for consultation and dialogue, and is characterised by 'an extreme lack of transparency'.¹¹¹ This absence of control mechanisms could have the result that soft rulemaking practices are used to circumvent the legislative procedures spelled out in the Treaties.¹¹² What is more, as is also argued by Scott, there is little *ex post* control on the quality of the issuing process, as the majority of guidance documents escapes the scope of judicial review.¹¹³

The study (commanded by the European Parliament) conducted by Senden and Van den Brink on soft rulemaking shows that for various reasons (many of which have been mentioned above) soft rulemaking instruments give rise to problems from the perspective of procedural and input legitimacy.¹¹⁴ The current EU legal framework does not contain the necessary mechanisms for procedural and judicial control of soft rulemaking instruments. Hence, the authors make 'a plea for enhanced proceduralisation' of the Commission's soft rulemaking practices.¹¹⁵

107 Scharpf 1999, p. 6, 7; Bokhorst 2014, p. 60.

108 Scharpf 1999, p. 6, 11.

109 Schmidt 2013.

110 Schmidt 2013 and Bokhorst 2014, p. 62.

111 Senden 2013, p. 65, 69.

112 Senden 2013, p. 65; Scott 2011, p. 349-352; .

113 Scott 2011; Senden 2013, p. 70. 2.2 also section 2.2.2.

114 Senden & Van den Brink 2012.

115 Senden & Van den Brink 2012, p. 71; see also Senden 2013.

2) *Risks related to the 'mystery' of the effectiveness of guidance*

Even if the EU legal framework is geared towards contributing to objectives of flexibility and effectiveness, as argued by Senden and Van den Brink,¹¹⁶ the question remains whether and under what circumstances guidance documents achieve their effects in practice. Indeed, in view of the lack of legally binding force of guidance documents, it is the responsibility of national authorities whether or not to follow the Commission guidelines when implementing EU law. The report 'Le droit souple' of the French Council of State states: 'Cette question de l'effectivité est au cœur du mystère et de la séduction exercée par le droit souple'.¹¹⁷ The second group of risks, therefore, relates to uncertainty about the effectiveness of guidance documents as an implementation tool.

This dimension of governance through guidance is linked to the output legitimacy of guidance documents, which (as mentioned above) is concerned with the effectiveness of regulatory instruments to achieve policy objectives. The output legitimacy is an important element of governance through guidance. Indeed, promoting the effective implementation of EU law is often the main rationale behind the issuing of guidance documents.¹¹⁸ The problem solving character of guidance is all more the important, one could argue, in light of its low level of input legitimacy. This view is also taken in the report of the French Council of State referred to above, which states: 'lorsque la légitimité du droit souple est incertaine, le problème est d'autant plus aigu que son effectivité est importante'.¹¹⁹

Therefore, the question under what conditions and circumstances guidance documents are actually able to exert effects in practice is an important question. Nonetheless, it is not the focal point of this research, which explores yet another dimension of governance through guidance.

3) *Risks of an 'unprincipled use' of guidance*

The third dimension of governance through guidance also relates to the effects of guidance documents, yet approaches these effects from the viewpoint of legal principles. Guidance documents are not only issued with the aim of contributing to the effective implementation of EU law. As will be discussed below in section 2.5.2, the issuing of guidance documents is also inspired by the objective to enhance principles such as legal certainty, transparency and consistency in implementation processes. However, it is questionable whether guidance documents live up to these goals in practice.¹²⁰

116 Senden & Van den Brink 2012, p.131.

117 Conseil D'État 2013, p. 85.

118 The role of guidance documents as a tool to promote the effective implementation of EU law has been discussed in section 2.3.

119 Conseil D'État 2013, p. 85.

120 Senden 2013, p. 64, 65; Stefan 2014; Georgieva 2016.

Furthermore, governance through guidance is accused of behaving as though it were hard law, thus jeopardising legality.¹²¹

This ‘procedural dimension’ of governance through guidance – after the documents have been adopted – therefore also defines, at least partly, its success as a governance tool. It is another piece in the puzzle of the legitimacy of governance through guidance and touches upon the notion of throughput legitimacy.¹²² Indeed, decision making in a transparent, objective, consistent and unbiased manner can be considered to enhance the quality of these processes.¹²³ These values also contribute to compliance with, and acceptance of, the decisions being taken, as research on procedural justice has shown.¹²⁴ This means that respect for legal principles during the implementation process could also contribute to the effectiveness of guidance documents.¹²⁵

In this research, I choose to explore the effects of guidance documents through the lens of legal principles. The research is conducted with the aim of identifying the legal implications of the use of guidance that thus far have remained highly uncertain and speculative.

2.5 GUIDANCE, LEGAL PRINCIPLES AND PROMISES

Aiming to explore the relationship between the use of guidance and legal principles, the question that arises is *how* to assess the use of guidance in the national legal order in light of legal principles that govern the implementation of EU law. Indeed, there are many legal principles that govern the implementation of EU law, and many possible aspects of the use of guidance that might be relevant when studying the use of guidance documents in light of these legal principles. This section seeks to develop a framework that enables to analyse the use of guidance in light of legal principles governing the implementation of EU law.

How to proceed? First, this section reflects on what is understood by legal principles in this research. It subsequently selects four legal principles that are likely to be affected by the use of guidance documents in the national legal order. In light of these four legal principles four ‘ideal effects’ will be formulated that the use of guidance documents could bring about in practice. These ideal effects are the promises that will be tested in this research.

121 Klabbers 1998, p. 176, 177; Van den Brink 2016.

122 Schmidt 2013.

123 See on different forms of throughput legitimacy can take Schmidt 2013; According to Bokhorst the exact definition, and content of throughput legitimacy is uncertain Bokhorst 2014, p. 60.

124 Tyler 2003, p. 350; Lind & Arndt 2016,, p. 6, 7.

125 Compare Buijze 2009.

2.5.1 Legal principles: an EU perspective

'Legal principles governing the implementation of EU law'

Legal principles are an important 'source of law' in the European Union legal order.¹²⁶ They fill the gaps of the EU Treaties and legislation. Tridimas distinguishes two groups of general principles.¹²⁷ The first group includes principles such as supremacy and direct effect, subsidiarity and institutional balance; principles that are characteristic for the 'EU legal edifice'. The second group includes principles that derive from the rule of law, which in the words of Tridimas, essentially means that public power is subject to substantive and procedural limitations. This group includes principles such as legality, legal certainty, equality, proportionality and legitimate expectations.¹²⁸

The legal principles entrenched in the rule of law have been derived from the 'constitutional traditions common to the Member States'¹²⁹ and have been adapted and transformed by the Court of Justice in light of the characteristics of EU law, following a 'creative and eclectic judicial process'.¹³⁰ The principles are part of the *acquis communautaire* that must be respected by the EU institutions when fulfilling their legislative and administrative tasks. Important for this research is that these principles must also be respected by the Member States when implementing EU law.¹³¹ The principles are to be observed not only when defining the content of implementing measures, but also during the adoption process of such measures.¹³²

This research focuses on the second group of legal principles mentioned above: the legal principles that derive from the rule of law. It seeks to study the use of guidance documents in light of 'legal principles governing the implementation of EU law' (as the second part of the research question states). 'Legal principles', in this research, are understood to be general values that are fundamental to the EU legal order based on the rule of law, and that must be respected during the implementation of EU law.

126 Hartley 2014, p. 144.

127 Tridimas 2006, p. 4.

128 Tridimas 2006, p. 4.

129 Article 6 TEU.

130 Tridimas 2006, p. 6. This process follows an 'evaluative comparative approach'. See {Schwarze, 2006 #192, p. 72 and {Tridimas, 2006 #32, p. 21.

131 CJEU 25 November 1986, C-201 and 202/85, ECLI:EU:C:1986:439, par. 10-12 (*Klensch v Secrétaire d'État à l'Agriculture et à la Viticulture*) and for further discussion on this point {Tridimas, 2006 #327}, p. 36, 37.

132 CJEU 20 June 2002, C-313/99, ECLI:EU:C:2002:386, par. 48 (*Mulligan and Others*) and Tridimas 2006, p. 37 and 287.

Which role for general principles of Dutch administrative law?

As the previous section concluded, this research evaluates the use of guidance in light of legal principles that are fundamental to the EU legal order. This raises the question what role *national* legal principles have in this research. Indeed, not only EU legal principles but also national legal principles play an important role in implementation processes. This follows from the principle of procedural autonomy according to which Member States apply the EU rules, in principle, using their own national procedural rules and principles provided this is in line with the requirements set at the EU level.¹³³

Studying the use of guidance in light of national legal principles could provide interesting insights and questions on how guidance documents should be used from a national point of view, thus providing further insights into legitimacy questions related to governance through guidance.¹³⁴ The objective of this research, however, is not to evaluate the use of guidance documents in light of the general understanding of legal principles in Dutch legal scholarship and practice. This could be an avenue for further research.

Nonetheless, even when taking an ‘EU perspective’ towards legal principles, this does not mean that Dutch legal principles have no role or are of no relevance for this research. The way in which guidance documents are used at the national level may still be influenced and shaped by national legal principles and, more generally, by national administrative practices and culture. Therefore, in this research Dutch administrative law and culture is perceived as a contextual factor which might influence the use and implications of guidance documents in the national legal order.¹³⁵

2.5.2 Which legal principles?

In view of the aim of this research to conduct an in-depth study of the implications of the use of guidance documents in the light of legal principles, it is not possible to include all legal principles that derive from the rule of law. The next question, therefore, is in light of which legal principles the use of guidance documents by national authorities and national courts will be evaluated. This section identifies which legal principles, according to literature on guidance and soft law, have been considered to be served by the

133 See for instance See for instance CJEU 21 September 1983, C-205-215/82, ECLI:EU:C:1983:233, par. 17 (*Deutsche Milchkontor GmbH*). See also Jans, Prechal & Widdershoven 2011, p. 44.

134 In Van Dam 2013 I explore the role of guidance documents in light of the Dutch principle of legality.

135 The general features of Dutch administrative law and practices are discussed in section 4.1.

use of guidance documents and which legal principles have been associated with the possible risks of the use of guidance as an implementation tool.

Winning principles of guidance: (only) theory?

Which legal principles are, according to the literature, considered ‘winning principles’ of governance through guidance in the context of the implementation of EU law?

The legal principle that perhaps is most often considered to benefit from the issuing of guidance documents is the principle of legal certainty. Hofmann, Rowe and Türk, for instance, consider ‘legal certainty and predictability’ one of the main functions of administrative rule-making by the Commission.¹³⁶ Senden notes that the objective of enhancing legal certainty often transpires from decisional guidance documents in which the Commission makes clear how it exercises its discretion.¹³⁷ More generally, the French Council of State refers to ‘le rôle que peut jouer le droit souple pour rendre plus prévisible l’application du droit dur par les administrations’.¹³⁸

The second principle that is considered to be a function, or objective of guidance documents is the ability of those documents to enhance consistency and equality in the implementation of EU law. Several authors consider equal treatment and the consistent application of Union law amongst soft law’s key objectives.¹³⁹ For instance, Georgieva shows that the Commission’s premise of competition law notices and guidelines is to make a ‘valuable contribution to the consistent application of Community law’.¹⁴⁰ Hofmann, Rowe and Türk consider that Commission Communications ‘assist in ensuring respect for equal treatment’ for the reason that all organisations have access to the same information.¹⁴¹

Thirdly, the issuing of guidelines has been related to the notion of ‘transparency’ of the Commission’s decision-making processes.¹⁴² For instance, according to Prechal and De Leeuw the Commission has adopted numerous soft law instruments in order to render its decision-making processes more transparent.¹⁴³ The objective of promoting transparency seems to be related in particular to the issuing of decisional guidelines in which the Commission makes clear how it will use its discretionary implementing powers.

136 Hofmann, Rowe & Türk 2011, p. 542; See also Van den Brink 2016, p. 9.

137 Senden 2013, p. 64.

138 Conseil D’État 2013, p. 98.

139 See for instance Senden 2013, p. 64, 65; Stefan 2014, p. 359; Van den Brink 2016, p. 9; Georgieva 2016 and Devine & Eliantonio 2018, p. 52.

140 Georgieva 2017, p. 176; This objective can be found in the Commission White Paper on Modernisation of the rules implementing articles 85 and 86 of the EC Treaty of 12 May 1999, par. 86.

141 Hofmann, Rowe & Türk 2011, p. 542.

142 Van den Brink 2016, p. 10; Senden 2013, p. 61, 64; Stefan 2014, p. 374.

143 Prechal & de Leeuw 2007, p. 55.

This not only follows from the literature, but also from rulings of the Court of Justice. For instance in the case *Italy v Commission*, the Court considers that guidelines in which the Commission clarifies how it exercises its discretion, 'certainly help to ensure that it [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty'.¹⁴⁴

From the above, it follows that the issuing of guidance documents is considered to be aimed at, or to contribute to, ensuring legal certainty, consistency, equality as well as transparency in the implementation process.¹⁴⁵ In this regard, it should be noted that these principles are mentioned most often in relation to the use of guidance documents in the *Commission's* practices. This research, instead, studies the use of guidance documents at the national level. Are guidance documents also able to exert such effects at the national level, in national implementing practices?

Losing principles, in practice?

Although legal certainty, equality and consistency, and transparency may be considered the driving forces behind the issuing of guidance documents, it is also questioned whether these objectives are accomplished in practice. In the words of Senden: the fact that the issuing of guidance is 'inspired' by the desire to enhance the mentioned legal principles, 'does not mean that their actual use meets these goals'.¹⁴⁶

In the literature, several risks and factors have been pointed out that could hamper guidance documents in achieving these objectives in practice. Stefan, for instance, considers that if it is not recognised by the Court of Justice, soft law fails to accomplish its key objectives.¹⁴⁷ The same author also notes that soft law's aim of enhancing predictability is in contradiction to the uncertainty as to the legal effects that soft law instruments generate in court.¹⁴⁸ Georgieva considers the lack of binding force of soft law instruments an obstacle to the ability of those documents to achieve their objective of consistency as the guidelines might not be used similarly by national courts.¹⁴⁹ The function of guidance documents to contribute to transparency is also called into question. It has been observed that the documents are 'not always easily understood by the individuals concerned',¹⁵⁰ whilst the procedure for the adoption of post-legislative acts has been denoted as being 'characterised by an (extreme) lack of transparency'.¹⁵¹

144 CJEU 7 March 2002, Case C-310/99, ECLI:EU:C:2002:143, par. 52 (*Italy v Commission*).

145 See also Stefan 2014; Senden 2013, p. 64, 65; Van den Brink 2016, p. 9, 10.

146 Senden 2013, p. 65.

147 Stefan 2014.

148 Stefan 2014, 365.

149 Georgieva 2017, p. 176.

150 Stefan 2014, 374; .

151 Senden 2013, p. 65.

Finally, the effects of guidance documents have also given rise to concerns in light of the principle of legality and the closely related principle of conferral. In this regard, guidance documents are considered to jeopardise the vertical division of competences, by pre-empting the Member States from choosing their own path in the implementation of EU legislation.¹⁵² As already mentioned it has also been argued that guidelines risk being used to circumvent the legislative procedures in the Treaties, thus taking over the rule of EU hard law.¹⁵³ Hofmann, Rowe and Türk, on the other hand, emphasise that national administrations can always 'choose to deviate from the path suggested by the Commission and, where controversial, have this tested before the Court'.¹⁵⁴

Legal certainty, equality and consistency, transparency and legality

The literature thus shows two scenarios: on the one hand, the issuing and use of guidance documents is presented as a potential catalyst of legal principles in implementation practices. Guidance documents could contribute to the observance of legal certainty, equality and consistency as well transparency in the implementation process. Yet several authors have also expressed concerns. They warn that guidance documents could equally undermine these legal principles, as well as the principle of legality in implementing practices. It is the aim of this research to clarify what guidance documents do in real life, in light of these four legal principles.

2.5.3 From principles to promises

The above sections lead to the conclusion that the use of guidance documents in the Dutch legal order will be evaluated in light of four legal principles that derive from the rule of law: the principles of legal certainty, the principle of equality and consistency, the principle of transparency and the principle legality. The final sections of this chapter will develop a framework to analyse and evaluate Dutch implementing and judicial decision-making practices in light of those four legal principles. The next four sections each consist of two parts.

First, the sections will give a general outline of the content and general requirements of the four legal principles in the context of the implementation of EU law at the national level. The discussion of those legal principles will focus on aspects, or dimensions of these legal principles that are relevant for examining the use of guidance in implementation practices at the national level. This means that the aim of the following sections is not to give a detailed outline or definition of the content of the four legal principles. Not only is it impossible to give an exact definition of the content of

152 Ehricke 2004, p. 360.

153 Luijendijk & Senden 2011, p. 318; Van den Brink 2016, p. 10.

154 Hofmann, Rowe & Türk 2011, p. 570.

these principles for the reason that legal principles are characterised by their ‘openness’ and general wording;¹⁵⁵ this is also not the aim of this research. Therefore, some distance is taken and, whilst taking note of the case law of the Court of Justice and legal doctrine, the legal principles and relevant aspects thereof will be broadly and briefly outlined.

Subsequently, for each of the four legal principles the next sections will explore how guidance documents should ideally be used in order to be in line with these legal principles. These ideal uses of guidance documents are of a hypothetical nature, and inspired by the literature on the potential role of guidance as a catalyst of legal principles. This exercise of constructing ideal uses leads to four promises of guidance documents – which perhaps are more wishful thinking than reality – against which the use of guidance documents can then be tested: does the use of guidance documents by national authorities and national courts fulfil the promises of guidance in practice?

2.5.4 Promise 1: promoting certainty and predictability in the implementation of EU law

The principle of legal certainty

The first principle in light of which the use of guidance documents will be assessed is the principle of legal certainty. This principle seeks to ensure that those who are subject to the law must be able to know and understand their rights and obligations, and must be able to plan their actions in light of the rules by which they are governed.¹⁵⁶ The Court of Justice requires that EU legislation must be ‘clear and precise’ and that the application of these rules ‘must be foreseeable by those subject to it’.¹⁵⁷ The requirements of the principle of legal certainty not only govern EU institutions when enacting legal acts, but also Member States when implementing EU legislation.¹⁵⁸ This means that the provisions of a directive must be implemented ‘with unquestionable binding force and with the specificity, precision and clarity needed in order to satisfy the need for legal certainty’.¹⁵⁹ What is more, the requirement of legal certainty must be observed all the more strictly in the case of rules which are liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.¹⁶⁰

155 Schmidt-Aßmann 2013, p. 5; Tridimas 2006, p. 1 and Hofmann, Rowe & Türk 2011, p. 145.

156 Tridimas 2006, p. 242.

157 CJEU 29 October 2009, C-29/08, ECLI:EU:C:2009:665, par. 77 (*Skatteverket v AB SKF*); CJEU 13 October 2016, C-231/15, ECLI:EU:C:2016:769, par. 29 (*Prezes Urzędu*).

158 CJEU 10 September 2009, C-201/08, ECLI:EU:C:2009:539, par. 43 (*Plantanol v Hauptzollamt Darmstadt*).

159 CJEU 3 March 2011, C-50/09, ECLI:EU:C:2011:109, par. 46 (*European Commission v Ireland*).

160 CJEU 29 October 2009, C-29/08, ECLI:EU:C:2009:665, par. 77 (*Skatteverket v AB SKF*).

Despite the fact that legal certainty is one of the principles that guides the practices of legislative drafting,¹⁶¹ in reality questions often arise as to the interpretation and application of EU legislative provisions.¹⁶² The Court of Justice has the final authority to clarify questions on the interpretation of EU legislation.¹⁶³ However, judicial guidance provided by the Court of Justice is not available for all questions, and may be open to multiple interpretations.¹⁶⁴ Consequently, questions on the correct interpretation and application of EU law inevitably arise, which may give rise to questions and uncertainty for national authorities when implementing Union law in the national legal order.

The promise of predictability

The question now is how guidance documents could play a role in taking away uncertainty in the implementation of EU law. As we have seen above in section 2.3.1 and section 2.5.2, ensuring legal certainty and predictability in the implementation of Union law is one of the main functions devoted to guidance documents in literature as well in practice. As also mentioned above in section 2.5.2, the function of guidance documents to enhance certainty and predictability is generally related to the use of guidance documents by the European Commission. In the words of the Court of Justice, the guidelines ‘certainly help to ensure that it [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty’.¹⁶⁵

Hence, by issuing guidelines the Commission is able to address uncertainty of national authorities, for whom uncertainty is particularly problematic in light of the role of the European Commission in monitoring implementing practices in the Member States.¹⁶⁶ Could guidance documents also render the implementation of EU law predictable and foreseeable for citizens who are affected by the implementing practices of national authorities? What conditions need to be fulfilled for the guidelines to exert this ‘predictability effect’ in implementing practices at the national level, which indeed is the focal point of this research?

As mentioned above, one of the main elements of the principle of legal certainty is that it requires the actions of the administration to be foreseeable. Therefore, in order for guidance documents to be able to contribute to

161 This aspect of legal certainty is referred to as ‘formal legal certainty’. Ranchordás 2014, p. 126.

162 These questions, for instance, arise when legislative provisions have a vague or ambiguous character due to political compromises or where legal provisions have a complex character. What is more, to a certain extent vagueness is inherent to the general character of legal rules which must be applicable to individual cases. See for instance Paunio 2003, p. 1471; Prechal & van Roermand 2008, p. 5; Klap 1994.

163 Article 19 TEU.

164 Compare Hofmann, Rowe & Türk 2011, p. 569.

165 CJEU 7 March 2002, Case C-310/99, ECLI:EU:C:2002:143, par. 52 (*Italy v Commission*).

166 Baratta 2014.

predictability in implementing practices, it is presumed that the Commission guidelines should be used in a predictable manner. What does this mean? It means, first, that national authorities are clear about whether they use Commission guidelines when implementing provisions of EU law. Second, it means that they must be clear about the status, or binding effect, that they attach to those guidelines when implementing Union law.

Similar conditions can be assumed to apply to national courts when reviewing the implementing practices of national authorities. In order to be able to promote the 'predictability effect' of Commission guidelines, national courts should use guidance documents in a predictable manner too. First, they should make clear whether they use the guidelines when interpreting or applying EU legislative provisions. Second, the courts should be clear about the legal status or binding effect of those guidelines for the courts themselves, as well as for national authorities.

To conclude, in order to be able to assess whether guidance documents contribute to enhancing legal certainty in implementation processes, this research presumes that guidelines need to be used in a predictable manner. Only then can the guidelines be considered able to fulfil their promise of contributing to a predictable implementation of Union law. The promise of predictability is the first promise that will guide the empirical analysis.

2.5.5 Promise 2: Promoting consistency in the implementation of EU law

The principle of equal treatment and consistency

The principle of equal treatment has been recognised by the Court of Justice as one of the general principles of Union law.¹⁶⁷ Article 2 of the Treaty on European Union now expressly refers to equality as one of the values on which the European Union is founded. However, equality is not only a 'constitutional necessity';¹⁶⁸ equality is also a 'cornerstone of European integration', as it protects the internal market against distortions of competition and an unequal playing field.¹⁶⁹ Important for this research is that the principle of equal treatment needs to be respected not only by the EU institutions, but also by the Member States when implementing EU law. The Court of Justice already made this clear in 1986 in the case *Klensch*.¹⁷⁰

The principle of equality is closely related to consistency. In the words of Tridimas '[e]quality means consistency and rationality. A decision maker must treat similar cases consistently'.¹⁷¹ According to Van Ommeren, the

167 CJEU 13 July 1978 Case 8/78, ECLI:EU:C:1978:157, par. 18 (*Milac*). See also Hofmann, Rowe & Türk 2011, p. 163.

168 Tridimas 2006, p. 76.

169 Tridimas 2006, p. 76.

170 CJEU 25 November 1986, C-201 and 202/85, ECLI:EU:C:1986:439, par. 10 (*Klensch v Secrétaire d'État à l'Agriculture et à la Viticulture*). See also Tridimas 2006, p. 8.

171 Tridimas 2006, p. 76.

principle of consistency even has a certain independent status and therefore can be considered a legal principle that is entrenched in the rule of law.¹⁷²

The requirement of consistency is relevant in the context of the exercise of administrative discretion by the European Commission. This follows from the case law in relation to the use of decisional guidelines, in which the Commission lays down the policy line on how it intends to exercise its discretionary powers. The Court of Justice has ruled that when issuing guidelines, the Commission limits its own discretion and therefore 'cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of Union law such as equal treatment or the protection of legitimate expectations'.¹⁷³ Thus, the principle of equality is one of the principles leading to a self-binding effect of decisional guidelines on the Commission when exercising its discretion.¹⁷⁴

The requirement of consistency also governs the implementation of Union law in the national legal order. Indeed, from the principle of equality it can be derived that national authorities should exercise their discretionary implementing powers in a consistent manner. Consequently, in the words of Tridimas, national authorities should 'treat similar cases consistently'.

In this research equality, of which consistency is thus considered an essential element, is taken as one of the legal principles in light of which the use of guidance documents at the national level will be analysed.

The promise of consistency

As mentioned above, the issuing and use of guidance documents is often associated with promoting uniformity as well as consistency in the implementation of EU law.¹⁷⁵ Now, how can the use of guidance documents live up to this 'promise of consistency'?

A 'consistency effect' can be expected to arise where guidance documents are used in a consistent manner by national authorities when implementing EU law.¹⁷⁶ The same goes for national courts. From the viewpoint of consistency, national courts need to take account of guidance documents and use them in a consistent manner when reviewing the Member States' practices. National courts could also promote a consistent use of the guidelines by requiring national authorities to use Commission guidelines in a

172 Van Ommeren 1996, 318-325.

173 CJEU 28 June 2005, C-189/02 P, ECLI:EU:C:2005:408, par. 211 (*Dansk Rørindustri and Others v Commission*). See on these self-binding effects of guidelines Stefan 2013, p. 188-191.

174 Senden 2004, p. 411, 412.

175 Hofmann, Rowe & Türk 2011, p. 570; Georgieva 2017; Devine & Eliantonio 2018. See section 2.5.2.

176 Compare Georgieva who considers that for soft law instruments to enhance consistency, the instruments need to be treated 'consistently' by national judiciaries. Georgieva 2017.

consistent manner and by recognising a self-binding effect of those guidelines on them.¹⁷⁷

By consistency, I refer to the situations where guidance provisions are used in a steady, similar way by national authorities when taking implementing measures and by national courts when reviewing these measures and/or when interpreting or applying provisions of Union law. Nonetheless, even when used in a consistent manner, the degree to which a consistent use of guidance provisions leads to a consistency effect or outcome is likely to differ, depending on the type of guidance provision, the underlying provisions in Union law and the way in which guidance is used. Moreover, even where the use of guidelines does not give rise to a visible, tangible consistency effect in implementing practices, guidance documents could still promote consistency in the implementation of EU law, if only by aligning discussions or debates around similar concepts.¹⁷⁸ In brief, when exploring whether guidance is used in a consistent manner, different degrees and types of consistency effects might be observed.

2.5.6 Promise 3: Promoting transparency in the implementation of EU law

The principle of transparency

In legal literature it is widely acknowledged that transparency of EU administrative action, including administrative action of the European Commission as well as that of the Member States, is vital for the legitimacy of EU governance.¹⁷⁹ Transparency of administrative action contributes to the observance of other legal principles such as legal certainty and consistency,¹⁸⁰ improves the quality of decision-making processes,¹⁸¹ and makes legal as well as political accountability of administrative actions possible.¹⁸²

In view of the different forms and purposes of transparency requirements, it has been debated whether transparency is to be seen as an independent principle of EU law or merely as a corollary of other legal principles.¹⁸³ At this time, it is still uncertain whether the Court of Justice regards transparency as an 'independent' general principle of law. Often,

177 Whether such a self-binding effect also arises as to the use of Commission guidelines by national authorities, has not been clarified by the Court of Justice. See Senden 2004, p. 404.

178 Compare Politt 2001.

179 Hofmann, Rowe & Türk 2011, p. 170-172; See on the relationship between transparency and legitimacy Curtin & Meijer 2006.

180 See for instance Prechal & de Leeuw 2007.

181 Buijze 2013, p. 7; see also Schmidt 2013.

182 Buijze 2013, p. 41, 50.

183 See Jans, Prechal & Widdershoven 2015 pp. 254-255; Buijze 2013, p. 7.

the Court links transparency to other legal principles such as the principle of equality¹⁸⁴ and the principle of legal certainty.¹⁸⁵

The question whether transparency can be considered an independent, general legal principle of EU law is an interesting academic question, yet not a question that is of direct concern for this research. Here, it suffices to note that transparency in implementing processes contributes to the observance of legal principles and, more generally, to the rule of law. Therefore, in this research the principle of transparency is considered an independent legal principle for analytical purposes: it allows transparency to be taken as one of the promises in light of which the use of guidance documents will be analysed.

Different dimensions of transparency are relevant for the implementation of Union law. The notion of transparency is, in the first place, concerned with the clarity and foreseeability of the law. This requirement not only applies to EU legislation, but also to national implementing measures. For instance, the Court of Justice makes clear that the implementing measures taken for the transposition of a directive must be sufficiently clear and precise¹⁸⁶ and that a directive must be implemented with precision, clarity and transparency.¹⁸⁷ Although the Court sometimes expressly refers to transparency, the Court generally links these requirements to the principle of legal certainty.¹⁸⁸

The promise of transparency

How and under what conditions could guidance documents of the European Commission play a role in enhancing the transparency of implementing practices, thus exerting a certain ‘transparency effect’? In the literature, the issuing of guidance documents is often associated with rendering the Commission’s actions more transparent. By issuing guidelines the European Commission makes it clear how it will interpret or apply EU law when monitoring Member States’ implementing practices.¹⁸⁹

Could Commission guidance documents exert similar transparency effects at the national level? Guidance documents can be expected to enhance transparency in implementation processes in two ways. First, the guidance documents might be used as an aid to explain implementing

184 Transparency is considered a corollary of the principle of equal treatment, notably when it concerns the transparency of allocation procedures in the area of public procurement and other scarce economic resources. See for instance CJEU 13 April 2010, C-91/08, ECLI:EU:C:2010:182 (*Wall AG*). See also Jans, Prechal & Widdershoven 2015, p. 252-254.

185 CJEU 13 September 2001, C-417/99, ECLI:EU:C:2001:445, par. 40 (*Commission v Spain*).

186 CJEU 28 January 2010, C-406-08, ECLI:EU:C:2010:45, par. 39 (*Uniplex*), par. 39 ; CJEU 20 June 2002, C-313/99, ECLI:EU:C:2002:386, par. 51 (*Mulligan and Others*).

187 CJEU 13 September 2001, C-417/99, ECLI:EU:C:2001:445, par. 40 (*Commission v Spain*).

188 Jans, Prechal & Widdershoven 2015, p. 256.

189 Compare Prechal & de Leeuw 2007, p. 54. See also section 2.5.2.

decisions.¹⁹⁰ Second, national authorities might use guidance documents as a tool to indicate what decision-making criteria will be applied when exercising discretionary powers in implementation processes. In this regard, a parallel can be drawn with the use of national guidelines and policy rules, in which national authorities make clear how they interpret or apply provisions of national law. Transparency effects of guidance documents might also be strengthened by national courts when the guidelines play a role in judicial decision-making processes.¹⁹¹ In this way, guidelines – through judicial practices – could contribute to clarifying standards or criteria that should be followed by national authorities when implementing EU legislative rules.

For these transparency effects to occur, it is assumed that two conditions need to be fulfilled. In the first place, it is necessary that national authorities and national courts are explicitly clear about when and how they use Commission guidelines as an implementation tool or as a judicial decision-making aid. Secondly, transparency effects are expected to occur only if the content of the guidance documents themselves are made accessible to the public. If the use of guidance documents (or deviation from these documents) is not communicated and/or the content of the guidelines is inaccessible, the use of guidance documents risks only contributing to a secretive character of implementing processes as well as to the uncertain role of guidance documents.¹⁹² In other words, from the viewpoint of transparency, guidance documents should be used in a transparent manner in both implementing and judicial practices.

2.5.7 Promise 4: Respecting the rule of EU (hard) law

The principle of legality

The fourth legal principle in light of which the use of guidance documents in the Dutch legal order will be studied, is the principle of legality. The principle of legality is closely related to the rule of law, and generally considered one of its founding elements.¹⁹³ The essence of the legality principle is that the government, as well as the administration, acts on the basis of the law and in accordance with the law.¹⁹⁴

190 Luijendijk and Senden mention the use of guidance documents as an explanatory reference when drafting implementing legislation. See Luijendijk & Senden 2011, p. 340.

191 The transparency of legal reasoning increases the predictability of judicial decision making and increases the acceptance of judicial decisions. See Paunio 2013, p. 79, 80; See also Bokhorst & Witteveen 2013, p. 130.

192 Secrecy could undermine the perceived legitimacy of judicial decision making, see Broeders et al. 2013, p. 134.

193 Verhoeven 2011, p. 125.

194 Schlössels et al. 2012, p. 1; Hofmann, Rowe & Türk 2011, p. 151.

When studying the use of guidance documents in light of 'EU legality' it should be noted that the nature and objective of legality at the EU level is not entirely parallel to its meaning at the national level in the Member States.¹⁹⁵ In the Member States, the primary objective of the principle of legality is to protect individuals against the powers and intervention of the state.¹⁹⁶ Although differences exist as regards its meaning and scope, a common, shared characteristic of the national legality requirements is that a legal basis is required, at the least, for acts that unilaterally impose obligations on individuals.¹⁹⁷

In the European Union, the principle of legality is closely related to the principle of conferral, and primarily governs the relationship between the EU institutions and the Member States.¹⁹⁸ According to the principle of conferral, the EU institutions 'shall act only within the limits of the competences conferred upon it by the Member States in the Treaties'.¹⁹⁹ As a result, EU institutions only have the power to legislate when there is a legislative power conferred on the EU institutions by the Member States.²⁰⁰

When the EU institutions exercise their competences and adopt the legally binding Union acts following the legislative procedures in the Treaties, Member States can no longer unilaterally change these rules: they become bound by them.²⁰¹ This follows from the principle of primacy of Union law, which means that EU legislation has prevalence over (conflicting) national laws of the Member States.²⁰² Thus, the Member States are not only responsible for the implementation of the legally binding Union rules, they must also act in line with these rules and give prevalence to Union law over national law.

As we have seen in section 2.2.2, guidance documents are not issued following a legislative procedure spelled out in the Treaties and lack legally binding force. Consequently, through the issuing of guidance documents the Commission cannot create new, binding obligations on the Member States.²⁰³

Does the EU legality principle also have consequences for the form of measures to be adopted when implementing the EU legislative provisions? In the implementation of EU law, Member States in principle follow their

195 See for a discussion on the parallels and differences Verhoeven 2011, p. 161; See also Molendijk & Ortleip 2017.

196 Verhoeven 2011, p. 125, 162.

197 Jans, Prechal & Widdershoven 2015, p. 24; Schwarze 2006, p. 231.

198 Verhoeven 2011, p. 162.

199 Article 5 TEU.

200 The EU institutions thus do have *kompetenz-kompetenz* (general law-making powers) as the Member States do. See Majone 2005, p. 205. See also CJEU 6 July 1982, C-188-190/80, ECLI:EU:C:1982:257, par. 7 (*France, Italy and United Kingdom v Commission*).

201 Article 288 TEU; see also Hofmann, Rowe & Türk 2011, p. 120

202 Case 106/77, *Simmenthal*, ECLI:EU:C:1978:49.

203 See for instance CJEU 20 March 1997, C-57/95, ECLI:EU:C:1997:164 (*France v Commission*) and CJEU 16 June 1993, C-325/91, ECLI:EU:C:1993:245 (*France v Commission*). See also Scott 2011, p. 340.

own legality requirements – as follows from the principle of procedural autonomy.²⁰⁴ This does not mean, however, that the Member States have full ‘procedural discretion’ when it comes to the ‘form and method’ by which they implement the EU legally binding rules.²⁰⁵ For instance, the Court of Justice requires that the transposition of directives must take place ‘by means of national provisions of a binding nature’,²⁰⁶ whereas for EU regulations the adoption of legislative transposition is not required, and in principle, not even permitted.²⁰⁷ The Court of Justice has considered that, only if necessary, Member States can adopt legislative measures that ‘operationalise’ EU regulations so that they are effectively applied. This operationalisation is subject to strict conditions: the measures should not ‘conceal’ the Union nature of the rules, specify that a discretion granted by the regulation is exercised and respect the ‘parameters laid down under it’.²⁰⁸ In *Fratelli Zerbone* the Court of Justice considered that the Member States cannot issue ‘binding rules of interpretation’:

‘Although it is true that in the event of difficulty of interpretation the national administration may be led to adopt detailed rules for the application of a Community regulation and at the same time to clarify any doubts raised, it can do so only in so far as it complies with the provisions of Community law *and the national authorities cannot issue binding rules of interpretation*.’²⁰⁹ [Emphasis added]

According to Van den Brink, by not permitting binding rules of interpretation, the Court of Justice ‘protects’ its prerogative to determine the authoritative interpretation of provisions of Union law.²¹⁰

The promise of non-bindingness

Having outlined the contours of the legality principle, this paragraph explores how the use of guidance documents at the national level, by Dutch authorities and courts, can respect the requirements that follow from the EU legality principle.

From the above analysis it follows that the EU legality principle requires that the Member States are bound to respect and implement the rules and principles laid down in Union law (‘the primacy of Union law over national law’). Therefore, the first condition for using guidance documents in a way

204 Jans, Prechal & Widdershoven 2015, p. 24.

205 Compare Jans, Prechal & Widdershoven 2015, p. 11 and 15; Hofmann, Rowe & Türk 2011, p. 139.

206 CJEU 25 May 1982, Case 97/81, ECLI:EU:C:1982:193, par. 2 (*Commission v Netherlands*).

207 Jans, Prechal & Widdershoven 2015, par. 11 and 15. 27 and CJEU 31 January 1978, C-94/77, ECLI:EU:C:1978:17, par. 27 (*Fratelli Zerbone*).

208 CJEU 25 October 2012, C-592/11, ECLI:EU:C:2012:673, par. 36 (*Ketelä*).

209 Case 94/77, *Fratelli Zerbone*, ECLI:EU:C:1978:17, par. 27.

210 Van den Brink 2012, p. 206. See also CJEU 16 June 2011, C-536/09, ECLI:EU:C:2011:398, par. 18-20 and par. 37 (*Marija Omejc*).

that is 'legality proof' is that national authorities need to make sure that the use of guidance documents as an implementation tool respects the rules and principles of Union law. Guidance documents, in other words, cannot be used as a tool to adopt implementing measures that go beyond, detract from or change the requirements laid down in EU legislative rules. The use of guidance documents as a means for finding new obligations that are not already laid down in EU legally binding rules does not pass the 'EU legality test'. In brief, when using Commission guidelines, the rule of EU hard law must be respected.

The above analysis of the legality principle also shows that the 'procedural discretion' as to the form and methods to implement EU law is not unlimited. What does this mean for the use of guidance documents as an implementation tool? Can, or should, Commission guidelines be transposed into national legally binding rules?

First of all, there is not an *obligation* for national authorities to transpose the Commission's guidance documents into legally binding rules. As also argued by Lijndijk and Senden, Article 291 TFEU provides that the Member States are responsible for the implementation of legally binding Union rules.²¹¹ Consequently, it can be reasoned *a contrario* that there is no obligation for national courts to implement the Commission's guidelines in national legally binding rules. Only when provisions in secondary Union legislation provide that national authorities should take account of Commission guidelines, national authorities, and thus the national legislature, must take account of these guidelines when implementing the legislative provisions.²¹²

If there is no obligation for national authorities to transpose Commission guidelines into legally binding rules, is it still possible for national authorities to transpose Commission guidelines into national legally binding rules 'on a voluntary basis'? In principle, it does not seem problematic if guidelines are used as an *aid* to transpose or operationalise legally binding provisions of EU law into national legally binding rules. Yet, this does not mean that problems may not arise. Indeed, also when Commission guidance is used as a 'rulemaking aid' for the adoption of national implementing measures, the basis for these implementing measures should still be the 'hard' Union rules – not the provisions in the Commission's guidelines. Besides, when using guidelines for the operationalisation of EU regulations, this might have as a consequence that these rules provide for 'binding interpretations of Union law' – which as we have seen are not permitted by the Court of Justice.²¹³

As a final remark, it should be noted that also when guidance documents are used as a tool to adopt other measures than legally binding rules, such as Dutch policy rules or individualised decisions, legality problems

211 Lijndijk & Senden 2011, p. 329.

212 Van Dam 2013, par. 2.2.2.

213 CJEU 31 January 1978, C-94/77, ECLI:EU:C:1978:17, par. 27 (*Fratelli Zerbone*).

might still arise. Indeed, these implementing measures must also respect the provisions laid down in Union law. The ‘transposition’ of guidance into national (policy) rules could, for instance, risk making illusory the room for discretion in EU legislative provisions, not taking account of the importance of the facts and circumstances where this is required by EU law.²¹⁴ Whether and in what ways guidance is used in national rulemaking practices is one of the questions that will be examined in this research.

The above remarks relate to the consequences of EU legality for the use of guidance as an implementation aid by national authorities. Just like national authorities, national courts need to respect the non-legally binding character of guidance documents when adjudicating on questions of EU law. This means that national courts can use guidance documents only as an *aid* (not substitute) for the interpretation and application of EU legislative rules. This also means that national courts cannot use guidance documents as if they were the authoritative interpretation of the Court of Justice. Indeed, the Court of Justice has the ‘monopoly’ in giving the authoritative interpretation of EU law.²¹⁵ When doubt arises as to the correct interpretation of provisions of Union law, a national court could or should (in the case no appeal is possible), refer a question to the Court of Justice.²¹⁶ As will be discussed below, the Court of Justice also accepts questions on the interpretation and validity of guidance documents.²¹⁷ Hence, also the interpretation and ‘legality’ of guidance documents is to be determined by the Court of Justice alone and is not a question to be decided on by national courts.

To conclude, the principle of legality requires that national authorities and courts use guidance documents in a way that is in accordance with the legally binding Union acts and principles, as well as with the case law of the Court of Justice. In other words, account must be taken of the fact that guidance documents do not have legally binding force so that their use respects the rule through hard law. The fourth promise of guidance documents that will be tested in this research is therefore referred to as the ‘promise of non-bindingness’.

Table 2-1 provides an overview of the four legal principles, the four promises that have been extracted from these principles and the ‘ideal uses’ that are expected to lead to a use of guidance documents that is ‘principle-proof’. The question whether the Commission guidelines live up to their promises in Dutch implementing and judicial decision-making practices will guide the empirical analysis in the subsequent chapters.

214 See for a discussion in Dutch administrative law on the (im)possibility of policy rules that make discretionary powers illusory Bröring et al. 2016, p. 210.

215 Van Harten 2014, p. 5.

216 See also Luijendijk & Senden 2011, p. 324.

217 See below section 3.4.4.

Table 2-1 *Legal principles, promises and ideal uses in light of legal principles*

Legal principles	Promise	Ideal use by national authorities	Ideal use by national courts
Legal certainty	Enhancing predictability in implementing practices: Promise of predictability	Use of a guidance provision in a predictable manner when implementing EU law	Use of a guidance provision in a predictable manner when adjudicating on questions of EU law
Transparency	Enhancing transparency in implementing practices: Promise of transparency	Use of guidance documents in a transparent manner when implementing EU law	Use of guidance documents in a transparent manner when adjudicating on questions of EU law
Consistency and equal treatment	Enhancing consistency in implementing practices : Promise of consistency	Use of guidance documents in a consistent manner when implementing EU law	Use of guidance documents in a consistent manner when adjudicating on questions of EU law
Legality	Respecting the rule of law: Promise of non-bindingness ⁷	Use of guidance documents as an implementation aid, not as a substitute for EU legislative provisions.	Use of guidance documents as an aid, not a substitute for EU legislative provisions when adjudicating on questions of EU law

2.6 CONCLUSION

The above sections explored the phenomenon of guidance documents and their relationship to the hard, legally binding rules (regulations, directives) that they complement. It was established that although the word guidance is often used in practice, most guidance documents fall within the scope of what, in the literature, is referred to as ‘soft law’. This is due to the fact that guidance documents are able to exert practical effects (which makes them a regulatory instrument) as well as legal effects (thus giving them a law-like character).

Taking some further distance, the second part of this chapter explored the functions of guidance documents in relation to the effective implementation of EU law: the documents clarify legal provisions, promote uniformity in implementing practices whilst at the same time leaving flexibility to the Member States, and facilitating a dialogue between the Commission and the Member States. Guidance documents are able to fulfil these functions, it has been argued, largely due to the different features of informality. However, at the same time, these features of informality also make ‘governance through guidance’ susceptible to risks, among which the uncertainty of the effects that guidance documents exert in practice.

This research will shed light on the effects of the use of guidance documents in practice, and will assess these effects in light of legal principles that govern the implementation of EU law. It approaches legal principles

from an EU perspective. This means that it looks at the content and requirements of legal principles that are fundamental to the EU legal order and that have been developed in the case law of the Court of Justice. National legal principles might play a role in 'shaping' the use of guidance documents, but are not taken as a framework for assessment.

Four legal principles have been selected in the light of which the use of guidance will be analysed: the principles of legal certainty, transparency, equal treatment and consistency, and legality. In order to be able to assess the effects of guidance documents in the light of these four legal principles, I formulated four promises, or ideal effects that guidance documents should exert in order to be able to serve the four legal principles. Do guidance documents fulfil these 'promises' in practice? That is the question to be explored in the next chapters.

One of the features of informality that governs the issuing of guidance documents is that there is no standardised, coherent approach as regards the form that guidance documents should take or the different types of guidance that can be contained in guidance documents. Guidance documents come in various forms and shapes, which makes it difficult to analyse the use of guidance documents in a systematic manner.¹ This chapter seeks to identify, in this myriad of guidance documents, the different types of guidance – not by looking at the form of guidance documents but by looking at the content and purpose of the provisions laid down in these documents (see sections 3.1 and 3.2). It is in the light of these types of guidance that the use of guidance documents at the national level can be analysed in a more systematic manner.

Having identified the different types of guidance documents issued by the Commission services, the following sections proceed to explore whether, and how, expectations are formulated at the EU level on how guidance documents could or should be used by authorities and national courts at the national level. To this end, sections 3.3 and 3.4 explore what expectations can be identified in the text of the Commission's guidance documents, in the Commission's monitoring practices, in provisions of secondary Union legislation and, finally, in the case law of the EU Court of Justice. It turns out that when looking at the EU level, a plethora of *de jure* and *de facto* expectations as to the use of guidance documents can be identified.

Together, the various types of guidance and the EU expectations are part of the EU context in the light of which the use of guidance documents at the national level will be studied.

3.1 DEVELOPING A TYPOLOGY

When aiming to distinguish between types of guidance, different approaches are possible. For instance, the typology could take as a starting point the different forms of guidance documents.² However, the form of a guidance document often says little about its content or effects in practice. Thus, I set out with the idea of developing a typology with two questions in mind: 1) is it possible to discern different types of guidance provisions

1 Compare Stefan 2013, p 7; Senden & Van den Brink 2012, p. 63.

2 See for a categorisation along the lines of different forms of the Commission's rule-making, Hofmann, Rowe & Türk 2011, p. 544-566.

in guidance documents when going beyond the form of the documents, looking instead at their content?; and 2) what is the function of guidance provisions in relation to the underlying legislative rules – what implementing question/problem do they seek to answer? Does it concern the interpretation or application of legislative rules in practice?

This idea of developing a typology was put into practice during the internship that I conducted at the Directorate General for Agriculture and Rural Development (DG AGRI) of the European Commission.³ I set out to develop a typology following four steps:

- 1) First, I made an inventory and overview of the guidance documents issued by DG AGRI in the area of direct payments. This inventory grouped guidance documents into different ‘thematic’ groups of guidance.⁴
- 2) Second, I read through the different guidance documents and marked passages of the documents that either scored very high in interpretative character or, in contrast, that had a very practical, or technical nature. This resulted in the identification of the five different types of guidance – but only in direct payment guidance documents.
- 3) Third, I conducted informal interviews with officials who were involved in the elaboration of guidance documents in the area of direct payments. On the basis of these interviews I tested and further refined the types of guidance I had identified.
- 4) Fourthly, I explored whether it was possible to identify these five types of guidance in guidance documents in other policy areas. To this end, I mainly focused on the guidance documents in policy areas selected for this research: the guidance documents related to Directive 92/43/EEC (the Habitats Directive) and the guidance documents related to Directive 2004/38/EC (Citizenship Directive).

3.2 FIVE TYPES OF GUIDANCE

Following the above steps, I identified five different types of guidance provisions that can be found in the various guidance documents of the Commission, and which reflect the different ways in which the Commission assists the Member States in the implementation of obligations laid down

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

4 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.

in EU legislation. The five types of guidance provisions that were identified in guidance documents are: interpretative guidance, implementing guidance, explanatory guidance, technical guidance and the dissemination of good practices.⁵ The sections below describe these types of guidance in more detail. The types of guidance will be used to describe the guidance documents, and their use at the national level, in the three policy areas selected for this research. As we will see, although guidance documents may be aimed at providing mainly one type of guidance, they often contain different types of guidance.

The purpose of discerning among these five 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.⁶ The attempt to distinguish different types of guidance in the first place serves analytical purposes: it enables tracing the use and effects of different guidance provisions in the national legal order in a more systematic and differentiated manner.

3.2.1 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 precision to underlying legal provisions.⁷ These interpretative rules seek to operationalise legal provisions that, for instance, have a vague or ambiguous character or that are openly formulated.⁸ This means that the interpretative rule that is given to some extent adds an interpretative rule or element to the underlying legal provision. The interpretative rule does not only capture or explain what is already in the law.⁹ This element of interpretation makes interpretative guidance, probably, also the most controversial type of guid-

5 See for a discussion of these five types of guidance also Van Dam 2017a.

6 According to Van Harten the distinction between interpretation and application of European law is a 'legal fiction'. Van Harten 2014, p. 40; This fiction may be related to the inherent vagueness of language, see Klap 1994, p. 7.

7 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 and above section 2.1.3.

8 According to Nicolaidis this is the first step towards effective implementation. See Nicolaidis 2012, p. 6.

9 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. Lefèvre 2004, p. 812, 813. A similar distinction is made by Groenewegen between a broad and narrow interpretation of the law, see Groenewegen 2006, p. 7,8.

ance. When does an interpretative rule impose a new obligation instead of clarifying an already existing hard law provision?¹⁰

The character of interpretative guidelines of 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 2005.¹¹ This document prescribes that as a general rule, parcels that contain more than fifty trees per hectare should be considered ineligible.¹² 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 factors that can be taken into account by national authorities.¹³

3.2.2 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.¹⁴ 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.¹⁵ 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 which 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 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 imple-

10 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 CJEU 20 March 1997, C-57/95, ECLI:EU:C:1997:164, par. 13 (*France v Commission*). The vague and undefined character of this question has been discussed by Scott 2011, p. 342.

11 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.

12 Working Document AGRI/60363/2005-REV1, p. 4.

13 COM(2009)313 final, p. 11, 12.

14 Compare Nicolaidis 2012, p. 6.

15 Nicolaidis 2012, p. 7, 8.

menting 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.¹⁶ For instance, the 'guidance for on-the-spot checks and area measurement' spells out possible definitions that can be chosen on how to demarcate an agricultural parcel for the purpose of on-the-spot checks.¹⁷ Provisions of implementing guidance also feature in the guidance documents related to the Habitats Directive. For instance the guidance document 'Managing Natura 2000' that accompanies the Habitats Directive, 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.¹⁸ In a similar way, the Managing Natura 2000 guidance document recommends that 'alternative solutions and mitigation measures' can be taken into account when examining the implications for the site.¹⁹

3.2.3 Explanatory guidance: explaining and providing an overview of legislation and jurisprudence

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 rationale 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 is already in the law.²⁰

The explanation of the rationale for legislative provisions or of the logic behind the legal framework, could help the Member States to understand and thus better implement the requirements laid down at the European level.²¹ Explanatory guidance can be found in many different policy areas

16 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.

17 DSCG/2014/31-FINAL REV 1, p. 12.

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

19 Managing Natura 2000 Sites, p. 37, 38.

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

21 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 2013, p. 98.

where guidance documents provide an overview or explanation of the relevant provisions or summarise the relationship between different legal acts.²²

There may be different reasons for providing explanatory guidance to complement the legislative provisions that were adopted by the EU legislature. One of these reasons could be that the EU legal framework is characterised by a high level of complexity,²³ which is certainly the case for explanatory guidance documents issued in relation to the complex EU direct payments legal framework.²⁴ An example is the guidance on the purpose and content of on-the-spot checks²⁵ as well as the 'aid applications guidance' which explains the logic behind the issuing of 'pre-established information' for aid applications to be submitted by the beneficiaries.²⁶ 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.²⁷ One guidance document that seems to fill this gap is for instance the Natura 2000 guidance document, which at many places explains the logic behind Article 6 of the Habitats Directive.²⁸

As mentioned above, explanatory guidance provides an explanation of the logic or the rationale 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.²⁹ Indeed, even the explanation of legislative rules could reflect a normative view of the Commission services as to the interpretation of legislative provisions. Consequently, 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 that it is not readily visible in the implementing practices.³⁰

22 See for instance the which gives an overview of objectives of the Habitats and Birds Directive, p. 17-22.

23 Baratta 2014, p. 293-298.

24 Kranenborg notes that after the 2013 reform the direct payments legal framework still maintains its complex character, see, Kranenborg 2016p. 117.

25 Guidance for on-the-spot checks and area measurement. DSCG/2014/31-FINAL REV 1, p. 11.

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

27 The better regulation guidelines of May 2015 provide for the issuing of explanatory memoranda to the legislative initiatives of the European Commission 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.

28 Managing Natura 2000 sites, p. 36, 37.

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

30 Europeanisation processes as a result of explanatory guidance might (also) take place at the level of discourse. See on the Europeanisation of public discourse Börzel & Risse 2010, p. 488.

3.2.4 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 several technical measures that can be adopted in order to comply with the legislative requirements.³¹ It is then up to the national authorities to choose the technical modalities in order to comply with the EU legal standards.

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 legislation. Underlying this technical guidance, as with implementing guidance, is a view of what is necessary to achieve compliance with the requirements set out by the EU legislature. Technical guidance documents generally do not contain interpretative elements, although in practice the line between interpretation and technical rules may be hard to draw.³²

The European Commission provides for technical assistance to the Member States in several policy areas. Guidance with a technical nature is issued for instance in relation to the Water Framework Directive³³ and in relation to the Industrial Emissions Directive.³⁴ 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.³⁵ The Joint Research Centre, which is the Commission's scientific and knowledge service, also provides technical guidance documents in other policy areas.³⁶

31 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.

32 See for instance Technical guidance for the On-The-Spot checks of Crop Diversification, DS-CDP-2015-08-FINALp. 4, 5.

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

34 Directive 2010/75/EU of 24 November 2010 on industrial emissions; The so-called 'BREF documents' provide for the Best Available Techniques (BAT). See: <http://eippcb.jrc.ec.europa.eu/reference/> (last accessed at 23 April 2019).

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

36 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 29 April 2019).

3.2.5 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 appropriate ways or practices that are expected to lead to compliance with the requirements of EU legislation.³⁷ 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 decision to make when implementing the EU legislative requirements.³⁸

The exchange of good practices can be found, for instance, in the area of free movement of persons, in the Handbook addressing the fight against marriages of conveniences. This Handbook provides a toolkit to assist Member States in detecting whether a marriage is one of convenience.³⁹ The Handbook is issued by the European Commission though prepared in close cooperation with the Member States.⁴⁰ 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 developing the so-called 'management plans' mentioned in Article 6(1) of the Habitats Directive.⁴¹ 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.⁴²

The types of guidance provisions described above are summarised in Table 3-1.

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

38 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 continuous benchmarking of performance is indispensable for the effective implementation of EU law. See Nicolaides 2012, p. 6.

39 SWD(2014)284 final, 2014.

40 SWD(2014)284 final, 2014, p. 3,4.

41 Managing Natura 2000 sites, p. 53.

42 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.groupDetailDoc&id=20934&no=3> (last accessed at 23 April 2019).

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)	Which implementation practices are expected to be successful, which practices should be avoided?
Explanatory guidance (EXP)	What is the logic behind or the purpose of legislative provisions?
Technical guidance (TECH)	Which technical modalities could be used in order to implement the legislative requirements?
Dissemination of good practices (GP)	Which good practices could be used to implement the legislative requirements?

3.3 EU EXPECTATIONS ON THE USE OF GUIDANCE BY NATIONAL AUTHORITIES

The EU treaties do not provide for a strict, constitutionally embedded, hierarchical relationship between the European Commission and the Member States.⁴³ According to Article 291 TFEU the Member States are primarily responsible for the implementation of EU legislation. Only where the EU legislature confers implementing powers on the European Commission, is the Commission empowered to adopt implementing acts that are legally binding upon the Member States.⁴⁴ The European Commission has not been granted the general power to give binding instructions to the Member States, which explains the non-legally binding character of guidance documents.⁴⁵

Despite the lack of legally binding force and the various ‘non-binding clauses’ in the text of guidance documents, in various ways the European Commission, the EU legislature and the Court of Justice formulate expectations as to the use of guidance documents by national authorities. These expectations may affect the use and perception of guidance documents at the national level, and thus are part of the context in which the use of guidance documents by national authorities takes place. Therefore, this section seeks to identify the expectations formulated at the EU level vis-à-vis national authorities. The next section explores whether, and in what ways, rulings of the Court of Justice formulate expectations on the use of guidance documents by national authorities and national courts.

In this section, ‘expectations’ are understood in a broad sense as the ways in which the EU legislature, the EU Courts and the European Commission express their views on how national authorities and national courts are to use guidance documents. This means that expectations can be

43 See Hofmann, Rowe & Türk 2011, p. 572.
44 Article 291(2) TFEU.
45 See Hofmann, Rowe & Türk 2011, p. 573.

of a legal or extra-legal nature; the purpose is not to confine the analysis to legal requirements laid down in EU law.

3.3.1 The *IJssel-Vliet* case law: binding legal effects on the Member States

Expectations on the use of Commission guidance documents by national authorities were formulated by the Court of Justice in the *IJssel-Vliet* case.⁴⁶ In this judgment, handed down in 1996, the Court of Justice recognises that guidelines related to State aid in the fisheries sector can have a binding effect on the Member State, in this case on the Netherlands.⁴⁷ The Court derives this binding effect from the obligation of cooperation between the European Commission and the Member States as laid down in Article 108(1) TFEU.⁴⁸ Furthermore, the Court considers that the binding effect only emerges with the acceptance of the content of the guidelines by the Member State concerned.⁴⁹ In the *IJssel-Vliet* judgment, both conditions were fulfilled which led the Court to conclude:

Thus, as a result of the obligation of cooperation laid down by Article 93(1) of the Treaty and of its acceptance of the rules laid down in the Guidelines, a Member State, such as the Netherlands, must apply the Guidelines when deciding on an application for aid for the construction of a vessel intended for fishing.⁵⁰

The binding effect of the Commission guidelines consists, in the words of the Court, of the obligation to ‘apply the Guidelines when deciding on an application for aid’.⁵¹ The *IJssel-Vliet* case thus leaves little or even no room for national authorities to depart from the interpretation suggested by the European Commission. The degree to which there is room for national authorities to depart from the guidelines depends on the wording chosen in the guidelines issued by the European Commission.⁵² Thus, from the

46 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383 (*IJssel-Vliet v Minister van Economische Zaken*). The implications of this judgment for national courts has been discussed for instance by Stefan 2013, p. 189; Hofmann, Rowe & Türk 2011, pp. 574, 575; Senden 2004, p. 277, 278.

47 The recognition of binding legal effects should not be equated with legally binding force. See on the distinction between legal effects and legally binding force Stefan 2013, p. 181 and p. 192-199.

48 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383, par. 36 and 37 (*IJssel-Vliet v Minister van Economische Zaken*).

49 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383, par. 43 (*IJssel-Vliet v Minister van Economische Zaken*). See also CJEU 5 October 2000, C-288/96, ECLI:EU:C:2000:537, par. 65 (*Germany v Commission*), in which the Court derives this acceptance from the fact that the German Government took part in the procedure for the adoption of the guidelines and that it approved them.

50 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383, par. 44 (*IJssel-Vliet v Minister van Economische Zaken*).

51 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383, par. 44 (*IJssel-Vliet v Minister van Economische Zaken*).

52 Van Dam 2013, par. 2.2.2.

Ijssel-Vliet case law it follows that despite the lack of legally binding force, guidance documents can have far-reaching binding legal effects on the Member States.

Thus far, the Court of Justice has reiterated the '*Ijssel-Vliet* formula' only in relation to guidelines related to State aid.⁵³ One explanation for the recognition of binding effects only in this area could be the special status of the regulation of State aid in the EU Treaties and the exclusive competence of the European Commission to decide on the compatibility of State aid with the internal market. On the other hand, it cannot be ruled out that in future case law the *Ijssel-Vliet* formula will be considered applicable to other policy areas as well. Indeed, in other policy areas the European Commission and the Member States are also expected to cooperate in order to ensure the effective implementation of EU law.⁵⁴ For instance, an obligation of cooperation features in EU subsidy regulations that are implemented in shared management by the European Commission and the Member States.⁵⁵ Applying the *Ijssel-Vliet* case law, the acceptance of guidance documents related to the implementation of EU subsidy regulations would generate a binding effect of the guidelines on the Member States. However, as already mentioned, at the moment the Court does not go this far and the *Ijssel-Vliet* obligation remains restricted to State aid guidelines. Therefore, from the *Ijssel-Vliet* case law a general obligation for national authorities to comply with guidance documents cannot be derived.⁵⁶ Nor has such a general obligation been derived by the Court of Justice from the principle of loyal cooperation as laid down in Article 4(3) TEU.⁵⁷

3.3.2 Obligations in secondary legislation: comply or explain?

The *Ijssel-Vliet* ruling discussed above shows how Commission 'State aid guidelines' could acquire binding legal effects on the Member State on the basis of the obligation of cooperation laid down in Article 108 TFEU. Expectations as to how national authorities should use the Commission's guidelines can also be found in provisions laid down in EU secondary legislation.

One example is Article 38 of the Directive establishing the European Electronic Communications Code which, in its first paragraph, empowers the Commission to adopt recommendations where it finds that divergences in implementing practices create a barrier to the internal market.⁵⁸

53 For instance CJEU 18 June 2002, C-242/00, ECLI:EU:C:2002:380 (*Germany v Commission*); CJEU 5 October 2000, C-288/96, ECLI:EU:C:2000:537, par. 65 (*Germany v Commission*),

54 See also Luijendijk & Senden 2011, p. 331.

55 Such as the principle of partnership related to ESI funds, see Van den Brink 2016, p. 5.

56 Cf. Stefan 2013, p. 190, 191.

57 See CJEU 30 September 1987, C-229/86, ECLI:EU:C:1987:403 (*Brother Industries/Commission*); that compliance with Commission's non-binding documents occurs on a voluntary basis also follows from CJEU 13 December 1990, T-113/89, ECLI:EU:T:1990:82, par. 79 (*Nefarma*). See also Luijendijk & Senden 2011, p. 330.

58 Directive (EU) 2018/1972.

Paragraph 2 of Article 38 states: ‘Member States shall ensure that national regulatory and other competent authorities take the utmost account of the recommendations referred to in paragraph 1 in carrying out their tasks’. What is more, the article also requires that ‘where a national regulatory or other competent authority chooses not to follow a recommendation, it shall inform the Commission, giving reasons for its opinions.’⁵⁹

Even where a provision in a regulation or directive mentions how national authorities should use guidance documents issued by the Commission, the question remains as to how such provisions should be interpreted. What does it mean, for instance, that national authorities shall take ‘the utmost account’ of Commission recommendations’?

In the *KPN v ACM* ruling the Court of Justice clarifies the meaning of this requirement laid down in Article 19 of the previous Framework Directive regulating telecommunication markets.⁶⁰ Article 19 of that Directive contained a similar wording to Article 38 of the current Directive mentioned above, thus requiring national regulatory authorities to take the utmost account of Commission recommendations.⁶¹ In the *KPN v ACM* case, the Dutch Trade and Industry Appeals Tribunal asks the question, in essence, what value is to be given by the national court to the recommendation on the ‘Regulatory Treatment of Fixed and Mobile Termination Rates in the EU’.⁶² The answer to this question (how national courts should use the recommendation) is discussed below in section 3.4.2. Relevant for this section, is the part of the CJEU’s ruling that elaborates on the ‘binding effect’ of that recommendation for the national regulatory authorities.

The Court first recalls that according to Article 288 TFEU, a recommendation is not legally binding and notes that the second paragraph of Article 19 of the Framework Directive allows national regulatory authorities to depart from the guidelines, provided that they inform the Commission.⁶³ This leads the Court to the conclusion that national regulatory authorities are not bound by the Commission’s recommendation.⁶⁴ The regulatory

59 Article 64 of the Directive, similarly, states that the national regulatory authorities shall take utmost account of the Recommendation on Relevant Product and Service Markets as well as the ‘SMP guidelines’ for market analysis and the assessment of significant market power. And, Article 10 of the Directive also requires that the national regulatory authorities take the utmost account of ‘guidelines, opinions, recommendations, common positions, best practices and methodologies adopted by BEREC (the Body of European Regulators for Electronic Communications). In brief, guidelines play an important role for the implementation of the Directive in the Member States.

60 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*). This section builds on my contribution in Van Dam 2017b.

61 Article 19 of Directive (EC) 2002/21/EC as amended by Directive (EC) 2009/140.

62 Recommendation (EC) 2009/396. See CBb 13 January 2015, ECLI:NL:CBB:2015:4, par. 7.3 and 8.2 (*ACM v KPN*).

63 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 34 (*KPN v ACM*).

64 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 35 (*KPN v ACM*).

authorities, as follows from previous case law, have broad discretion in carrying out their regulatory functions.⁶⁵

However, the Court subsequently adds nuance to this sub-conclusion. The Court notes that Article 19(2) of the Framework Directive ‘nevertheless’ requires national regulatory authorities to ‘take the utmost account’ of the Commission recommendations.⁶⁶ ‘Accordingly,’ the Court considers, the national regulatory authorities are to follow, ‘as a rule’, the guidance contained in the Recommendation concerned.⁶⁷ It is only possible for a national regulatory authority to depart from the recommendation if it appears that the cost methodology advocated by the Commission is considered to be inappropriate in light of the circumstance of the case. The regulatory authority must give reasons for its position.⁶⁸

From the above, it follows that the Court’s reasoning in the *KPN v ACM* case points in the direction of a ‘comply or explain obligation’ for national regulatory authorities. Indeed, in principle, the national regulatory authorities must comply with the Commission’s recommendations; deviation is only possible in light of the circumstances of the case and under the condition of giving reasons for doing so. The question, however, is whether this ‘comply or explain approach’ of the Court of Justice should be read in light of the specific legal context in this case, or whether it can be considered the ‘general interpretation’ of the *Grimaldi* formula. The latter would mean that the comply or explain obligation applies to all recommendations (and possibly also to other guidance documents), even in the situation where there is no provision in secondary legislation that gives instructions as to how the documents should be used by national authorities.

Such a broad reading of the *KPN v ACM* case would, in my view, go too far. It is more likely that the Court’s reasoning needs to be read in light of the specific context of the telecommunications regulatory framework, for two reasons.

Firstly, in the *KPN v ACM* case the Court explicitly refers to Article 19 of the Framework Directive, and infers from this article the general rule that national regulatory authorities are to follow the Commission’s guidelines. This approach shows similarities with the line taken in the *Friesland Coberco Dairy Foods* case. In this case, the Court of Justice inferred a similar comply or explain obligation from Article 504(4) of the Commission regulation on the implementation of Council Regulation establishing the Community Customs Code. Article 504(4) of that Commission regulation prescribed that

65 The Court of Justice refers to CJEU 24 April 2008, C-55/06, ECLI:EU:C:2008:244, par. 153-156 (*Arcor*) and to recital 10 of the Access Directive (EU) 2009/140.

66 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 37 (*KPN v ACM*).

67 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*).

68 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*).

national customs authorities shall take into account the Conclusions of the Customs Code Committee.⁶⁹

Secondly, the comply or explain obligation acknowledged by the Court in the *KPN v ACM* ruling, can be explained in light of the important function of the recommendation for the harmonised implementation of that Directive. The aim of creating an equal playing field is high on the Commission's 'telecommunications agenda' and entrenched in the provisions of the Framework Directive. Furthermore, the Directive empowers the Commission to adopt recommendations in order to promote a harmonised implementation of that Directive.⁷⁰ The recommendation in the *KPN v ACM* case was even adopted with the aim of addressing divergences and inconsistencies in the tasks of the national regulatory authorities. This is also emphasised by the Court, as well as by Advocate General Mengozzi in the opinion to this case.⁷¹

When following the above line of reasoning, it can be concluded that the comply or explain obligation as recognised in the *KPN v ACM* ruling does not govern the use of guidance documents that are studied in the three policy areas included in this research. Indeed, at the time of writing, there is no such provision in the secondary legislation in these areas that prescribes how national authorities should use guidance documents issued by the European Commission. In contrast, the Habitats Directive, the Citizenship Directive and the EU subsidy regulations do not even refer to recommendations or other guidance documents of the Commission in these fields.

3.3.3 The use of guidance as a supervisory tool by the European Commission

Expectations indicating how national authorities should use guidance documents of the European Commission not only feature in the case law of the Court of Justice and in EU secondary legislation. National authorities, when using Commission guidance, may also be governed by expectations that are formulated by the European Commission when the Commission uses guidance documents as a supervisory tool. Guidance documents can serve as an instrument in order to monitor and supervise the implementing practices of the Member States in several ways.⁷²

69 CJEU 11 May 2006, C-11/05, ECLI:EU:C:2006:312, par. 27 (*Friesland Coberco Dairy Foods BV v Inspecteur van de Belastingdienst*).

70 Article 38 of Directive (EU) 2018/1972 and Article 19 of Directive (EC) 2002/21 as amended by Directive (EC) 2009/140.

71 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 32 (*KPN v ACM*) and Opinion to the judgment of the CJEU 28 April 2016, C-28/15, ECLI:EU:C:2016:310, par. 61 (*KPN v ACM*).

72 See also Andersen 2012, p. 213; Hofmann, Rowe and Turk regard guidance documents as an expression of administrative supervision. See Hofmann, Rowe & Türk 2011, p. 756. See on the responsibilities of the European Commission section 2.2 above.

For instance, the Commission services may use guidance documents when deciding on whether or not an infringement procedure should be started.⁷³ Guidance documents are then taken into account for the assessment of the Member States' practices in light of the obligations laid down in EU legislative provisions.⁷⁴ Similarly, where the Commission has the power to impose financial corrections or sanctions, its guidelines might be taken into consideration for the decision whether or not to impose a financial correction on a Member State.⁷⁵ Finally, even when guidance documents are not used for the decision on whether or not to start an infringement procedure or to impose a financial correction, guidance documents may be used to report on the correctness of the Member States' implementing practices.⁷⁶

The use of guidance documents as an aid in order to monitor and supervise the implementing practices at the level of the Member States, creates pressure vis-à-vis national authorities to comply with Commission guidance.⁷⁷ Indeed, when not acting in conformity with Commission guidance, Member States run the risk of an infringement procedure being started or, in some areas, of financial corrections being imposed.⁷⁸ When the Commission services publish compliance tables stating which Member States authorities comply with the guidelines, pressure to comply with the Commission guidance arises through 'naming and shaming'.⁷⁹

Thus, underlying the use of Commission guidance as a supervisory tool is the expectation, even if implicit, that Member States are to comply with the guidance documents it has issued. Not surprisingly, the use of guidance documents by the Commission as a supervisory instrument has been contested before the Court of Justice.

Italy, for instance, requested the annulment of a guidance document and of notes related to the date of eligibility of new expenditure from the regional funds when programming documents established by the Member States are amended.⁸⁰ According to Italy, the guidance documents have 'immediate and prejudicial effects on Member States', since the latter will

73 Andersen 2012, p. 213; See also Luijendijk & Senden 2011, p. 321.

74 An example is mentioned in CJEU 20 May 2010, T-258/06, ECLI:EU:T:2010:214, par. 159 (*Germany v Commission*). The judgment of the Court of Justice makes clear that the Communication on public contracts below the threshold is referred to in a reasoned opinion against Germany. The judgment also emphasises that the Communications is not referred to in that document as a legal basis.

75 As is also recognised by the Court of Justice, see CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727, par. 30 (*Italy v Commission*).

76 For instance the European Securities and Markets Authority publishes compliance tables stating which competent authorities in the Member States comply or intend to comply with the guidelines. See Van Rijsbergen 2014, p. 124.

77 In Europeanisation literature it is argued that the degree of adaptational pressures depends on the goodness of fit between EU policies and national policies (see for critical discussion Börzel & Risse 2010, p. 492).

78 Hofmann, Rowe & Türk 2011, p. 756.

79 See also Van Rijsbergen 2014, p. 124.

80 CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727 (*Italy v Commission*).

have to adopt different procedural rules on eligibility dates in the case of amendments to 'operational programmes' in order to not run the risk that expenditure is considered ineligible.⁸¹ The Court of Justice does not accept the argument and considers:

'While the contested document and notes may have the effect of informing the Member States that they are running the risk of Community financing being refused for some of the expenditure incurred, in accordance with a different interpretation of the same provision of the regulation, this is none the less a mere consequence of fact and not a legal effect the contested document and notes are intended to have'.⁸²

Similarly, in the case *Germany v Commission*, Germany seeks the annulment a Communication of the European Commission on public contracts under the threshold. According to Germany paragraph 1.3 of the Communication indicates that an infringement procedure will be opened in the case of non-compliance with the procedure set out in the Communication.⁸³ The Communication therefore intends to produce legal effects and should be admissible for judicial review under Article 263 TFEU, Germany argues. In contrast, the General Court considers the risk of an infringement procedure being opened a mere consequence of fact and not a binding legal effect.⁸⁴

'Even though it is true that Section 1.3 of the Communication may suggest to a Member States that it runs the risk of infringement proceedings if it does not comply with its obligations under primary Community law as reiterated in the Communication, that is a mere consequence of fact and not a binding legal effect.'

However, from the General Court's ruling it also becomes clear that this does not mean that guidance documents can be used as a substitute for the legal basis on which infringement proceedings are based.⁸⁵ This is also made clear by the Court of Justice. Illustrative are two rulings in the area of transport which reveal the attempts of the Commission to seek a declaration of non-compliance with criteria set out in a Commission's Staff Working

81 CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727, par. 18 (*Italy v Commission*).

82 CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727, par. 30 (*Italy v Commission*).

83 CJEU 20 May 2010, T-258/06, ECLI:EU:T:2010:214, par. 144 (*Germany v Commission*). \\VUW\Personal\$\Homes\D\damjcavan\My Documents\Proefschrift\Hoofdstukken\Hoofdstuk 3 – analytical framework\6 november 2016\6 november – roles of the European Commission.docx

84 CJEU 20 May 2010, T-258/06, ECLI:EU:T:2010:214, par. 151 (*Germany v Commission*).

85 See also the judgment in CJEU 20 May 2010, T-258/06, ECLI:EU:T:2010:214, par. 159 (*Germany v Commission*). The Court of Justice states that the Communication on public contracts below the threshold is referred to in a reasoned opinion against Germany but also emphasises that the Communications is not referred to in that document as a legal basis.

Document.⁸⁶ The criteria that relate to the independence of the ‘railway infrastructure manager’, are not referred to in an underlying legally binding act. The Court of Justice considers that a declaration for failure to fulfil obligations cannot be induced from non-compliance with criteria that are not laid down in a legislative measure.

To conclude, the General Court and the Court of Justice allow for the use of guidance documents as a supervisory tool, but only in so far as the underlying legislative provisions constitute the legal basis. The Courts consider the binding effects that guidance documents may exert ‘a consequence of fact’. In this way, the Courts – though in an implicit manner – recognise the ‘expectation of compliance’ that is inextricably related to the use of Commission guidance as a supervisory tool. The Courts, however, do not give legal weight to the regulatory effects that the use of guidance as a supervisory tool may have on the Member States.

3.4 EU EXPECTATIONS ON THE USE OF GUIDANCE DOCUMENTS BY NATIONAL COURTS

Guidance documents issued by the European Commission primarily address national authorities that are involved in the implementation of EU law. Nonetheless, national courts also play an important role in effecting EU law in everyday practice. Following the principle of primacy, national courts must respect and, in the words of the Court of Justice, ‘give full effect’ to the provisions of Union law.⁸⁷ Guidance documents could be a helpful instrument for national courts in applying and, to a certain extent, interpreting the EU legislative provisions or provisions of national law that implement EU law.⁸⁸ The non-legally binding character of guidance documents suggests that it is for the national courts to decide whether or not to follow the guidelines given by the European Commission.

Does the Court of Justice, despite this lack of legally binding force, expect national courts to take into account or even to follow the Commission’s guidelines? This section outlines in what ways the Court of Justice formulates expectations vis-à-vis national courts on how to use guidance documents issued by the European Commission. Such expectations arise in the first place when the Court of Justice uses guidance documents as an interpretation aid. Secondly, the Court of Justice provides guidelines more directly on the use of guidance by national courts in the *Grimaldi* case law.

86 CJEU 28 February 2013, C-555/10, ECLI:EU:C:2013:115, par. 58 (*Commission v Austria*); CJEU 28 February 2013, C-556/10, ECLI:EU:C:2013:116, par. 63 (*Commission v Germany*).

87 CJEU 9 March 1978, C-106/77, ECLI:EU:C:1978:49, par. 24 (*Simmenthal*).

88 Indeed, although the final authority lies with the EU Court of Justice, in practice national courts are, in any case to a certain extent, involved in interpreting EU law. According to Van Harten the distinction between application and interpretation is a ‘legal fiction’. See Van Harten 2014, p. 14, 15.

Thirdly, the *IJssel-Vliet* case law implies that national courts may even be expected to act in conformity with the Commission's (decisional) guidelines in the area of State aid. The final and fourth part of this section discusses the question whether national courts are empowered and/or expected to refer preliminary questions to the Court of Justice on the interpretation or validity of Commission guidance documents.

3.4.1 The use of Commission guidance as an interpretation aid by the CJEU

Guidance documents often include interpretative elements. Although these interpretations only represent the view of the European Commission, references to guidance documents feature in the case law of the Court of Justice. Such references to guidance documents can, for instance, be found in the part of the ruling that outlines the *acquis communautaire* or the applicable legal framework.⁸⁹ Most relevant for this research is the question whether the Court uses guidance documents as an aid for the interpretation of EU law provisions.⁹⁰ If the Court of Justice uses guidance documents when interpreting EU law, the national courts have to follow the judicial guidelines given by the Court. Indeed, the Court of Justice provides the authoritative interpretation of EU law. Moreover, the use of guidance as an interpretation aid by the Court of Justice also – albeit in an implicit manner – gives a certain ‘authoritative status’ to the Commission guidelines, which might resonate in the case law of the national courts.⁹¹

The use of Commission guidance as an interpretation aid becomes visible in the text of the rulings where the Court of Justice explicitly refers to guidance documents for the interpretation of EU legislative provisions. For instance, in the *Waddenzee* case the Court of Justice refers to the Managing Natura 2000 guidance document related to the Habitats Directive for the interpretation of paragraph 3 of Article 6 of the Habitats Directive.⁹² The Court considers that the article requires that an appropriate assessment shall be carried out in the case there is ‘a mere probability’ that a plan or project has significant effects on the Natura 2000 sites.⁹³ This, the Court states, ‘is, moreover, clear from the guidelines for interpreting that article

89 See for an extensive discussion Stefan 2013, pp. 117-124.

90 See on the use of soft law as an interpretation aid by the CJEU Luijendijk & Senden 2011, p. 327; Conseil D'État 2013, p. 82,83; Eliantonio explores the use of soft law by the CJEU as ‘interpretational tool’ in environmental matters Eliantonio 2018, p. 508-511.

91 See for instance the ‘incidental killing ruling’ of the Dutch Council of State to be discussed in section 6.6.2.

92 Judgment in CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482 (*Waddenzee*). The guidance document also plays a role in the AG opinion to this case (Opinion to the judgment of the CJEU 29 January 2004, C-127/02, ECLI:EU:C:2004:60 (*Waddenzee*)). See for a discussion of this opinion Eliantonio 2018, p. 509.

93 Judgment in CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482, par. 41. (*Waddenzee*).

drawn up by the Commission'.⁹⁴ Another example is the *Fermabel* case where the Court of Justice refers to the handbook on the implementation of the services Directive for the interpretation of the scope of healthcare exemption in this Directive.⁹⁵

Even when a guidance document is not explicitly mentioned in the text of a judgment, it cannot be ruled out that the Court of Justice nonetheless consulted or took account of the guidance given by the Commission.⁹⁶ An implicit use of a guidance document can be identified in the situation where there is a 'linguistic similarity'⁹⁷ between the judgment of the Court of Justice and the interpretation laid down in the guidance document. The judgment of the Court of Justice then 'covers' the interpretation given by the Commission.⁹⁸

Thus, the Court of Justice uses guidance documents as an interpretation aid, both in an implicit or explicit manner. This, however, does not mean that the Court of Justice *always* follows the guidance given by the European Commission. It has been argued that the Court of Justice uses guidance documents in so far as the Court considers the interpretation supportive to its own interpretation and line of reasoning.⁹⁹ This also means that the Court of Justice can just as well depart from the interpretative guidance proposed by the Commission.¹⁰⁰ This is shown by the ruling *SM*. In this case, the Court of Justice does not follow the Commission's interpretation that a child placed in legal guardianship of a Union citizen falls within the scope of the definition of 'direct descendent' as laid down in Article 2(2) (c) of Directive 2004/38.¹⁰¹ The Court considers that the definition of this concept does not include the interpretation 'such as that which is apparent from point 2.1.2 of Communication COM(2009)313 final'.¹⁰² Another example is the case *SF*, in which the Court makes explicitly clear that the Commission guidelines do not bind the Court.¹⁰³ In this case, the Court does not follow the interpretation proposed in the explanatory notes and a practical guide that were adopted by the Administrative Commission for the Coordination of Social Security Systems. The Court considers that 'even though those documents are useful tools for interpreting the regulation No 883/2004, they are not legally enforceable and cannot, therefore, bind the Court in the interpretation of that regulation.'¹⁰⁴

94 Judgment in CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482, par. 41. (Waddenzee).

95 CJEU 11 July 2013, C-57/12, ECLI:EU:C:2013:517, par. 37 (*Fermabel*).

96 Compare Senden 2004, pp. 372, 373.

97 With the term 'linguistic similarity' I mean similarities in language, following Sadl 2015.

98 Senden 2004, p. 372.

99 Luijendijk & Senden 2011, p. 328; Eliantonio 2018, p. 511.

100 Luijendijk & Senden 2011, p. 328.

101 CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248 (*SM*).

102 CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248, par. 55 (*SM*).

103 CJEU 8 May 2019, C-631/17, ECLI:EU:C:2019:381 (*SF*).

104 CJEU 8 May 2019, C-631/17, ECLI:EU:C:2019:381, par. 41 (*SF*).

To conclude, the Court of Justice uses Commission guidance as an optional, not as a mandatory, interpretation aid.¹⁰⁵ Does this ‘voluntary use’ of guidance by the EU Courts, imply that the Court of Justice leaves the same leeway to national courts when it comes to the use of guidance documents as an interpretation aid?

3.4.2 The *Grimaldi* case law: guidance as a mandatory interpretation aid for national courts

In its early case law the Court of Justice indeed emphasises the voluntary character of Commission guidance for national courts. Guidance documents constitute one of the factors that national courts could take into account when interpreting and applying EU law.¹⁰⁶ For instance, in the *Perfume* cases the Court of Justice considers that letters from the Directorate General Competition do not bind the national courts, but that ‘the opinion transmitted in such letters nevertheless constitutes a factor which the national courts *may* take into account’ [Emphasis added].¹⁰⁷

Later it becomes clear that for national courts the use of guidance documents, or in any case of recommendations of the European Commission, is not entirely voluntary. Important in this respect is the *Grimaldi* ruling handed down by the Court in 1989.¹⁰⁸ In the *Grimaldi* ruling the Court of Justice considers that a recommendation that is issued in the field of social policy cannot, despite its lack of binding force, be regarded as having no legal effects.¹⁰⁹ National courts are bound to take the recommendation into consideration. The Court considers:

*‘The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.’*¹¹⁰ [Emphasis added].

105 According to Senden the Court of Justice ‘does not wish to create the impression that it is guided or governed by such [interpretative] acts.’ This would jeopardise the monopoly of the Court on the final interpretation of EU law and weaken the position of the Court. Senden 2004, pp. 397.

106 CJEU 12 December 1973, C-149/73, ECLI:EU:C:1973:160, par. 3 (*Witt*). The Court takes a similar approach in the more recent case CJEU 6 September 2012, C-308/11, ECLI:EU:C:2012:548, par. 25 and 26 (*Kreussler*).

107 CJEU 10 July 1980, C-253/78 and 1-3/79, ECLI:EU:C:1980:188, par. 13 (*Giry and Guerlain*). See for a discussion of this and other cases Senden 2004, pp. 384, 385.

108 CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi*).

109 The Court first concluded that the recommendation was a ‘true recommendation’ in the sense that the recommendation is not intended to produce legal effects. Judgment in CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646, par. 16 (*Grimaldi*).

110 CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646, par. 18 (*Grimaldi*).

The *Grimaldi* formula has been reiterated in later case law by the Court of Justice, and initially only regarding recommendations.¹¹¹ This raises the question whether the *Grimaldi* formula is also applicable to other guidance documents of the European Commission.¹¹² In the *Batlanta* case the Court of Justice applies the *Grimaldi* formula ‘by analogy’ to Commission guidelines in relation to structural funds.¹¹³ This judgment thus points in the direction that the *Grimaldi* case law may be applied not only to recommendations, but also to other guidance documents.¹¹⁴

On the other hand, in the *Kreussler* judgment handed down in 2010, the Court of Justice considers that national courts *may* take account of the guidance document on the demarcation between the Cosmetic Product Directive and the Medicinal Products Directive.¹¹⁵ In this judgment, the Court of Justice does not refer to the *Grimaldi* case law. A possible explanation for the Court’s approach in the *Kreussler* case might be that the guidance document related to the Medicinal Products Directive was issued by the Commission services, not by the College of Commissioners. In contrast, in the judgments where the Court applies the *Grimaldi* formula, the recommendations and guidelines were issued by the European Commission ‘as a collegiate body’, not by Commission services.¹¹⁶

Not only does the *Grimaldi* case law raise the question of which documents the *Grimaldi* formula applies, the question is also what the *Grimaldi* formula actually entails. What does it mean that national courts are ‘bound to take recommendations into consideration’?

The Dutch Trade and Industry Appeals Tribunal raises this question in the *KPN v ACM* case.¹¹⁷ In this case the ACM,¹¹⁸ the Dutch regulatory authority, imposed price regulation measures in accordance with the pure Bulric cost calculation method as advocated by the Commission in the Recommendation 2009/396 on the ‘Regulatory Treatment of Fixed and Mobile Termination Rates in the EU’. This Recommendation was adopted on the basis of Article 19 of the Telecommunications Framework Directive,

111 CJEU 18 March 2010, C-317/08, C-318/08, C-319/08 and C-320/08, ECLI:EU:C:2010:146 (*Alassini e.a.*), [2010] ECR I-2213, par. 40; CJEU 24 April 2008, C-55/06, ECLI:EU:C:2008:244, par. 94 (*Arcor*); Judgment in CJEU 11 September 2003 C-207/01, ECLI:EU:C:2003:451 (*Altair Chimica*), [2003] ECR I-8875, par. 41.

112 See on this question Van den Brink 2016, p. 5,6.

113 Judgment in CJEU 3 September 2014, C-410/13, ECLI:EU:C:2014:2134, par. 64 (*Batlanta*).

114 See also Van Dam 2017b, p. 87.

115 C-308/11, *Kreussler* ECLI:EU:C:2012:548, par. 25, 26.

116 Similarly the guidelines that are at issue in the *Batlanta* case were adopted by a Commission decision which, so it seems, reflects the view of the Commission and not only the Commission services.

117 CBb 13 January 2015, ECLI:NL:CBB:2015:4, par. 7.3 and 8.2 (*ACM v KPN*). Section 3.3.2 already discussed the part of this ruling that provides insight in the binding effect of the recommendation for national courts.

118 *Autoriteit Consument en Markt*.

which requires national regulatory authorities to take ‘the utmost account of the Commission recommendations when carrying out their tasks’.¹¹⁹

The Dutch Tribunal, however, considers that a different model, the ‘Bulric plus model’ could be more appropriate in light of the facts of the case.¹²⁰ In a previous case, the Tribunal had already deviated from the Commission’s recommendation, considering the Bulric plus model the appropriate price regulation measure.¹²¹ In *KPN v ACM* the Tribunal decides to refer a question to the Court of Justice on whether it is possible for the national court to deviate from the method proposed by the European Commission.¹²² In light of the *Grimaldi* case law of the Court of Justice, the Dutch highest administrative court considers it uncertain what weight needs to be given to Commission Recommendation 2009/396.¹²³

In its preliminary ruling, the Court of Justice first notes that a national court may depart from Recommendation 2009/396.¹²⁴ This follows from Article 4(1) of the Framework Directive which requires that an effective appeal mechanism needs to be put in place by the Member States. The Court then refers to the *Grimaldi* formula and recalls that it is settled case law that national courts are nevertheless bound to take recommendations into consideration.¹²⁵ The Court subsequently gives further guidelines on what this obligation entails for national courts in the context of reviewing the decisions of the national regulatory authority:

Therefore, in the context of its review of a decision of the NRA adopted on the basis of Articles 8 and 13 of the Access Directive, a national court may depart from Recommendation 2009/396 only where, as stated by the Advocate General in point 78 of his opinion, it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question’.¹²⁶ [Emphasis added]

In the *ACM v KPN* judgment, the Court of Justice thus not only reiterates the *Grimaldi* formula. It goes further by making clear that the national court may depart from the guidelines only under certain conditions: when this is required in light of the facts of the individual case and the specific characteristics of the market in particular.

As I already argued above in section 3.3.2, it is most likely that the reasoning of the Court in the *KPN v ACM* ruling must be understood and explained in light of the specific regulatory context. These same arguments apply as already mentioned above. Firstly, the strict interpretation

119 Article 19 of Directive (EC) 2002/21/EC as amended by Directive (EC) 2009/140.

120 CBb 13 January 2015, ECLI:NL:CBB:2015:4, par. 7.2 (*ACM v KPN*).

121 CBb 31 August 2011, ECLI:NL:CBB:2011:BR6195, par. 4.8.3.6.

122 CBb 13 January 2015, ECLI:NL:CBB:2015:4, par. 7.3 and 8.2 (*ACM v KPN*).

123 CBb 13 January 2015, ECLI:NL:CBB:2015:4, par. 7.3 and 8.2 (*ACM v KPN*).

124 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 40 and 41 (*KPN v ACM*).

125 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 41 (*KPN v ACM*).

126 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 42 (*KPN v ACM*).

of the *Grimaldi* ruling can be related to the requirement in Article 19 of the Directive that national regulatory authorities take utmost account of the recommendations. This obligation for national authorities, which the Court interprets as a comply or explain obligation, needs to be reviewed by national courts. Otherwise, this legislative requirement could risk not being enforced in national proceedings.

Secondly, the imperative wording chosen by the Court may also need to be understood in light of the importance of the harmonising function of the recommendation.¹²⁷ In his opinion, Advocate General Mengozzi takes the view that national courts cannot ‘ignore the fact that Recommendation 2009/396 was specifically adopted following the finding of significant divergences and inconsistencies’ between the regulatory practices of the national regulatory authorities.¹²⁸ This leads the Advocate General to consider that:

‘In that context, a national court, when conducting a judicial review of an NRA decision implementing Recommendation 2009/396 on the relevant market of the Member State concerned, must act circumspectly and with caution if it intends to depart from the cost model advocated by that recommendation and the way that model has been applied by the NRA concerned.’¹²⁹ [Emphasis added]

Thus, both in light of Article 19 of the Framework Directive and in light of the (assumed) harmonising effect of the recommendation, the reasoning of the Court of Justice in *KPN v ACM* cannot ‘by default’ be extrapolated to other policy areas or other recommendations issued by the European Commission.¹³⁰

To conclude, a trend can be discerned that the Court of Justice does not shy away from formulating guidelines on how national courts should use guidance documents issued by the European Commission. Although questions remain as regards the scope and meaning of the *Grimaldi* case law, it is clear that guidance documents – or in any case recommendations – may need to be taken into account by national courts. By ignoring guidance documents, national courts run the risk of not respecting the expectations developed by the Court of Justice.

The approach of the Court of Justice, formulating guidance documents as a ‘mandatory interpretation aid’ for national courts, contrasts with CJEU’s ‘own’ use of guidance documents. Indeed, as concluded above in

127 The principle objective of the recommendation is to address divergent approaches of national regulatory authorities, aiming to take away competition distortions. See Opinion to the judgment of the CJEU 28 April 2016, C-28/15, ECLI:EU:C:2016:310, par. 62 (*KPN v ACM*).

128 Opinion to the judgment of the CJEU 28 April 2016, C-28/15, ECLI:EU:C:2016:310, par. 61 (*KPN v ACM*).

129 Opinion to the judgment of the CJEU 28 April 2016, C-28/15, ECLI:EU:C:2016:310, par. 64 (*KPN v ACM*).

130 See also the analysis in Van Dam 2017b, p. 88, 89.

section 3.4.1 the CJEU's case law does not suggest that the Court considers itself, to any extent, bound to take the Commission's guidelines into consideration when deciding on interpretative questions.¹³¹

3.4.3 The *IJssel-Vliet* case law: binding effects on national courts?

Judicial guidelines for national courts on how to use Commission guidance documents can also be derived from the *IJssel-Vliet* case law of the Court of Justice.¹³² As discussed in section 3.3.1, in the *IJssel-Vliet* case the Court of Justice considers that 'state aid guidelines' may have a binding effect on the Member States. The Court derives this binding effect from Article 108(1) TFEU, and considers it a necessary condition that the guidelines have been agreed on by the Member State concerned. Does the recognition of a binding legal effect of State aid guidelines also imply that these guidelines are binding for national courts?

Even if the *IJssel-Vliet* obligation applies only to the government concerned,¹³³ it is hard to maintain that this case law does not have consequences for national courts. Indeed, in order to ensure compliance with the *IJssel-Vliet* case law, national courts would need to assess the administrative decisions of the national authority in light of the two conditions formulated by the Court of Justice. Thus, national courts would need to assess whether the guidelines are issued on the basis of the obligation of cooperation laid down in Article 108(1) TFEU and assess whether the guidelines have been agreed on by the Member State.

Following this line of reasoning, the *IJssel-Vliet* case law suggests that not only national authorities but also national courts are bound to apply the guidance documents issued by the European Commission. In view of the binding effect as recognised by the Court of Justice, the *IJssel-Vliet* obligation therefore goes further than the *Grimaldi* case law and may even come close to an obligation of consistent interpretation.¹³⁴ The extent to which there is room for national courts to depart from the guidelines then depends on the mandatory character of the wording chosen by the Commission in its guidelines.¹³⁵

As argued in section 3.3.1, this far-reaching and binding effect of State aid guidelines for national courts cannot be considered generally applicable to any situation where national courts are confronted with guidance documents. It was mentioned that the *IJssel-Vliet* case law has only been applied

131 See for a critical discussion of this approach of the Court applying 'double standards' Stefan 2013, p. 165.

132 CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383, par. 44 (*IJssel-Vliet v Minister van Economische Zaken*).

133 In the case *Germany v Commission* the Court considers the state aid guidelines generate a binding effect on the German government. See the judgment CJEU 5 October 2000, C-288/96, ECLI:EU:C:2000:537 (*Germany v Commission*), [2000] ECR I-8237, par. 65.

134 Compare Luijendijk & Senden 2011, p. 355.

135 See also Van Dam 2013, par. 2.2.2.

to the area of State aid, and that the ruling needs to be read in the particular legal context that defines EU State aid rules. In this thesis, State aid has not been selected as one of the case studies and therefore the *IJssel-Vliet* formula does not govern the practices of national courts that are studied in this research.

3.4.4 Preliminary questions and guidance documents

The above sections show that the Court of Justice considers it possible for national courts to use the Commission's guidance documents as an interpretation aid and – as follows from the *Grimaldi* case law – considers that national courts are bound to take Commission recommendations into consideration. This, however, does not mean that national courts can use guidance documents as if they were the 'authoritative interpretation of EU law'. Indeed, it is the task of the Court of Justice to 'ensure that in the interpretation and application of the Treaties the law is observed'.¹³⁶

The preliminary ruling procedure facilitates dialogue and cooperation between national courts and the Court of Justice.¹³⁷ It empowers national courts to refer questions on the validity and interpretation of Union law – and it allows the Court of Justice to answer these questions whilst preserving its 'interpretative monopoly'.¹³⁸ The preliminary reference procedure has been considered the necessary instrument to prevent divergences in the interpretation of Union law by national courts.¹³⁹

Does the Court of Justice also accept questions on the interpretation and/or validity of guidance documents of the European Commission? Article 267(b) TFEU says that the Court of Justice can give preliminary rulings on the 'validity and interpretation of acts' of EU institutions. The Court of Justice has given a broad interpretation of 'acts' referred to in Article 267 TFEU:

'As regards the provisions of European Union law which may be the subject of a ruling of the Court of Justice under Article 267 TFEU, it must be recalled that the Court of Justice has jurisdiction to give a preliminary ruling on the validity and interpretation of *all acts of the institutions* of the European Union *without exception*'.¹⁴⁰ [Emphasis added]

This broad interpretation of Article 267 TFEU suggests that – as also noted by Luijendijk and Senden – the Court considers itself competent to rule on the interpretation and validity of guidance documents.¹⁴¹

136 Article 19 TEU.

137 Hartley 2014, p. 281, 282.

138 Van Harten 2014, p. 11 and 20.

139 Jacqu   2012, p. 693.

140 CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659, par. 38 (*VB Penzugyi Lizing Zrt*).

141 Luijendijk & Senden 2011, p. 324; See also Hartley 2014, p. 284.

From the Court's case law, it follows that the Court indeed accepts questions on the interpretation of guidance documents. In the *Grimaldi* ruling, for instance, the Court of Justice is asked to answer a question from a national court on the interpretation of a Commission recommendation.¹⁴² In this ruling, the Court of Justice considers that it 'has ruled on several occasions on the interpretation of recommendations based on the EEC Treaty' and that it is 'therefore necessary to consider the question before the Court'.¹⁴³ For national courts, this means that they are not only empowered to refer interpretative questions on guidance documents to the Court. It is also their *duty* if no appeal is possible and the interpretative question is necessary for the court to give the judgment.¹⁴⁴

Over the last decades, the preliminary ruling procedure appears to be an important instrument for the Court of Justice to shed light on the legal effects of guidance documents for national authorities and courts. Not only the *Grimaldi* ruling, but also the *IJssel-Vliet* ruling as well as the *ACM v KPN* ruling are all the outcome of a preliminary reference made by a national court. A different picture emerges in the case of preliminary rulings concerning the validity of guidance documents. Despite the Court's broad interpretation of 'acts' that are susceptible to the preliminary ruling procedure,¹⁴⁵ in practice the Court of Justice seems inclined to transform validity questions into questions of interpretation.¹⁴⁶ This, however, should not detain national courts from referring questions on the validity of guidance documents. As remarked by Eliantonio, the '*Foto Frost* limitation'¹⁴⁷ does not permit national courts to declare guidance documents invalid. In *Foto Frost* the Court of Justice considers it an exclusive power of the Court to decide on the validity of Union acts.¹⁴⁸

3.5 CONCLUSION

This third chapter explores the issuing and use of guidance documents at the EU level. The absence of a standardised issuing process and a standardised form that guidance documents should take, entails that in practice

142 CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi*).

143 CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646, par. 9 (*Grimaldi*).

144 In the case there is no judicial remedy for a court's decision, national courts are exempted from the duty to refer in the case of an *acte clair*, an *act éclairé* or in the case an action is brought for interim relief. CJEU 6 October 1982, C-283/81, ECLI:EU:C:1982:335 (*Cilfit*).

145 Cf. Eliantonio 2018, p. 512. Scott takes a different point of view, see Scott 2011, p. 345 and fn. 84.

146 For instance CJEU 12 January 2006, C-311/04, ECLI:EU:C:2006:23, par. 24-28 (*Algemene Scheeps Agentuur Dordrecht*). See also Luijendijk & Senden 2011, p. 324.

147 Eliantonio 2018, p. 513.

148 CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452, par. 9 (*Foto-Frost v Hauptzollamt Lübeck-Ost*).

guidance documents can take different forms and shapes. Five types of guidance have been identified that seek to assist the Member States in the implementation process in different ways. 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. The identification of these types of guidance mainly serves analytical purposes and can assist in tracing the use of guidance at the national level.

The second part of this chapter identified the expectations that are formulated at the EU level on how guidance documents should be dealt with by national authorities and national courts. The non-legally binding character of guidance documents contrasts with the plethora of expectations formulated at the EU level. The legal or extra-legal expectations formulated at the EU level make guidance documents an implementation tool that for many reasons cannot be ignored by national authorities and national courts. However, the question of what roles guidance documents actually play at the national level can only be answered by conducting an empirical study of the practices of national authorities and national courts.

When implementing EU law, national authorities and national courts operate not only in the European context described in the previous chapter. National authorities and national courts, perhaps first and foremost, also act in a national context. Within the limits set by EU law, the Member States are free to use their own administrative law and procedures and to designate the authorities that are in charge of giving effect to the Union rules.¹ Although common principles can be identified, the European legal culture is still characterised by the diversity of its national legal systems.² The Member States have their own legal traditions,³ cultures,⁴ and practices. National authorities implement Union law applying their principles and procedures that are often laid down in codes of administrative law.⁵

Focusing on the Netherlands, this research studies the use of guidance documents by national authorities and national courts in a 'Dutch administrative law context' (section 4.1). This chapter reflects on some of the general characteristics of Dutch administrative law and practice, and introduces the main legal and practical instruments that national authorities have at their disposal when implementing EU law (section 4.2). It also describes the main features of the judicial organisation in the Netherlands and the competences of Dutch administrative and civil courts in reviewing implementing practices of Dutch authorities (section 4.3).

Subsequently, this chapter outlines different perspectives on the degree to which guidance documents are perceived and used as having a certain binding force by national authorities and national courts (section 4.4). These perspectives will be taken as a reference point to identify different uses of guidance documents in practice.

1 As follows from the principle of procedural autonomy. See for instance CJEU 21 September 1983, C-205-215/82, ECLI:EU:C:1983:233, par. 17 (*Deutsche Milchkontor GmbH*); CJEU 7 December 2010, C-439/08, ECLI:EU:C:2010:739, par. 63, 64 (*Vebic*).

Schmidt-Aßmann refers to the Member States' 'autonomous administrative law'. Schmidt-Aßmann 2013, p.14.

2 Ruffert 2013b, p. 216, 218.

3 Schmidt-Aßmann defines traditions as 'values, ideas and patterns of action that have been performed for a long time and which are legitimized particularly by their usage'. See Schmidt-Aßmann 2013, p.4.

4 See on the development towards a 'European judicial culture': Mak 2015.

5 Hofmann et al. 2014, p. 12.

4.1 CHARACTERISTICS OF DUTCH ADMINISTRATIVE LAW IN AN EU CONTEXT

An 'open' legal system

As one of the founding Member States of the European Union, the experience of the Netherlands in implementing EU law goes back to the early years of the EU integration process. The Netherlands not only has a relatively long experience in the implementation of Union law, it is also one of the Member States with the most 'open' legal systems towards EU law.⁶

European Union law has a special status compared to provisions laid down in international law. Articles 93 and 94 of the Dutch Constitution provide the direct applicability of self-executing provisions of international treaties and resolutions in the Dutch legal order. This 'moderate monist' system does not apply to EU law.⁷ In the Netherlands, the Dutch judiciary recognises the primacy and autonomous character of EU law. Hence, the direct effect and primacy of Union law 'occurs' independently of the Dutch Constitution.⁸ This was made clear by the Judicial Division of the Council of State in 1995. In the *Metten* ruling, the Council of State reasoned that the principle of primacy of EU law as developed by the Court of Justice also applies to provisions of EU law that do *not* have direct effect.⁹ The Dutch highest civil court (*De Hoge Raad*) even ruled more explicitly, in the *Verplichte rusttijden* ruling of 2005, that provisions in EU regulations that have direct effect apply directly, not on the basis of Articles 93 and 94 of the Dutch Constitution, in the national legal order¹⁰ In brief, the implementation of EU law in the Netherlands occurs in the context of an open, 'EU friendly' legal system.

The central role for (individual) administrative acts

When Union law is 'received' into the Dutch legal order it is – as in most other Member States – implemented and enforced mainly by means of national *administrative* law. The administrative rules, definitions, as well as some of the principles of good administration, are codified in the Dutch General Administrative Law Act (GALA). The GALA, that entered into force in 1994, lays down the rules that govern the adoption and judicial review of so-called 'administrative acts' (*besluiten*). Administrative acts are

6 Prechal et al. 2017, p. 75, 76; Van der Burg & Voermans 2015, p. 18, 30.

7 These Articles provide that 'self-executing provisions' of international treaties and resolutions become binding after they have binding published and have precedence over conflicting statutory regulations of Dutch law. See also Van den Brink et al. 2016, question I-3.

8 See Barkhuysen 2006, p. 8.

9 ABRvS 7 July 1995, ECLI:NL:RVS:1995:AN5284 (*Metten*).

10 HR 2 November 2004, ECLI:NL:HR:2004:AR1797 (*Verplichte rusttijden*).

considered to be the ‘pivotal object’¹¹ of Dutch administrative law. These acts can have a general scope of application or take the form of ‘individualised decisions’ that do not provide for general rules.¹²

In particular the latter category – individual administrative acts – takes central place in the GALA. This Act gives detailed rules for the adoption of individual administrative acts and renders these acts susceptible to judicial review.¹³ The adoption of general rules, in contrast, is regulated to a far less detailed extent. Formal legislative acts adopted by the Dutch legislature fall outside the scope of the GALA.¹⁴ Dutch administrative law does not provide for concepts like ‘notice-and-comment rulemaking procedures’ or modes of ‘formal participation rights of individuals in rulemaking’.¹⁵ This focus on individualised decision making rather than on rules and principles governing general rulemaking, can be considered a general feature of Dutch administrative law. In the words of Schuurmans: Dutch administrative law is concerned with decision making on the retail rather than on the wholesale level.¹⁶

The prominence of individualised decision making in Dutch administrative law resonates throughout the system of administrative judicial review. It is also, as a general rule, only individualised decisions that are susceptible to judicial review by administrative courts. Article 8:3 GALA excludes generally binding regulations as well as the typical Dutch policy rules from judicial review by administrative courts.¹⁷ The Netherlands is also peculiar due to the exclusion of formal legislation from the possibility of judicial review: such a ‘constitutional review’ is prohibited by Article 120 of the Dutch Constitution.¹⁸ As a result, the Netherlands does not have a constitutional court, in contrast to most of the other EU Member States.¹⁹

11 See for a critical discussion on the ‘administrative acts’ as central object of the Dutch administrative law and its focus on autonomy rather than relational ideas, Van den Berge 2016.

12 Article 1:3 GALA and De Moor-Van Vugt & De Waard 2016, p. 369

13 Title 4.1 and Article 8:1 GALA; Schuurmans 2015.

14 The legislature is not an administrative authority in the sense of Article 1:1 GALA.

15 Barkhuysen, Den Ouden & Schuurmans 2012.

16 Schuurmans 2015.

17 These rules are challengeable for civil courts on the ground that the regulations are unlawful. See also below section 4.3.1.

18 The Netherlands traditionally has a high level of trust in the government and legislature, which might be related to the highly ‘compromised’ nature of Dutch legislation; Schuurmans 2015; Stolk & Voermans 2016, p. 39.

19 The Netherlands is not the only Member State with limited constitutionality review: Finland also only has a form of ‘weak judicial review’ of the constitutionality of Acts of Parliament. See Kirvesniemi, Sormunen & Ojanen 2016, Kirvesniemi, Sormunen & Ojanen 2016.

Europeanisation of Dutch administrative law

To the central role for administrative acts and the openness towards Union law, a third general feature that characterises and shapes administrative law can be added: the increased Europeanisation of Dutch administrative law and practices. This trend of Europeanisation not only shapes and influences Dutch administrative law in several ways, it also gives rise to legal concerns or problems. For instance, the transposition of European Union law might be contested and/or give rise to uncertainty as to the meaning and provisions in implementing legislation (such as has been the case in the Habitats Directive).²⁰ Union rules and principles could also give rise to tensions in light of Dutch general principles of law,²¹ or pose a threat to the 'unity' of administrative law and the 'coherence' of effective judicial protection.²²

Studying the use of guidance documents of the European Commission, this research is conducted against the background of this general trend of Europeanisation which, although increasingly discussed in legal literature, still leaves many questions open as regards its legal and practical implications.²³ The use of guidance documents might be perceived as a 'vehicle'²⁴ for Europeanisation of Dutch administrative law, and as such also fits in a broader context of the increased Europeanisation of Dutch administrative law.²⁵

The following sections provide an overview of the various instruments by which EU law is implemented and discusses the competence of national administrative and civil courts in reviewing these implementing practices. These instruments, as well as the judicial practices, are the objects of study in which traces of the use of guidance documents may be found.

4.2 DUTCH AUTHORITIES AND THE IMPLEMENTATION OF EU LAW

The implementation at the national level of provisions in legally binding Union acts occurs through various processes and practices involving different national authorities. This is the consequence of the principle of institutional and procedural autonomy. As long as Union law does not provide otherwise, it is up to the Member States to designate national authorities to implement EU law and to choose the 'form and procedures'

²⁰ See Van Keulen 2007.

²¹ Van den Brink & Den Ouden 2015.

²² Barkhuysen 2006, Barkhuysen 2006.

²³ As is illustrated, for instance, by the contributions in Schueler & Widdershoven 2014.

²⁴ I draw inspiration of Widdershoven 2014, p. 16 who considers national administrative law a 'vehicle' for the effective application of Union law.

²⁵ See on the Europeanisation of administrative law in the Netherlands Schueler & Widdershoven 2014.

by which EU legislation is implemented in the national legal order.²⁶ In order to be able to provide in-depth insights into the different roles that guidance documents take at the national level, it is necessary to study the use of guidance documents throughout the different stages of the implementation process. Therefore, in this research I understand the ‘implementation of EU law’ in a broad sense as encompassing the interpretation, transposition, application and enforcement of EU law.²⁷

In the national legal order, Union law is implemented using various legal instruments, such as formal and/or secondary legislation, policy rules and individualised decisions. EU sectoral legislation often introduces ‘specific’ measures to be introduced by the Member States. One example is the ‘management plans’ that are mentioned in Article 6(1) of the Habitats Directive. Moreover, the implementation of Union law also often requires *de facto* implementing measures, and actions such as the on-the-spot controls that must be carried out in the area of direct payments. Consequently, tracing the use of guidance documents in three different policy areas will lead to studying different implementing activities and measures.

Tracing the use of guidance also means studying the implementing practices of different authorities designated to implement the EU regulations and directives. Implementing measures are taken, for instance, by the responsible minister and state secretary (when adopting Ministerial regulations and Circulars), by agencies (such as the Immigration and Naturalisation Service), as well as by Dutch provinces (that play a central role in the implementation of the Habitats Directive).

The purpose of this section is not to ‘dive’ into the three selected policy areas and to describe the specific measures that are taken to implement the legally binding Union rules. Instead, this section only gives an overview of the main instruments by which EU law is implemented. It does so by outlining the implementing instruments available to national authorities at different stages of the implementation process. The analysis reflects on the forms of legally binding rules that transpose or operationalise Union legislation, discusses the adoption and characteristics of the typical Dutch policy rules as well as of individualised decisions. Finally, it outlines some other implementing measures as well as practices.

26 CJEU 21 September 1983, C-205-215/82, ECLI:EU:C:1983:233, par. 17 (*Deutsche Milchkontor GmbH*); CJEU 7 December 2010, C-439/08, ECLI:EU:C:2010:739, par. 63, 64 (*Vebic*); Other authors consider procedural autonomy as an expression of the sovereignty of the Member States. Cf. Van Gerven 2000, p. 501 and Jans, Prechal & Widdershoven 2015, p. 44 footnote 22.

27 Compare Prechal 2009, p. 5-6; Luijendijk & Senden 2011, p. 315; Jans, Prechal & Widdershoven 2015, p. 13.

4.2.1 Adopting ‘implementing legislation’

The effective implementation of EU law demands that the often openly formulated norms laid down in Union legislation must be translated into tangible goals and policy objectives.²⁸ The incorporation of EU law into national legally binding rules is usually the first stage of the implementation process. It is referred to as ‘transposition’ in the context of EU directives for which the Court of Justice requires the rules of national law to have binding force.²⁹ Regulations are directly applicable and ideally do not need to be operationalised into national legal rules.³⁰ The adoption of further rules for EU regulations is only permitted if the rules do not obstruct the direct effect and conceal the Community nature, and if the Member States specify that a discretion granted to them is being exercised.³¹ However, in practice the normative operationalisation of EU regulations into national legally binding rules is often required.³²

In the Netherlands, legally binding rules of general application can take different forms. A distinction can be made between formal legislation (or primary legislation) and other generally binding regulations (secondary legislation). Formal legislation, also referred to as an Act of Parliament,³³ is enacted jointly by the government and the Dutch parliament.³⁴ Secondary legislation can take the form of delegated legislation – such as Ministerial Regulations or governmental decrees – or of decentralised regulations such as the provincial regulations enacted by the Dutch provinces or municipal regulations enacted by the Dutch municipalities.³⁵

The legally binding acts of general application, both primary legislation and secondary legislation, are referred to in this thesis as legislative practices. Similarly, the notion of ‘legislature’ is understood in a broad sense, encompassing public authorities that are empowered to adopt legally binding rules of a general nature. When legislation is adopted in order to transpose or operationalise EU legislation, this is referred to as ‘implementing legislation.’

Guidance documents often assist Member States in transposing or operationalising EU regulations or directives.³⁶ Therefore, implementing legislation will be among the measures to be studied in the three policy

28 Nicolaides 2012, p. 6.

29 See CJEU 30 May 1991, C-361/88, ECLI:EU:C:1991:224, par. 30 (*Commission v Germany*).

30 Jans, Prechal & Widdershoven 2015, p. 11; Hofmann, Rowe & Türk 2011, p. 91.

31 CJEU 25 October 2012, C-592/11, ECLI:EU:C:2012:673, par. 36 (*Ketelä*). See also above section 2.5.7.

32 See Kral 2008;

33 Cf. Barkhuysen, Den Ouden & Schuurmans 2012, Verhoeven 2011, p. 9, 10., Voermans 2016, p. 345.

34 See Article 81 of the Dutch Constitution. See also Voermans 2016, p. 345.

35 See for a detailed overview of the hierarchy of norms in The Netherlands Voermans 2016, p. 347.

36 For instance COM(2009)313 final.

areas. In this regard, I remark as a final note that in the Netherlands it is common practice to issue an explanatory memorandum to the proposal for a legislative act. As we will see, traces of Commission guidance documents may be found in the explanatory memoranda to legislative acts.³⁷

4.2.2 The Dutch policy rule

The implementation of Union law often requires more than the adoption of implementing legislation. It also often involves the issuing of non-legally binding instruments. Just as at the European level, soft rulemaking and the issuing of quasi-legislative instruments is part of the regulatory arsenal at the national level too.³⁸

In this respect, the Netherlands is quite a peculiar and interesting case, as one type of non-legally binding instruments has been given a formal basis in the Dutch General Administrative Law Act.³⁹ This concerns the so-called policy rules that were introduced in the GALA in 1998.⁴⁰ Article 1:3 GALA defines the policy rule as: ‘an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting legislative provisions in the exercise of a power of an administrative authority’.

The competence to issue policy rules is given where an administrative authority has discretionary administrative powers; an (additional) express basis in a legally binding rule is not required.⁴¹ However, this does not mean that any administrative rule qualifies as a policy rule. The GALA labels a policy rule as an ‘order’, which means that the rule must be published.⁴² The GALA, however, does not prescribe the form that the policy rule should take. Consequently, Dutch policy rules can (like the Commission’s guidance documents) take various forms and shapes such as ‘policy notes, circulars or even letters’.⁴³ An important consequence of the issuing of a policy rule is that the rule has a self-binding effect on the administrative authority.⁴⁴ This follows from Article 4:84 GALA, which states that the administrative authority shall act in accordance with the policy rule ‘unless, due to special circumstances, the consequences for one or more parties would be out of proportion to the purposes of a policy rule’.

37 See section 6.5.1.

38 See Bröring & Geertjes 2013.

39 Compare Tollenaar 2012, par. 3.2.

40 Bröring 2012, p. 168.

41 Article 4:81(1) GALA; De Moor-Van Vugt & De Waard 2016, p. 372; Voermans 2016, p. 347.

42 Tollenaar 2012, par. 3.2. This follows from the requirement that a policy rule needs to be established by an order, which is ‘a written decision of an administrative authority constituting a public law juridical act’. Article 1:3 GALA.

43 *Kamerstukken II*, 1993/94, 23700, 3, p. 107.

44 Tollenaar 2012, par. 4.2.

Commission guidance documents are sometimes considered the equivalents of Dutch policy rules.⁴⁵ There are, however, important differences between Dutch policy rules and Commission guidance documents. Dutch policy rules are issued by an administrative authority for the exercise of its *own* administrative discretion. Guidance documents, in contrast, are issued by the Commission whilst addressing the implementing responsibilities of the national authorities in the Member States. Moreover, whilst Dutch policy rules have been given a 'legal basis' in the Dutch GALA, Commission guidance still lacks a general institutional basis in the EU Treaties.

Another regulatory phenomenon that features in the Dutch legal landscape shows more similarities with the Commission's guidelines that address national authorities. These are the so-called *richtsnoeren* or 'guidelines' that – contrary to the Dutch policy rules – do not have a legal basis in the Dutch GALA.⁴⁶ Like the Commission's guidance documents, the 'Dutch guidelines' are issued by a different authority than the authority that uses the guidelines to exercise its discretionary power.⁴⁷ One example is the guidelines that are issued by the Association of Netherlands Municipalities⁴⁸ that – not surprisingly – address the Dutch municipalities. Dutch guidelines, especially those with a highly technical character, have a certain binding effect on their addressees. The technical guidelines must, in principle, be followed and deviation is only permitted provided an explanation is given.⁴⁹

Thus, Commission guidelines have more resemblance to the Dutch informal guidelines between different authorities than with the famous Dutch policy rules. This of course does not mean that the Commission guidance documents cannot be used as an aid by national authorities to formulate policy rules in the context of the implementation of EU legislation. As we will see, the Commission guidelines might even be 'transposed' into Dutch policy rules.⁵⁰

4.2.3 Administrative decisions

The application of EU law or of national implementing legislation often results in the adoption of decisions in individual cases.⁵¹ An example is the decision that grants a residence permit to a third country national, taken on the basis of the Dutch Aliens Decree that implements Directive 2004/38/

45 See for instance Van den Brink & Van Dam 2014.

46 I compare Commission guidance and Dutch policy rules in Van Dam 2019, p. 535.

47 Bröring 1993.

48 Vereniging voor Nederlandse Gemeenten – VNG

49 Bröring 2012, p. 180-181. See for instance ABRvS 2 April 2014, ECLI:NL:RVS:2014:1173, par. 3.4.

50 See section

51 This is the third phase of the implementation process according to Jans, Prechal & Widdershoven 2015, p. 17.

EC.⁵² Individualised decisions could also be taken in order to enforce provisions of Union law,⁵³ requiring for instance the recovery of aid when it is found that a beneficiary does not comply with the EU direct payments legislation.⁵⁴

The legal instrument by which rights and obligations can be created in individual cases is the *beschikking*. Article 1:3(2) GALA defines an administrative decision as an ‘order which is not of a general nature, including the rejection of an application for such an order’. As we saw above in section 4.2.2 individualised decision-making practices might be guided by a Dutch policy rule, which lays down the rules and criteria to be taken into account by national authorities. Administrative authorities, however, are not obliged to adopt policy rules and thus can also define decision-making criteria in other (internal) documents that do not qualify as such. These documents can take the form of internal instructions, framework documents, technical guidelines or even algorithms.⁵⁵ Based on such documents, the administrative authority can develop a line of conduct (*vaste gedragsregel*).

Even when not based on a policy rule in the sense of Article 4:81 GALA, a line of conduct still has a self-binding effect for the administrative authority.⁵⁶ This self-binding effect arises through general principles of law, such as the principle of equal treatment and the principle of legitimate expectations.⁵⁷ In that case, though, the binding effect of policy lines is considered less strong than the binding effect of policy rules provided for in Article 4:84 GALA.⁵⁸

Traces of Commission guidelines might feature in Dutch individualised decision-making practices. Indeed, guidance documents of the Commission often provide guidance for the application of EU legislative provisions in individual cases, and might thus be used as a decision-making aid by national administrative authorities. What is more, Commission guidance documents might also be helpful (or perhaps even serve as a basis) for developing a line of conduct that is followed by administrative authorities in the context of implementing practices. In that case, it is not unlikely that these guidelines even acquire a certain binding effect on national authorities via general principles of Dutch administrative law.

52 Article 8.13 of the Dutch Aliens Decree 2000.

53 Jans, Prechal & Widdershoven 2015, p. 17, 18 refer to the enforcement of EU law as the fourth phase of the implementation process.

54 Article 4.8 paragraph 1 of the Dutch ministerial regulation which implements Regulation 13006/2013/EU.

55 Bröring 2019, p. 175.

56 Bröring 2012, p. 168.

57 Bröring & Geertjes 2013, p. 6.

58 Bröring & Geertjes 2013, p. 6.

4.2.4 Other implementing measures and practices

The implementation process of Union law usually entails more than the adoption of legally binding rules, policy rules and/or individual decisions. In many situations, further implementation instruments and practices are needed.⁵⁹ Of course, it is impossible and not necessary to list the entire catalogue of such specific instruments and measures. This section outlines some main features of such instruments, as it is also at this stage of the implementation process that guidance documents might play a role as an implementation tool.

In this regard, as already mentioned, the adoption of specific instruments might be required by EU legislative provisions. Examples of such instruments can be found for instance in the context of the Habitats Directive. Article 6(1) of the Habitats Directive requires national authorities to adopt certain conservation measures that involve ‘if need be, appropriate management plans specifically designed for the sites’. Accordingly, the Dutch Nature Protection Act requires the executive council of the Dutch provinces to establish a management plan that contains the conservation objectives for a Natura 2000 site.⁶⁰

It should not be forgotten that the implementation of EU law often also involves and requires factual conduct. For instance, in the area of direct payments, on-the-spot controls need to be conducted on farms in the Member States in order to ensure compliance with the EU legislative rules.⁶¹ Such factual implementing measures can have a highly technical character, as again is shown by the direct payments legislation. This requires Member States to set up complex technical systems such as the establishment of a land parcel identification system in which the agricultural parcels can be registered and measured.⁶²

Guidance documents, and particularly implementing and technical guidance provisions, often assist national administrative authorities in decisions related to the (possible) form of practical and technical implementing measures. The use of guidance documents for these practical measures and techniques might be difficult to identify, as these practices often remain ‘internal’ and invisible to the outside world.

4.3 DUTCH COURTS AND THE IMPLEMENTATION OF EU LAW

National courts have a different relationship to the implementation of European Union legislation than national authorities. National courts do not adopt implementing measures through which EU law is put into practice.

59 See Prechal 2009, p. 6.

60 Article 2.3. of the *Wet natuurbescherming*.

61 Article 74 of Regulation 1306/2013/EU.

62 Article 70 of Regulation 1306/2013/EU.

Instead, as *juge de droit communautaire*, national courts assess the lawfulness of decisions and practices of national authorities in light of EU legal rules and principles.

Guidance documents may be taken into account by national courts when the courts apply or, to a certain extent, interpret EU law. What is more, as we have seen on the basis of the *Grimaldi* case law, recommendations even constitute a mandatory interpretation aid for national courts.⁶³ Nevertheless, national courts do not have the final say on interpretative questions, as these questions are to be referred to the Court of Justice. The role of national courts and the possibility to refer questions on the interpretation and validity of EU acts and guidance documents has already been discussed above in section 3.4.4.

This section discusses the competence of Dutch administrative and civil courts to review implementing decisions and measures, and describes the judicial organisation of administrative courts in the Netherlands. It is, as we will see, the administrative courts⁶⁴ that play the main role in reviewing the implementing practices in the three policy areas selected for this research, and therefore the administrative judicial branch will take centre stage in this thesis.

4.3.1 The competence of Dutch administrative and civil courts

Article 8:1(1) GALA lays down the rule that interested parties can lodge an appeal against an 'order' before the administrative court. However, as said in section 4.1, the GALA excludes the possibility to directly challenge orders that take the form of generally binding regulations before an administrative court.⁶⁵ It is also not possible to directly challenge Dutch policy rules.⁶⁶ Generally binding rules and policy rules can only be reviewed *indirectly* by administrative courts. The review of the lawfulness of a binding regulation (other than a formal legislative act) or a policy rule is thus part of the lawfulness review of the contested individual decision that is based on that regulation or policy rule.⁶⁷

In view of the exclusion of judicial review of generally binding rules and policy rules, the competence of Dutch administrative courts centres on the direct review of individualised decisions. The GALA provides for the general rule that before lodging an appeal before an administrative court, the interested party needs to file a notice of objection to the authority that issued the administrative decision.⁶⁸ The decision that is taken at the objec-

63 The *Grimaldi* case law is discussed in section 3.4.2.

64 The term administrative courts includes separate administrative courts as well as a division of an ordinary court that deals with administrative proceedings.

65 Article 8:3 GALA. Article 120 of the Dutch Constitution excludes the possibility of judicial review of Acts of Parliament. See Voermans 2016, p. 359.

66 Article 8:3 GALA.

67 Stolk & Voermans 2016, p. 39.

68 Article 7:1 GALA; De Moor-Van Vugt & De Waard 2016, p. 387, 388.

tion stage by the administrative authority, is susceptible to judicial review by a Dutch district court. Accordingly, when studying the rulings of Dutch administrative courts, it needs to be kept in mind that the contested decision is generally the decision taken by the administrative authority in the administrative objection procedure. Only if all parties agree, is it possible to skip the notice of objection stage and to directly contest the decision before an administrative court.⁶⁹

Civil courts act as *restrechter*, which might be best translated as providing for a 'safety net'. An administrative case can be brought before a civil court if sufficient judicial protection cannot be ensured by administrative courts. The civil judge, however, is only competent to review questions on the grounds that the Dutch government has committed a wrongful act. Such a plea for a wrongful act could, for instance, concern the adoption of unlawful legislation (*onrechtmatige wetgeving*). The Dutch administration can also be challenged for committing a wrongful act by not fulfilling its positive obligations stemming from EU legislation. In such cases Commission guidelines may come to play a role as a judicial decision-making aid, as we will see in section 6.6.2.

4.3.2 The judicial organisation of administrative courts in the Netherlands

Throughout the twentieth century, the task to review administrative decisions was entrusted to several specialised administrative courts.⁷⁰ With the aim of providing a more uniform system of judicial review, the judicial organisation of administrative courts has been undergoing a reorganisation process since 1971.⁷¹ This process, however, has not gone so far as to lead to one single highest administrative court. There are currently still three highest administrative courts in the Netherlands.⁷²

Three highest administrative courts

Two of these three highest administrative courts are specialised courts. The Central Council of Appeals (*Centrale Raad van Beroep*) is the highest court in the area of social security matters and cases concerning civil servants. The second specialised court is the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*). This court deals with cases that concern socio-economic questions. It concludes cases for instance in the field of competition law, telecommunications law as well as EU direct payments. The third highest administrative court is the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).

69 See Article 7:1a GALA, which also provides for some other exceptions that allow to challenge a decision directly before an administrative court.

70 De Moor-Van Vugt & De Waard 2016, p. 389.

71 Stolk & Voermans 2016, p. 34-35.

72 Stolk & Voermans 2016, p. 46.

It is the only administrative court with general jurisdiction in the sense that it has competence to review the lawfulness of administrative orders, unless a specialised administrative court has been designated. Normally, before appealing to one of the three highest administrative courts appellants first need to appeal to one of the eleven district courts in the Netherlands. The district courts have various divisions, among which is the administrative division with general competence in the area of administrative law.

Which courts to study in this research?

Exceptionally, one of the highest administrative courts is designated as the court *in first and only* instance. This is the case in the area of EU subsidies. Decisions that are taken on the basis of the Ministerial Regulation implementing the EU direct payments legislation should be challenged directly before the Trade and Industry Appeals Tribunal.⁷³ The search for guidance practices in the field of 'direct payments' therefore only encompasses rulings of the Trade and Industry Appeals Tribunal.

The Judicial Division of the Council of State is the highest administrative court in the other two policy areas, the Citizenship Directive and the Habitats Directive. The Council of State rules on the numerous cases in the field of immigration law, which in the Netherlands includes the EU free movement rules and also reviews decisions taken on the provisions of the Nature Protection Act that implement the Habitats Directive.

The analysis also includes rulings of lower courts. Cases in the field of free movement are decided in first instance only by the District Court of The Hague, after which appeal before the Council of State is possible. Decisions taken on the basis of the Nature Protection Act also follow the two layers of judicial review, which means that the study of Habitat guidance documents includes rulings of district courts and rulings of the Council of State.⁷⁴ What is more, traces of Habitat guidance documents also feature in civil proceedings of district courts as well as courts of appeal (no traces have (yet) been found in rulings of the Dutch Supreme Court). In brief, the search for traces of Habitat guidance documents includes the practices of various administrative courts, which possibly also reveals different 'guidance practices'.

4.4 PERSPECTIVES ON BINDINGNESS TO ANALYSE THE USE OF COMMISSION GUIDANCE

The above sections outline various stages of the implementation process as well as implementing instruments where traces of the use of guidance documents could possibly be found. It also provides an outline of the

⁷³ Art. 8:105 GALA and *bevoegdheidsregeling bestuursrechtspraak*.

⁷⁴ This was different under the previous Nature Protection Act 1998, which provides for the possibility of direct appeal before the Council of State.

competence of Dutch administrative and civil courts in reviewing the implementing practices of national authorities. The next step is to explore what role guidance documents actually take in implementing and judicial decision-making processes.

4.4.1 Developing perspectives on bindingness: a bottom-up approach

In the introduction I raised the question whether in the national legal order, guidance documents are used and perceived as having any degree of (*de jure* or *de facto*) binding force.⁷⁵

Literature suggests that in practice guidance documents might indeed acquire a certain degree of *de facto* binding force. Van den Brink, for instance, concludes on the basis of informal interviews that in the Netherlands national authorities tend to comply with soft law in the area of EU subsidies.⁷⁶ The guidelines and recommendations of European Supervisory Authorities are also considered to exert 'binding effects' in practice, as follows from research conducted by Van Rijsbergen.⁷⁷ Luijendijk and Senden explore the use of soft law in Dutch legislative practices and suggest that the way in which guidance documents are used might depend on whether or not a critical approach is taken towards the soft law instruments.⁷⁸ Georgieva identifies different ways in which national courts refer to competition soft law instruments of the European Commission, yet does not provide insights into the perspectives of these courts on the binding character of the Commission's soft law.⁷⁹

Thus, from the above it follows that research on the use of guidance documents that has been conducted thus far, shows that guidance documents can have a binding effect in practice. This research builds on the previous studies, yet goes further as it seeks to explore whether different perspectives on the bindingness of Commission guidance documents can be discerned in Dutch implementing and judicial decision-making practice.

In order to be able to identify such perspectives in a systematic manner, this section identifies four 'ideal perspectives on bindingness' for both national authorities and courts. The perspectives are introduced below in sections 4.4.2 and 4.4.3, and will be used as reference points when identifying and analysing the use of the five different types of Commission guidance at the national level. This means that the perspectives do not serve as blueprints that always fit the observed guidance practices perfectly. The perspectives, instead, serve as 'ideal types' of different uses of guidance,

⁷⁵ See section 1.5.2.

⁷⁶ Van den Brink 2012, p. 289 and p. 924, 925; Van den Brink 2016, p. 7. See also Van Dam 2013.

⁷⁷ Van Rijsbergen 2018, p. 179, 180; See also Barkhuysen, Westendorp & Ramsanjhal 2017.

⁷⁸ Luijendijk & Senden 2011, p. 341.

⁷⁹ Georgieva 2016 and Georgieva 2015.

with the only aim of facilitating the analysis of the use of guidance in a systematic and objectified manner as much as possible.⁸⁰

I developed these perspectives not only in light of literature on the use of soft law and guidance documents,⁸¹ but first and foremost in light of the empirical findings of the research conducted in the exploratory phase of this research. During this exploratory phase, the first ‘contours’ of different perspectives on bindingness were discerned. The preliminary findings that pointed in the direction of the different perspectives were tested and refined in later phases of this research. In brief, when elaborating the different perspectives, I followed a ‘bottom-up approach’ in the sense that the perspectives have been developed whilst conducting the empirical research.⁸²

What perspective is taken in practice towards Commission guidance is likely to depend on various factors. For instance, the perspective might be shaped by pressure constructed at the European level, by the administrative culture in the Member States, and the EU-mindedness of the actors involved.⁸³ When exploring the use of guidance documents in the Dutch legal order, possible factors could be discerned that trigger a certain perspective on bindingness vis-à-vis Commission guidance. Yet this is not the main purpose of this research. The perspectives serve descriptive purposes: they facilitate the search for possible different ‘uses’ of guidance documents in implementing practices.⁸⁴

Two lenses to identify ‘uses’ of guidance

The perspectives outlined in this section thus form one of the lenses of the analytical framework in the light of which the use of guidance documents in the Dutch legal order will be analysed. The other lens is formed by the different types of guidance that were discerned in the previous chapter. This means that the analytical framework consists of two lenses, or ‘axes’: 1) the degree to which guidance is used as if it were a binding rule; and 2) the type of guidance that is concerned. In light of these two axis it is then possible to identify different ‘roles’ of guidance documents in the implementation process as well as in judicial decision-making practices.

80 See on the construction of ‘ideal types’ Collier, Laporte & Seawright 2008, pp. 158-161.

81 I draw inspiration from, in particular, Van den Brink 2016; Luijendijk & Senden 2011; Georgieva 2016; Van Dam 2013 and Senden 2004 p. 363, 364.

82 According to Adler, when constructing ideal types in light of existing insights and literature only, the risks exists that the framework does not fit or capture the variety of uses or interactions that can be discerned in real-life. Adler 2005, p. 288, 289.

83 See for the role of ‘facilitating factors’ that could shape Europeanisation processes Börzel & Risse 2010 and Börzel & Risse 2000.

84 See on the difference between ‘descriptive typologies’ and ‘explanatory typologies’ Collier, Laporte & Seawright 2008.

4.4.2 The use of Commission guidance by national authorities

Use of guidance as if it were a binding rule

According to this first perspective, guidance is used as if it were a binding act by the authority involved in the implementation of EU legislation. The guidance document is strictly adhered to by the legislature or the administrative authority. The room to deviate, to choose a different path than proposed in the guidance document is perceived as very limited or even absent. This use of guidance might be the result of strong pressures at the European level in the form of the risk of financial corrections or sanctions when the guidance documents are not followed. The use of guidance in this way makes that guidance documents, despite their non-legally binding character, steer implementation practices to a large extent. They could define the content or outcome of implementation measures that are being taken. The effect or impact of guidance is almost 'tangible': the room for discretion is confined or may even be considered illusory.

Use of guidance as an authoritative implementation aid that cannot be ignored

Following the second perspective, guidance documents are not perceived as being de facto binding, yet as highly authoritative. It is considered appropriate to take guidance documents into account when implementing EU legislation. Departure or deviation from the Commission's guidelines is considered only possible if this is duly justified and for 'good reasons'. This means that when drafting legislation, when taking individual (administrative) decisions or when adjudicating on legal questions, national authorities cannot blindly follow the guidance provided by the European Commission. They take account of their 'implementing responsibility', whilst at the same time consider the guidance documents to be an authoritative instrument which cannot be ignored and that – in principle – must be followed.

Pick and choose: a voluntary implementation aid

According to the third perspective, national authorities use guidance documents in a strategic and pragmatic manner. Guidance is followed only and in so far as it serves their views on how EU legislation should be implemented (e.g. transposed, applied or interpreted). Thus, guidance documents are not perceived nor treated as being binding. Rather, the documents constitute a voluntary justification aid that could be used in order to support an administrative decision, a legal interpretation or a certain implementation mode. Vice versa, the perspective of guidance as a voluntary decision-making aid, could also lead to the situation where the responsible authority deliberately chooses not to follow the guidance document for the reason that it does not suit the implementing practices or policy. The competent authority considers itself to a large extent 'autonomous' *vis-à-vis*

the European Commission and emphasises the non-binding character of Commission guidance.

No use or ignorance of guidance as an implementation aid

The fourth perspective gives guidance provisions the least 'normative force' as an implementation tool. In this situation, the guidance provision or document is considered as having no binding or authoritative status, and is therefore not given a role as an implementation aid. The reason for not using guidance documents may be an explicit denial of the relevance of guidance as an implementation aid. The 'non-use' of guidance as an implementation tool may also have other origins. For instance, the guidance document may be unknown to the responsible authority, the guidance document may be regarded as irrelevant for the question concerned or as 'outdated' since judicial guidance on the question is already available.

4.4.3 The use of Commission guidance by national courts

Use of guidance as a binding rule or assessment standard

The first perspective is where the national court perceives and uses Commission guidance as the authoritative interpretation of EU law and/or as an assessment standard to assess the lawfulness of the implementing practices of the administrative authority. In this first situation, the court strictly follows the guidance of the European Commission and considers that there is no room to deviate from the guidelines. The court thus uses the Commission guidelines as a standard that needs to be followed in order to comply with the underlying EU law provisions.

Use of guidance as a mandatory judicial decision-making aid

The second perspective is where Commission guidance is used as a mandatory decision-making tool in Dutch judicial practices. In this situation, the national court uses Commission guidance as a recommendation on the interpretation or application of EU law that in principle must be followed and which is not possible to ignore. Still the court considers it possible to adopt a different interpretation or allows for a different approach other than that proposed by the Commission services; provided this is justified in light of the facts and circumstances of the individual case. This perspective shows similarities to the line set out by the Court of Justice in the *Grimaldi* judgment,⁸⁵ and might therefore be inspired by the case law of the EU Courts.

85 See above section 3.4.2.

Use of guidance as a voluntary judicial decision-making aid

When Commission guidance is not used as a binding rule or as a mandatory interpretation aid, national courts may still refer to or use Commission guidance as a judicial decision-making aid. The third way in which Commission guidance can be used is as a 'voluntary interpretation aid'. In this situation, national courts do not consider themselves bound by the guidelines given by the Commission services, but still consider the guidelines to have (some) authoritative status. The court uses the Commission's guidelines as a judicial decision-making tool, but only in so far as the tool supports the court's line of reasoning. The court also considers it possible, without the necessity of giving reasons, to deviate from the Commission's guidelines.

No use of guidance as a decision-making aid

The fourth situation is where Commission guidance is neglected, ignored or overruled by the national court without taking the guidance into account or consideration. The guidance simply does not fulfil its role as 'help or support' in the decision-making process. This may be the result of the unawareness of the existence of guidance documents, but the Commission guidance may also be purposefully set aside. In this respect, it needs to be noted that even when Commission guidance is not explicitly mentioned in the text of a ruling of the national court, this might still mean that guidance is used as a source of inspiration for the national court. Thus, it might not always be clear from the text whether Commission guidance is actually set aside by the national court.

4.5 CONCLUSION

This chapter has shed light on the 'Dutch context' in which the EU legal framework is implemented. The characteristics of Dutch administrative law have been summarised by the emphasis on rules for individual decision making, by the use of the 'typical Dutch policy rules', the 'light judicial review' of administrative rulemaking practices and the prohibition of constitutional review of formal legislation.

Commission guidelines might come to play a role as an implementation aid at various stages in the implementation process. The Commission's guidelines could leave traces in legislative and rulemaking practices, in individualised decision-making processes, and affect factual conduct or other implementing measures. Similarly, the role that guidance documents come to play as a judicial decision-making aid is likely to be shaped by the features of the Dutch judicial system. Two main features have been outlined: the competence of Dutch administrative courts to review 'orders' that do not provide for general rules, as well as the organisation of judicial review with the three highest administrative courts.

In order to be able to analyse the use of guidance in a systematic and structured manner, the final section outlines different possible uses of guidance documents that reflect different perspectives on the (*de facto or de jure*) binding character of guidance documents. These perspectives on the bindingness of guidance documents, as well as the different types of guidance, constitute the two 'axes' in light of which the use of guidance documents in Dutch implementing and judicial decision-making processes will be studied in the three selected policy areas.

This first case study explores the role of the various guidance documents in relation to the implementation of direct payments regulations that provide rules for the granting of EU agricultural subsidies to farmers in the European Union. The case study consists of two parts.

The first part of this chapter discusses the Commission's and Member States' competences in the legal context of 'shared administration' (section 5.1), and provides insights into the various guidance documents that are issued in addition to the already complex EU legal framework (section 5.2). These guidance documents, as we will see, are issued with the aim of preventing financial corrections and are used by the Commission as an audit tool. This 'EU context', as will be shown, results in the exertion of strong pressures on the Member States to comply with the Commission's guidelines (section 5.3).

The second part of this chapter sets out by describing the main contours of the implementation process of the EU direct payments legislation in the Netherlands (section 5.4). It subsequently explores the use of guidance documents in the implementing practices of the Dutch Ministry of Economic Affairs as well as the Dutch paying agency (section 5.5). The general trend is that throughout the different stages of the implementation process, direct payments guidance documents tend to be strictly followed. This is the case not only for the 'interpretative guidelines' but also for the guidelines that provide for implementing practices and measures, as well as for the technical guidance documents. Direct payments guidance documents are used as if they were binding rules or standards, taking the role of 'legislation in disguise'.

However, as will be shown, the highest administrative court – the Trade and Industry Appeals Tribunal – takes a more critical stance towards the use of direct payments guidance documents as an implementation aid (section 5.6). Dutch authorities thus act between strong steering pressures to act 'guidance-proof' on the one hand, and the instruction not to use guidance as a binding rule given by the Dutch highest administrative court on the other hand (section 5.7).

5.1 THE EU DIRECT PAYMENTS LEGAL FRAMEWORK

Granting direct payments is the key support mechanism for farmers within the Common Agricultural Policy. It is one of the most highly Europeanised

policy areas, and has its roots in the early years of the EU integration process. The objectives of the Common Agricultural Policy were set out in the EEC Treaty signed in 1957 and have remained the same ever since.¹ The CAP aims at an increase in food and agricultural production, to ensure a fair standard of living for the agricultural community, to stabilise markets and to assure the availability of food supplies for consumers at reasonable prices.

In 1962, the European Agriculture Guidance and Guarantee Fund (EAGGF) was set up through which the Common Agricultural Policy was financed jointly by the Member States.² In 2007, the EAGGF was replaced by two separate funds each reflecting one pillar of the CAP.³ The direct payments are financed by the first pillar, the European Agricultural Guarantee Fund. The European Agricultural Fund for Rural Development constitutes the second pillar and provides financial support for the rural development programmes of the Member States.

Although the percentage of the EU budget reserved for agricultural subsidies has decreased over the years, it still represents an important share (38%) of the current EU budget. The direct payments constitute the key support mechanism under the CAP: 72% of the budget allocated for the CAP is reserved for direct payments. For the years 2014-2020, the direct payments aid accounted for over 40 billion euros per year.⁴

5.1.1 A complex legal framework

Over the last decades, EU agricultural policy has been subject to many reforms that have shaped the direct payments legal framework. The current legislative framework is the result of the reform that took place in 2013. The regulations that govern the direct payments consist of two basic acts, two delegated acts and two implementing acts:

Basic regulation 1306/2013⁵

Basic regulation 1307/2013⁶

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- 1 Article 39 of the Treaty establishing the European Economic Community and Article 39 TFEU.
 - 2 Regulation (EEC) 25/1962 of 20 April 1962 on the financing of the common agricultural policy.
 - 3 Council Regulation (EC) 1290/2005 of 21 June 2005 on the financing of the common agricultural policy.
 - 4 CAP explained. Direct Payments for Farmers 2015-2020 (May 2017) available at https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/direct-payments-schemes_en.pdf (last accessed 29 September 2019).
 - 5 Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy.
 - 6 Regulation (EU) 1307/2013 of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy.

- Commission delegated regulation 639/2014⁷
- Commission delegated regulation 640/2014⁸
- Commission implementing regulation 641/2014⁹
- Commission implementing regulation 809/2014¹⁰

Although the reform of 2013 aims at simplification of the direct payments rules, after the 2013 reform the legislative framework governing the direct payments still provides for a complex legal framework that must be implemented by the Member States.¹¹ One of the reasons for the increased complexity of the legal framework, is that the reform reinforced the integration of greening requirements in the first pillar by making 30% of the direct payments conditional on fulfilling greening requirements.¹² The reform further aimed at more 'targeted support' by introducing subsidies for young farmers as well as several optional schemes.¹³ Better targeting also implies additional eligibility criteria. The introduction of optional schemes and new eligibility criteria required detailed and different rules on controls and control methods.

5.1.2 Shared management

Characteristic for the direct payments financed from the first pillar is that the subsidies are implemented in the context of shared management.¹⁴ In this system of shared management, the responsibilities of the Commission and the Member States are intertwined. Whilst the Member States are responsible for the implementation of the direct payments regulations, the Commission monitors and controls the Member States' implementing practices.

The controlling and supervisory powers of the Commission can be traced back to the fact that the Commission is responsible for the implementation of the EU budget. Article 317(1) TFEU provides that the Commission implements the EU budget in cooperation with the Member States under its own responsibility. As 'guardian of the EU budget', the Commission audits the implementation of the direct payments legislation by the Member

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- 7 Commission delegated regulation 639/2014 of 11 March 2014 supplementing Regulation (EU) 1307/2013 and amending Annex X to that Regulation.
 - 8 Commission delegated regulation (EU) 640/2014 of 11 March 2014 supplementing Regulation 1306/2013.
 - 9 Commission implementing regulation (EU) 641/2014 of 16 June 2014 laying down rules for the application of Regulation 1307/2013.
 - 10 Commission implementing regulation 809/2014 of 17 July 2014 laying down rules for the application of Regulation 1306/2013 of the European Parliament and the Council with regard to the integrated administration and control system, rural development measures and cross compliance.
 - 11 See Kranenborg 2016, 117.
 - 12 Article 47 of Regulation (EU) 1307/2013; Kranenborg 2016, p. 115.
 - 13 CAP explained. Direct Payments for Farmers 2015-2020 (May 2017).
 - 14 Article 4 of Regulation 1306/2013.

States. Where the Commission finds that direct payments have not been granted in accordance with Union law, the Commission is empowered to impose financial corrections and to recover the amounts that have been unduly paid from the Member States.¹⁵ Although the Commission bears ultimate responsibility for the EU budget, the Commission is dependent on the Member States' administrations when it comes to the correct implementation of the budget.¹⁶

It is the obligation of the Member States to take 'all measures necessary to ensure effective protection of the financial interests of the European Union'.¹⁷ This means that the Member States shall designate paying agencies that are entrusted with the task of carrying out the payments (the direct payments) to the farmers (the beneficiaries). These paying agencies also need to verify and control whether direct payments are correctly and duly spent and to this end carries out administrative checks as well as on-the-spot checks.¹⁸ When irregularities are found, the Member States are required to take corrective measures that can take the form of the reduction or withdrawal of aid, or of administrative penalties.¹⁹ Furthermore, in order to be able to make the payments and carry out the controls, the Member States shall set up the Integrated Administration and Control System (IACS).²⁰ This system consists of different elements and databases, such as the land parcel identification system (LPIS), and a control system that ensures checks of aid applications lodged by the farmers.

In brief, the Member States need to take various implementing measures to implement the direct payments rules. These practices will be discussed in more detail when searching for traces of the use of guidance documents in this process. For now, it suffices to note that despite the notion of 'shared management' the implementation of EU subsidy regulations is characterised by hierarchal elements. The Member States need the approval of the European Commission for the payments that have been made and face financial corrections if they do not fulfil their tasks in accordance with EU legislation.

5.1.3 Flexibility

The direct payments legal framework, especially after the 2013 reform, leaves flexibility or 'room for manoeuvre' to the Member States in the implement of the EU legislative provisions. Different forms of flexibility can be discerned in the direct payments rules. For instance, Member States can voluntarily apply certain aid schemes in order to further 'target' direct

15 Article 52 of Regulation 1306/2013 and Article 59 of Regulation 966/2012.

16 See also Hofmann, Rowe & Türk 2011, p. 347.

17 Article 59(2) of Regulation 966/2012 and Article 58 of Regulation 1306/2013.

18 Article 74 of Regulation 1306/2013; article 59(2) of Regulation 966/2012.

19 Article 63 and article 77 of Regulation 1306/2013.

20 Article 67 of Regulation 1306/2013.

payments;²¹ they need to make decisions on the implementation of different aid schemes and on the conditions under which aid is granted;²² and they need to decide on the form of technical implementing measures.²³ Furthermore, direct payments regulations contain provisions of which the meaning might not be clear from the outset and that could be understood in various ways.²⁴

According to the former Commissioner of Agriculture and Rural Development, Dacian Cioloş, the 'European Union of 28' can only grant more flexibility in implementation practices than in the past.²⁵ However, in light of the flexibility clauses, the open and vague norms as well as the complex character of direct payments legislation, it is not surprising that implementing questions, problems or uncertainty might arise when implementing these EU legislative rules. Problems in implementation practices may eventually result in financial corrections being imposed on the Member States and lead to the recovery of aid from final beneficiaries. The Member States therefore regularly request that the Commission provides clarity and assistance on the implementation of the direct payments regulations.²⁶ Former Commissioner Cioloş considers the belief that ambiguous provisions provide room for manoeuvre to the Member States to be a *faux espoir*.²⁷ Eventually, as Cioloş explains,²⁸ the Commissioner is asked to clarify the issue. This leads us to the next section that discusses the various direct payment guidance documents that complement the EU legal framework.

5.2 DIRECT PAYMENTS GUIDANCE DOCUMENTS

In the area of direct payments, the issuing of guidance documents by the Commission's services is not a recent phenomenon. Direct payments guidance documents have been issued since the introduction of the first direct payments schemes in 1992. Initially, guidance was provided in the form of letters or interpretative notes that were sent to the Member States in response to questions raised on the correct interpretation or application of the EU legislative rules. The first working documents or predecessors

21 For instance, the Member States can chose to apply a so-called redistributive payment (Article 41 of Regulation 1307/2013), they can provide support to small farmers (Article 61 of Regulation 1307/2013) and may grant limited coupled support (Article 52 of Regulation 1307/2013).

22 See for instance Article 4(1)(c)(ii) of Regulation 1307/2013.

23 Such as the techniques used for the identification and delineation of agricultural parcels in the Land Parcel Identification System See Article 70 of Regulation 1307/2013.

24 See for instance Article 4(1)(i) of Regulation 1307/2013.

25 Hervieu 2015, p. 8.

26 As followed from (formal and informal) interviews conducted with Commission and national officials.

27 Hervieu 2015, p. 3.

28 Hervieu 2015, p. 8.

to working documents were also issued already in the early 1990s. Since the reform in 2013, the Commission services have started to issue guidance documents more proactively and at an early stage of the implementation process.²⁹ The guidance documents now have a more general character; not answering specific questions but giving extensive guidance and explanation on the EU direct payment rules. The number of guidance documents has increased and their form and character are now more diverse. Guidance documents are issued in different forms and under different names, resulting in a scattered landscape, or in the words of one of the interviewees: in 'guidionitis'.³⁰

This section describes this scattered landscape of direct payments guidance documents. It first outlines some general characteristics of these documents, gives an overview of different categories of guidance documents, and describes the different types of direct payments guidance that can be identified within the various guidance documents.

5.2.1 A scattered landscape

Most of the time, guidance given to the Member States is laid down in a document, the main aim of which is to assist the Member States in the implementation of direct payments legislation. These documents then bear the name guidance documents, interpretative notes, or working documents and as such are relatively easily recognisable as guidance documents. However, guidance can also be included in other documents that do not have the form of a 'typical' guidance document. For instance, guidance may feature in minutes of committee meetings, or in the reactions of the European Commission to the notifications made by Member States as required by the direct payments legislation.³¹ Furthermore, guidance may also be given orally, in bilateral meetings or during committee meetings or expert groups. The various forms that direct payments guidance may take make it difficult, if not impossible, to provide an exhaustive overview of the guidance documents.

The high number as well as the various forms of guidance documents is not the only characteristic of direct payments guidance documents. Another feature is that these documents are often, even most of the time, not 'published' in the sense that they are not made accessible to the public. Direct payments guidance documents are in principle only distributed among the paying agencies responsible for the implementation of direct payments legislation. Previously, the direct payments guidance documents were sent to the national authorities in paper. Nowadays, the guidance documents are distributed to the national authorities via CircaBC, a plat-

29 Interview 1 – Commission official A.

30 Interview 1 – Commission official A; Interview 2 – Commission official A.

31 DS-CDP-2015-04-rev1.

form where the documents are electronically distributed to the national administrations but not made publicly accessible.

Nonetheless, it seems that increasingly Commission services are opening up the black box of direct payments guidance to the general public, and thus to the farmers. Certain guidance documents have been published at the 'Wikicap' website.³² The Wikicap website is maintained by the Joint Research Centre (JRC) that supports DG AGRI services in providing technical assistance to the Member States. For a few years now several general as well as technical guidance documents are freely accessible on this website. To the above characteristics of guidance documents (the high number, various forms and shapes, and invisibility of guidance documents), a fourth characteristic can be added. This is the changeable character of direct payments guidance documents: guidance documents are often are subject to a continuous process of updates and revisions. This changeable character may be the result of the issuing of guidance documents at an early, anticipatory stage in the implementation process. As a result, guidance documents often have to be revised at a later stage when more insights have been acquired on the successes or pitfalls of implementing processes and methods.

Table 5-1 provides an overview of the main categories of guidance documents issued in the area of direct payments. These categories bring together guidance documents that are comparable in terms of their form, name and issuing process. This overview draws on an inventory of guidance documents made by the author in the context of a traineeship conducted at the Directorate General of Agriculture and Rural Development of the European Commission from October 2015 to February 2016.

32 See https://marswiki.jrc.ec.europa.eu/wikicap/index.php/Main_Page. Last accessed on 17 October 2019. <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

Table 5-1 Categories of direct payments guidance documents

Category	Description
Guidelines on financial corrections.	The guidelines on the calculation of financial corrections (C(2015)367 final) are adopted in the framework of the conformity and financial clearance of accounts procedures. The guidelines clarify how the European Commission intends to use its own discretionary powers to apply financial corrections and thus fall in the category of 'decisional acts' (see section 2.1.3).
RIPAC notes	RIPAC notes are one of the oldest forms of guidance documents, which during the last years have no longer been issued. RIPAC notes are usually drawn up after a similar problem or question has been raised, orally or in writing, by several Member States. The interpretative notes are drafted according to a standard model, are translated to all official EU languages and distributed to the Member States.
DG AGRI letters	The Member States regularly send letters to the European Commission asking questions related to the implementation of the direct payments schemes. The DG AGRI services reply to these questions in the form of letters that as a general rule made available to the other Member States via CircaBC.
DG AGRI guidance documents	DG AGRI guidance documents provide general guidance to the Member States on aspects related to one overarching topic, such as the active farmer provision, the on-the-spot checks, the elaboration of aid applications, and the management of permanent grassland areas.
Other guidelines and working documents	This broad category consists of other documents containing guidance related to IACS and Direct Payments. These documents can take various forms, such as working documents, question and answer documents, documents with observations of the Member States concerning their implementing decisions or documents that, simply, contain an overview with examples that could help Member States to implement direct payment schemes.
JRC technical guidance documents	The Joint Research Centre issues various 'technical guidance documents' related to the direct payments legislation after the 2013 reform. The guidance documents complement the DG AGRI guidance documents. The documents are prepared by the JRC, and reviewed and validated by the DG AGRI services. The technical guidance documents usually are developed after an exchange of best practices with experts from the Member States.
Wikicap guidance	The Wikicap website of the JRC serves as a platform to provide technical guidance to the Member States related to the implementation of the integrated administration and control system. For instance, the website gives instructions on the quality assessment of the land parcel identification system and displays answers to the questions of the Member States related to technical issues. The Wikicap website also gives access to several guidance documents issued by the DG AGRI services.
Expert Workshops	Guidance may also be given during the expert workshops that are organised in Brussels. During these workshops, organised by the DG AGRI services, Member States are invited to exchange experiences and good practices on the implementation of the CAP. The organisation of workshops in the area of direct payments and IACS is a recent phenomenon and was initiated in the first half of 2015.

5.2.2 Types of guidance

The above overview demonstrates that the issuing of guidance documents in the area of direct payments has become one of the core activities of the DG AGRI services responsible for the regulatory and implementing aspects of the direct payments legislation. These categories of guidance documents do not necessarily reflect one of the five types of guidance documents introduced in section 3.2. Instead, the five different types of guidance feature in direct payments guidance documents.

Firstly, direct payments guidance documents often contain interpretative guidelines that address vague or openly formulated legal provisions. For instance, the permanent grassland guidance provides guidance on the interpretation of the definition of permanent grassland that gave rise to many questions from Member States.³³ Interpretative guidelines are also given in relation to the active farmer provisions, or concerning the question what it means that ecological focus areas need to be 'adjacent' to arable land.³⁴

Secondly, characteristic for many direct payments guidance documents is that they assist Member States in making choices on the form or method of implementing measures that outline how the provisions in direct payments regulations are 'best met'. These guidelines thus take the form of 'implementing guidance'. Such implementing guidelines can for instance be found in the EFA layer guidance document which makes clear that for the design of the EFA layer in the LPIS system, the Member States should 'as a minimum requirement' register the EFAs that have been declared by the farmers.³⁵

Thirdly, direct payment guidance documents also contain explanatory guidance that explains or summarises the complex direct payments schemes. An example is the paragraph that elaborates on 'what/why checking/controlling and measuring' in the guidance document on on-the-spot checks.³⁶ Another example is the aid applications guidance document, which comprises an extensive overview of the information that is to be included in the pre-established form to be provided by the beneficiary.³⁷ Remarkably, in several places the aid applications guidance also refers to implementing guidance laid down in other DG AGRI guidance documents, such as the LPIS guidance and the OTSC guidance document.

Fourthly, the many technical guidance documents issued by the JRC and Commission services clarify what technical methodologies could or should be used by the Member States for the implementation of the inte-

33 DS/EGDP/2015/02 REV 4, p. 4, 5.

34 DSCG-2014-29 and DSCG/2014/31-FINAL REV 1.

35 DSCG/2014/31-FINAL REV 1, p. 19.

36 DSCG/2014/32 FINAL REV 1, p. 11.

37 DSCG/2014/39 FINAL – REV 1.

grated administration and control system. Illustrative is the technical guidance for on-the-spot checks of ecological focus area requirements.³⁸

Finally, during the so-called ‘workshops’, the Commission services facilitate and encourage an exchange of experiences and information on ‘good implementing practices’. The Member States provide information on their implementing decisions and methods, and discuss the various options during an informal expert meeting. These exchanges normally result in an overview of good practices developed by the Commission and shared with the Member States.

From the above, it follows that direct payments guidance documents assist the Member States in the implementation of direct payments legislation in various ways. The guidance documents seek to clarify vague and unclear provisions; explain the rationale and logic behind the complex direct payments legislation; support the Member States in dealing with the various implementing options; provide them with technical advice and inform them on good implementation practices. Different types of guidance can often be found in one and the same guidance document.

5.3 EU EXPECTATIONS ON THE USE OF DIRECT PAYMENTS GUIDANCE DOCUMENTS

Before turning to the national level, this section will explore whether the practices of the European Commission and the rulings of the Court of Justice reveal expectations as to how national authorities and courts should use direct payments guidance documents when implementing direct payments legislation. Do the practices of the European Commission and the rulings of the Court result in pressures to act guidance-proof?

5.3.1 Expectations of the Commission: guidance as an audit tool

‘Non-binding clauses’ in direct payments guidance documents

Despite their differences in form and shape, the direct payments guidance documents have one thing in common: they (generally) emphasise that they do not have legally binding force. The ‘oldest’ guidance documents in the form of interpretative notes already mentioned that the guidelines are not binding and that only the Court of Justice can give an authoritative interpretation of EU law. The more recent guidance documents elaborate further on the non-binding character of the guidelines. For instance, the introductory section to the on-the-spot check guidance document, revised in 2018, states that:

38 DSCG/2014/31-FINAL REV 1, p. 4.

'It [the guidance documents] is provided for information purposes only and is not a legally binding document. It was prepared by Commission services and does not commit the European Commission. In the event of a dispute involving Union law it is, under the Treaty of the Functioning of the European Union, ultimately for the Court of Justice of the European Union to provide a definitive interpretation on the applicable Union law.'³⁹

Similar references to the non-legally binding character can be found in technical guidance documents. For instance, the technical guide for on-the-spot checks of Ecological Focus Areas states that: 'only some general recommendations on how to possibly measure and check the different type of elements are given. (...) Ultimately it will [be] the Member State's choice to decide on the different rules to set up their methodology to implement, it should however be applied in a consistent way'.⁴⁰ Nonetheless, it needs to be noted that although direct payments guidance documents often emphasise the non-binding character of the guidelines, the text of the guidance documents can be compelling and prescriptive.

The European Commission: from partner to supervisor

Direct payments guidance documents are often drafted in cooperation with the Member States and discussed in expert committees. At this stage, the Commission acts more as a *partner*, assisting the Member States by providing guidance to them. However, at a later stage the Commission comes to act as 'guardian of the budget'. As already outlined above, the Commission has the power to impose financial corrections and to start an infringement procedure in the case of an alleged violation of EU direct payments rules.⁴¹

The protection of the financial interests of the European Union is high on the political agenda of the European Commission. It is included in the top three focus areas where the Commission closely monitors the implementation of EU law.⁴² This explains why in the area of EU subsidies, the European Commission actively monitors and 'watches' the Member States' implementing practices.⁴³ This means that the Member States run the risk of financial corrections when not acting in line with the direct payments legislation. Does the Commission also expect the Member States to act in accordance with the guidance documents?

39 DSCG/2014/32 – FINAL REV4.

40 DS-CDP-2015-09-FINAL, p. 4.

41 See above section 5.1.2

42 COM(2017)370 final, p. 4.

43 See on a discussion of different forms of Commission oversight Steunenberg 2010.

Generally speaking, the audit services of the Commission indeed expect the Member States to comply with the guidelines of the European Commission.⁴⁴ This was made clear by DG AGRI officials as well as by national officials working for the Dutch paying agency.⁴⁵ Indications about the use of the guidelines during audits can also be found in the case law of Dutch courts⁴⁶ as well in the explanatory notes to the ministerial regulation and policy rules that transpose guidelines of the European Commission.⁴⁷

Different roles for different types of guidance?

One of the Commission auditors who was interviewed in the context of this research, explained that in audit practices a distinction is made between the role played by the different types of guidance.⁴⁸ He mentioned that during audit missions the interpretative guidelines generally serve as the 'interpretation standard' as they represent the view of the Commission services as to how to interpret the direct payments rules. Implementing and technical guidance provisions are also used as an audit tool, but in a different way. The recommendations on the form and method of implementing measures are also, in principle, used to monitor implementing practices. However, there are alternatives: the Member States can also choose a different 'route' to implement the legally binding provisions.⁴⁹ 'We accept that a Member States applies a different route, as long as they respect the EU regulation'.⁵⁰

According to the official, guidance that has a highly explanatory character generally plays little role in auditing procedures.⁵¹ The explanatory guidance does not provide for standards or principles that can be taken into account, but rather explains the logic or rationale behind the legislative provisions. As a result, the explanatory guidelines may become irrelevant as an audit tool. Similarly, documents that provide for an overview of, and that communicate, best practices are likely to fade to the background in audit proceedings.⁵²

From the above, the conclusion can be drawn that through the use of the direct payments guidelines as an audit tool, strong pressure has been constructed vis-à-vis the Member States to comply with the guidelines.

44 Interview 1 – Commission official A; Interview 2 – Commission official A; and several informal interviews.

45 Interview 3 – National officials A and B; Interview 4 – National officials A and C; and several informal interviews.

46 See for instance CbB 13 October 2006, ECLI:NL:CBB:2006:AZ0218, par. 3.2.

47 See for instance the explanatory note that introduces the 'fifty trees rule' in the Dutch Ministerial regulation, which mentions that this rule is 'consistently' applied by the Commission services, See *Stcrt.* 2009, 62. p. 40 and below section 5.5.1

48 Interview 1 – Commission official A and Interview 2 – Commission official A.

49 Interview 1 – Commission official A.

50 Interview 2 – Commission official A.

51 Interview 1 – Commission official A and Interview 2 – Commission official A.

52 Interview 1 – Commission official A and Interview 2 – Commission official A.

Indeed, non-compliance with the guidelines can be taken into account by the Commission when it comes to the decision whether an alleged violation of the direct payments rules is at stake, and thus the decision whether to impose a financial correction. Even if in practice a distinction can be made for the role of different types of guidance in audit practices, the question remains whether at the national level the guidance documents are indeed perceived as having a different role than the audit instruments.

5.3.2 Expectations of the Court of Justice

Having concluded that the audit practices of the Commission lead to strong pressure on the Member States to act guidance-proof, the next question is whether and how the Court of Justice responds to these pressures. What expectations on the use of the direct payments guidelines can be derived from the case law of the Court?

As a first note, it can be remarked that no rulings were found in which the Court explicitly refers to direct payments guidelines for the interpretation or application of direct payments rules.⁵³ In the few rulings that were found in which it becomes clear that direct payments guidelines were invoked by one of the parties, the guidance documents are not referred to in the part of the rulings that sets out ‘the findings of the Court’.⁵⁴ Thus, it seems that references to direct payments guidance documents in the Court’s rulings are scarce. This invisibility of direct payments guidelines in the rulings of the Court contrasts with the numerous documents and their important role as a informal regulatory tool of the Commission.⁵⁵

Even though the Court does not refer to guidance documents in an explicit manner, the Court still acknowledges that the direct payments guidance documents can have a *de facto* binding effect on national authorities. As already discussed in section 3.3.3, the Court of Justice recognises that guidance documents may have informative or steering effects on the national authorities. In the ruling *Italy v Commission* the Court of Justice considers that the guidance ‘may have the effect of informing the Member States that they are running the risk of Community financing being refused’.⁵⁶

53 The search at www.curia.europa.eu for rulings in the field of ‘agriculture and fisheries’ was conducted with search terms: ‘interpretative notes’, ‘Wikicap’, ‘guidance document’, ‘working document’ and ‘guidelines’. Last search conducted at 15 June 2019.

54 See for example CJEU 15 May 2019, C-341/17, ECLI:EU:C:2019:409, par. 33 (*Hellenic Republic v European Commission*) in which the Hellenic Republic refers to a guide of the Commission, published by the Joint Research Centre, in support of its interpretation of ‘permanent pasture’.

55 In contrast, the decisional guidelines on the financial corrections feature frequently in the CJEU’s rulings. These guidelines, however, fall out of the scope of this research as they are adopted in the exercise of the Commission’s discretionary powers. See for an example: CJEU 15 October 2014, C-417/12 P, ECLI:EU:C:2014:2288 (*Denmark v European Commission*).

56 CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727, par. 30 (*Italy v Commission*).

According to the Court, this risk is not a legal effect but ‘a mere consequence of fact’.⁵⁷ Similarly, the General Court considers the risk that guidance might be relevant for the decision of the European Commission to start an infringement procedure ‘a mere consequence of fact’.⁵⁸

Finally, the direct payments guidelines may also have a certain binding effect on national courts. Indeed, in light of the *Grimaldi* case law it cannot be ruled out that national courts can be bound to take certain direct payments guidance documents into consideration. An indication that points in this direction is given in the *Batlanta* ruling, in which the Court of Justice applies the *Grimaldi* formula by analogy to guidelines related to the granting of subsidies in the area of structural funds.⁵⁹ Nonetheless, even if the *Grimaldi* formula applies to direct payments guidelines, the question remains whether this is the case for all guidelines laid down in all different forms of guidance documents. Should, for instance, a distinction be made between the guidelines laid down in the general guidance documents and other, more informal documents such as letters and notices? For now, on the basis of the rulings of the Court of Justice, there is no clear answer to this question.

5.3.3 Strong pressures to act guidance-proof

From the above, it follows that national authorities are subject to strong steering pressures to act in conformity with the direct payments guidelines. This pressures stem in particular from the threat of financial corrections, but also from the risk that not following the guidelines may be relevant for the Commission’s decision to open an infringement procedure. By acknowledging these informative effects of the Commission guidelines on national authorities, the Court of Justice – in an indirect manner – facilitates the construction of these steering pressures on national authorities.⁶⁰ Less strong pressures to apply the Commission’s guidelines when reviewing the administrative practices are exerted on national courts. The *Grimaldi* formula ‘only’ provides that national courts are bound to take the guidelines into consideration. These conclusions lead us to the next section, which analyses the use of direct payments guidance documents by the authorities and courts in the Dutch legal order.

57 CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727, par. 30 (*Italy v Commission*).

58 CJEU 20 May 2010, T-258/06, ECLI:EU:T:2010:214, par. 151 (*Germany v Commission*).

59 CJEU 3 September 2014, C-410/13, ECLI:EU:C:2014:2134, par. 64 (*Batlanta*). This ruling has been discussed above in section 3.4.2.

60 Van Dam 2015, p. 194, 195.

5.4 IMPLEMENTING EU DIRECT PAYMENTS LEGISLATION IN THE NETHERLANDS

Before tracing the use of direct payments guidance at the different stages of the implementation process, this section describes the ‘context’ in which direct payments regulations are implemented. It outlines the legal framework, the actors involved in the implementation process and introduces the Trade and Industry Appeals Tribunal.

5.4.1 The legal framework: the Ministerial Regulation and policy rules

EU direct payments legislation, although laid down in regulations, cannot be directly applied at the national level. Norms and concepts that shape the eligibility criteria for direct payments need to be further defined and operationalised. In the Netherlands, the post-2013 EU direct payments regulations are operationalised in the *Uitvoeringsregeling rechtstreekse betalingen GLB*, which is a Ministerial Regulation.⁶¹ This Ministerial Regulation is complemented by Dutch policy rules laid down in the *Beleidsregel Uitvoeringsregeling rechtstreekse betalingen GLB*. These policy rules provide for the sanctions that are applied in the case of irregularities and spell out what conditions apply for direct payments to ‘young farmers’.

Characteristic for both the Ministerial Regulation and the policy rules is that amendments to these rules are made on a frequent, almost continuous basis. These frequent changes to the Ministerial Regulation and the policy rules can be explained in light of the complex character of EU direct payments legislation and the changing insights on what is the correct interpretation of EU legislation, or on the feasibility of policy choices. Moreover, as we will see, amendments to the Ministerial Regulation and the policy rules are also the result of the frequent issuing and revision of guidance documents by the Commission.

5.4.2 Actors: the ministry and paying agency

At the time of writing, the responsible ministry for the implementation of the EU direct payments legal framework is the Ministry of Agriculture, Nature and Food Quality (hereinafter: the Ministry). The Minister (and previously the State Secretary)⁶² plays an important role at the first stage of the implementation process. He or she not only adopts the Ministerial Regulation, but also decides about amendments to this Regulation. At subsequent stages of the implementation process, the paying agency plays

61 The Ministerial Regulation is based on the *Landbouwwet* (the ‘Agricultural Act’), which is a formal legislative act.

62 The Regulation was adopted by the State Secretary of Economic Affairs, who under the former government was responsible for the adoption of the Ministerial Regulation.

a key role in the implementation process. The Dutch paying agency is the *Rijksdienst voor Ondernemend Nederland* (the Netherlands Enterprise Agency, RVO) which is an agency of the Ministry of Economic Affairs.⁶³ The paying agency makes payments to the beneficiaries, carries out the checks and controls and is responsible for keeping the integrated administration and control system up to date.

The Ministry and the paying agency thus have distinctive roles, yet in practice work closely together in the implementation process as well as during negotiations in Brussels. For instance, representatives of both the Ministry and the paying agency take part in expert committees held in Brussels.⁶⁴ It is also in these committees where draft direct payments guidance documents are presented and discussed, and where national experts regularly request that the Commission services issue guidance documents.

5.4.3 The Dutch Trade and Industry Appeals Tribunal

The competent court to review the decisions taken by the paying agency in the area of direct payments is the Dutch Trade and Industry Appeals Tribunal (*het College van Beroep voor het Bedrijfsleven*). The Tribunal is one of the three highest administrative courts and in the area of direct payments the court of first and only instance.⁶⁵ Nonetheless, prior to challenging a decision before the Tribunal, a farmer still needs to lodge an objection with the Minister. It is only possible to challenge a decision taken at the objection stage before the Trade and Industry Appeals Tribunal when a decision at the 'administrative' objection stage is turned down. Eventually, only a small percentage of all decisions concerning the eligibility of aid applications ends up being contested before the Trade and Industry Appeals Tribunal.⁶⁶

5.5 THE USE OF DIRECT PAYMENTS GUIDANCE BY NATIONAL AUTHORITIES

Having outlined the legal framework and actors involved in the implementation process, this section explores the use of direct payments guidance documents at the different stages of the implementation process. The analysis draws on: 1) traces found in the text of the Ministerial Regulation and policy rules as well as the explanatory notes thereto; 2) information in the rulings of the courts that were found with the search for explicit references; and 3)

63 The fact that the paying is an agency of the Ministry of Economic affairs still reflects the structure of the previous government, where the Ministry for Economic Affairs was responsible for the implementation of direct payments legislation.

64 These expert committees take place in the context of the legislative process of adopting implementing and delegated acts.

65 See also above section 4.3.2

66 See *Stcrt.* 2014, 36127, p. 35.

information acquired through informal and formal interviews with Dutch officials working for the Ministry and the RVO, the Dutch paying agency.

The interviews already give a first general impression of the role of direct payments guidance documents in Dutch implementation processes. The officials consistently and repeatedly emphasised the binding character of the guidance documents. The guidance documents, the officials noted, in practice 'have the same status as legislation'.⁶⁷ The guidance documents are generally strictly followed when implementing EU direct payments legislation in practice.⁶⁸

Still, however, this general insight given by the Dutch officials does not give a full answer about the role of direct payments guidance documents. For instance, does the use of direct payments guidance as binding aid apply to all types of guidance? In what implementing instruments can traces of guidance documents be found? And, what are the (possible) reasons for the perception and use of guidance documents as a binding instrument?

This section traces the role of direct payments guidance documents at the different stages of the implementation process. It shows that direct payments guidelines leave traces in the Dutch Ministerial Regulation 'as if they were binding rules', that guidelines are used as a standard when making implementing and technical decisions related to the setting up of the integrated administration and control system and, finally, that the guidelines serve as a basis for decisions that address the final beneficiaries.

5.5.1 Bringing the Ministerial Regulation in line with Commission guidance

The use of guidance documents as a 'rulemaking instrument' does not immediately become clear from the text of the Ministerial Regulation: the Regulation does not contain explicit references to Commission guidance documents. A glimpse of direct payments guidelines is only given in the explanatory notes to amending decisions of the Ministerial Regulation where some traces of direct payments guidance documents have been found.⁶⁹ For instance amending decision *Stcrt.* 2016, 16496 explains that a change to Article 2.2 that operationalises the concept of a minimum activity is made 'in light of remarks made by the European Commission'.⁷⁰ The explanatory note to the amending decision that gives rules on the definition of an 'active farmer' explains that this change is a 'direct consequence of a stricter interpretation of the European Commission'.⁷¹

67 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

68 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

69 The search for explicit references in these explanatory notes to the amending decisions (only) revealed eight references to direct payment guidance documents or more indirectly to the 'opinion' of the European Commission. See Annex 1.2.1

70 *Stcrt.* 2016, 16496, p. 4.

71 See *Stcrt.* 2017, 13791, p. 4.

These glimpses of direct payments guidelines reflect the ‘tip of the iceberg’. In practice, the direct payments guidelines are an important rule-making instrument to operationalise the complex direct payments rules. This was made clear by Dutch officials involved in the drafting process of the Ministerial Regulation as well as the policy rules (the latter will be discussed below). The officials explained that direct payments guidance documents regularly lead to amendments to the Ministerial Regulation and described various examples of such changes.⁷² The guidance documents are used to further operationalise and define the conditions under which direct payments are granted.⁷³

With these general remarks in mind, we can set out to further explore the (often invisible) traces of direct payments guidelines in the Dutch Ministerial Regulation. This section discusses some examples that illustrate how Commission guidelines find their way into the Dutch Ministerial Regulation.

Light tillage: touching upon the limits of EU hard law

Guidance guidelines leave ‘direct traces’ in the Ministerial Regulation when they are ‘copied’ into articles of the Ministerial Regulation.⁷⁴ The provisions in the Ministerial Regulation then reflect the wording of guidelines included in the direct payments guidance documents. An example is provided by Article 2.15(3) of the Ministerial Regulation, which provides that under certain circumstances ‘light tillage’ is allowed on environmentally sensitive permanent grassland. This Article implements Article 45(1) of Regulation 1307/2013 that imposes a ban on ploughing on environmentally sensitive grassland. The allowance of light tillage, however, derives from the permanent grassland guidance, as is also made clear in the explanatory note to the introduction of Article 2.15(3) in the Dutch Ministerial Regulation.⁷⁵ This permanent grassland guidance issued by the DG AGRI Commission services provides that in spite of the ban on ploughing on this type of grassland, the use of light tillage is allowed provided it is only with the purpose of preparing the soil to restore the grass.⁷⁶ Thus, this first example already illustrates the ‘tangible’ effects that Commission guidelines may have on Dutch rulemaking practices. It also shows that the transposition of the guidelines into national legally binding rules may touch upon the limits of underlying EU legislation.

72 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

73 Interview 3 – National officials A and B.

74 And thus take the form of linguistic similarities with the text of direct payment guidance documents.

75 *Stcrt.* 2016, 16496, p. 4.

76 See DS/EGDP/2015/02 REV 4, p. 9.

A five metres buffer zone: when guidelines become 'politically binding'

A second example of the transposition of direct payments guidelines into the Ministerial Regulation, is the adoption by the Ministerial Regulation of the Commission's guideline allowing for a 'five metres buffer zone'.⁷⁷ In line with the EFA layer guidance document, Article 2.17 allows for a five metres buffer zone between ecological focus areas and arable land. This article operationalises the legislative requirement that some ecological focus areas must be 'adjacent to arable land'.⁷⁸

The transposition of the Commission's five metres buffer zone guideline in the Ministerial Regulation is interesting since it shows how Commission guidelines could become 'politically binding'. In this case, the guideline was transposed contrary to Dutch policy preferences: Dutch officials preferred the criterion that the ecological focus areas and arable land had to be physically touching, as was provided for in the first version of the EFA layer guidance document.⁷⁹ The main reason to nevertheless proceed to transpose the Commission's rule is that Commissioner Hogan presented the guideline as one of his 'simplification measures'.⁸⁰ In light of the high 'political status' of the guidelines, it would be impossible to explain to farmers that a stricter interpretation was employed than the more lenient approach as allowed for by the Commission:

The guideline was presented as a simplification measure of Commissioner Hogan'. (...) 'Therefore the State Secretary cannot explain to parliament to not to implement the simplification measures'.⁸¹

The fact that the five metres buffer zone in the Dutch Ministerial Regulation transposes a guideline of the European Commission, does not become visible in the explanatory note to the amending decision. The explanatory note does not explain nor even mention that the five metres buffer zone derives from Commission guidelines.⁸²

The fifty trees rule: a good fit with national practices?

The above two examples of the transposition of Commission guidance feature in the Ministerial Regulation that is currently in force. Traces of Commission guidelines were also found in previous Ministerial Regulations.

77 DSCG/2014/31-FINAL REV 1.

78 The requirement can be found in article 46(2) of Regulation 1307/2013.

79 Interview 3 – National officials A and C.

80 The announcement of the simplification measures can be found via https://ec.europa.eu/agriculture/newsroom/204_en (last accessed 5 August 2019).

81 Interview 3 – National officials A and B.

82 See *Scrt.* 2015, 46132, p. 7.

One of these early traces⁸³ is the transposition of the Commission's fifty trees rule laid down in Article 21 of the '*Regeling GLB-inkomenssteun*'.⁸⁴ In line with the rule laid down in the 'on-the-spot-check working document',⁸⁵ Article 21 of the Ministerial Regulation provides that agricultural parcels with more than fifty trees cannot be eligible for aid. This Article implements Article 8(1) of Regulation 796/2004 according to which areas containing trees are eligible for aid, provided agricultural activities can be carried out in the same way as on agricultural parcels without trees.⁸⁶

The transposition of the Commission's fifty trees rule is one of the exceptional cases where the explanatory note that introduced this rule sheds light on the reasons for transposing the fifty trees rule into the Ministerial Regulation. It explains that the fifty trees rule was transposed into the Ministerial Regulation for reasons of feasibility, controllability and certainty for the farmer:

'These guidelines are, although consistently applied by the European Commission, not binding. For reasons of clarity for the farmers and for the reason that the norm is easily controllable, it was decided to transpose the 50 trees norm into national legislation.'⁸⁷

As transpires from the cited paragraph, the explanatory note also mentions that the Commission services 'consistently apply' the fifty trees rule. Here, in an indirect manner, the explanatory note refers to the use of the fifty trees rule as an audit tool by the Commission services. Perhaps the use of the fifty trees rule as an audit tool also played a role in transposing the fifty trees rule into the Ministerial Regulation?

What makes the fifty trees rule an even more interesting case is that application of the fifty trees rule is challenged before the Dutch Trade and Industry Appeals Tribunal. As we will see, the strict adherence to the fifty trees rule and the critical response of the Tribunal are illustrative for the dynamics that shape the role of direct payments guidance in the Dutch legal order.

83 Another early trace to Commission guidelines features in the Ministerial Regulation that laid down rules on EC animal premiums, the *Regeling dierlijke EG-premies of 1996* (See *Stcrt.* 2002, 143). The interpretative note is referred in the ruling of CBB 13 October 2006, ECLI:NL:CBB:2006:AZ0218, par. 2.2.

84 The fifty tree rule was introduced at 20 March 2009, see *Stcrt.* 2009, 62. The fifty trees rule still features in the current Ministerial Regulation (Article 2.2(4)). This article implements Article 9(3) of Delegated Regulation 640/2014 that now explicitly allows Member States to define a maximum density of trees per hectare (which shall not exceed 100 trees per hectare).

85 AGRI/60363/2005-REV.

86 Article 8(1) of Regulation 796/2004 and later Article 34(1) of Commission Regulation 1122/2009.

87 See *Stcrt.* 2009, 62, p. 40. The explanatory note to the current Ministerial Regulation provides that the maximum of fifty trees per hectare is in line with traditional practices and environmental circumstances. See *Stcrt.* 2015, 8489, p. 5.

The maintenance obligation: defining the margin of manoeuvre

In the above cases Commission guidelines are transposed into provisions of the Ministerial Regulation: the text of the Ministerial Regulation 'reflects' the text of the guidance provisions.⁸⁸ Nonetheless, direct payments guidelines may influence provisions of the Ministerial Regulation in an even more indirect manner.

This is illustrated by Article 2.2(1) of the Ministerial Regulation that defines the criteria that need to be met for an agricultural area to be maintained in a state that makes it suitable for grazing or cultivation and thus eligible for aid.⁸⁹ In this case, the Dutch State Secretary changed the initial criteria formulated in the Ministerial Regulation after critical remarks expressed by the Commission.⁹⁰ According to the Commission services, two of the initial criteria formulated in the Ministerial Regulation (the removal of grass clippings and the annual grazing of the agricultural area) did not meet the requirement, formulated by the Commission services that the criteria had to be 'non-production related'.⁹¹ In response to these remarks, the Dutch State Secretary changed the Ministerial Regulation and took out the two criteria laid down in Article 2.2.⁹²

In this case Commission guidelines shape the eligibility criteria in the Ministerial Regulation, without the text of the guidelines being reflected in the text of the legislative provision. Indeed, the non-production requirement formulated by the Commission services is not mentioned in text of the Ministerial Regulation. Thus, the guidelines are used to define the margin of manoeuvre, rather than to transpose a rule into the national implementing rules.

5.5.2 A silent influence of Commission guidance in Dutch policy rules

Direct payments guidelines not only leave their imprint in the Ministerial Regulation, the guidelines are also used as an aid when drafting the policy rules that complement the Ministerial Regulation. Article 5 of the policy

88 And therefore takes the form of a linguistic similarity.

89 See Article 4(c)(ii) of basic regulation 1307/2013 and Article 4(2)(a) of Regulation 1307/2013.

90 Interview 3 – National officials A and B.

91 The non-production requirement is laid down in document DS-CDP-2015-04-rev1. This document, as we will see in section 5.6.3, also features in rulings of the Trade and Industry Appeals Tribunal.

92 See *Stcrt.* 2016, 16496, p. 4. Article 2.2(1) of the Ministerial Regulation was – again – revised in 2017 since for reasons of controllability it appeared sufficient to provide that the agricultural area needs to be free from bushes (*verstruiking*) and from overgrowth (*verruiging*). See *Stcrt.* 2017, 70783, p. 11.

rules that further operationalise the eligibility criteria for the young farmers payment have been shaped by Commission guidelines.⁹³

In letters sent to the Dutch and Danish authorities, the DG AGRI Commission services give further guidance on the concept of ‘effective and long-term control’, which is one of the conditions for the young farmers payment.⁹⁴ The Commission services make clear that a young farmer is considered to have effective and long-term control when the structure of the holding is not organised in such a way that the young farmer may be overruled by non-young farmers.⁹⁵ The letters also give examples of situations where the young farmer can, or cannot, be considered to have sufficient decision-making power.

The two criteria in the Dutch policy rules that define when the young farmer has effective and long-term control derive from the answers given by the DG AGRI Commission services in these letters.⁹⁶ In line with the Commission’s guidelines, the Dutch policy rule requires that the young farmer must have overruling decision-making power for decisions over 25,000 euros and that the young farmer must take part in the daily management of the farm.⁹⁷ The explanatory memorandum reiterates the two criteria and provides for further rules that reflect the guidelines given by the DG AGRI services.⁹⁸

When reading through the text of the policy rules, the influence of the Commission guidelines is, however, hard to discern and to retrace. Neither the text of the policy rule nor the explanatory guidance in the note to the policy rules refers to the correspondence with the Commission services. What is more, the letters that have guided the Dutch policy rules are only published on CircaBC: a digital platform that is only accessible to the payment agencies of the Member States. Thus, the policy rules on the young farmers payments provide another example of where Commission guidelines silently influence Dutch rulemaking practices.

Conclusion: a strong steering effect of interpretative guidelines on rulemaking practices

Having explored the use of direct payments guidelines in relation to the Ministerial Regulation and policy rules, some general conclusions can be drawn as to the role that the direct payments guidelines play at this first stage of the implementation process. In the first place, from the above it

93 The young payment scheme can be found in Article 50 in Regulation 1307/2013 and Article 49 of delegated regulation 639/2014.

94 Interview 3 – National officials A and B.

95 This is made clear in the letter of 17 March 2015 sent by the DG Agri Commission services to the Dutch Ministry of Economic Affairs. The letters have not been published.

96 Interview 3 – National officials A and B.

97 See Article 4 of the policy rules. See also *Strcrt.* 2015, 13313, p. 4; Interview 3 – National officials A and B.

98 See *Strcrt.* 2015, 13313, p. 4.

follows that the guidelines in particular take a role as aid to interpret provisions in the EU direct payments legislation. Second, the above examples also show that generally the Commission's interpretative guidelines seem to be strictly followed. Third, reasons for applying Commission guidelines have been found in the aim to provide for legal certainty and controllability, in the objective to act in line with audit practices of the Commission services as well as in political pressure to act in accordance with the views of the Commissioner and the Commission.

5.5.3 Guidance as a standard for implementing and technical decisions

The above sections show how interpretative guidelines affect, directly or indirectly, the provisions in the Dutch Ministerial Regulation and policy rules. Direct payments guidance, however, often goes beyond interpretative rules, taking the form of implementing guidance, technical guidance or good practices. These types of guidance play a role in relation to the setting up and keeping up to date of the integrated administration and control system, as well as in relation to conducting administrative and on-the-spot controls.⁹⁹

The question is whether, and to what extent, these types of guidance guide Dutch implementing and technical practices. Officials of the Ministry as well as of the Dutch paying agency indicated that these types of guidance have a similar status to the guidelines with an interpretative character.¹⁰⁰ The various documents that provide implementing and technical guidance are perceived as binding and 'in fact have the same force as legislation'.¹⁰¹ The main reason, according to the interviewees, is not to take any risk in view of the possible financial consequences.¹⁰²

In that regard, the interviewees referred to the 'LPIS experience' in 2009.¹⁰³ During audits conducted in 2007 and 2009, Commission auditors concluded that the Dutch Land Parcel Identification System (LPIS) was not up to date. For this conclusion, the Commission services found support in guidelines of the Joint Research Centre: the Netherlands had used methods that according to the JRC guidelines would give rise to 'difficulties related to location of reference parcels'.¹⁰⁴ As a result, aid had been granted for non-eligible elements such as lines of trees, wooded banks and ditches.¹⁰⁵ Eventually, in September 2009 the Netherlands was given a financial correction of 16.6 billion euros.¹⁰⁶

99 See chapter II of Regulation 1306/2013.

100 Interview 4 – National officials A and C.

101 Interview 3 – National officials A and B.

102 Interview 3 – National officials A and B.

103 Interview 3 – National officials A and B and Interview 4 – National officials A and C.

104 See JRCIPSC/G03/P/skaD(2004)2575, p. 7 and *Kamerstukken II* 2009/10, 28625, 87, p. 2.

105 *Kamerstukken II* 2009/10, 28625, 87, p. 2.

106 See *Kamerstukken II*, 2009/10, 21501-32, 359, p. 1-2.

From this LPIS experience, Dutch officials learned their lesson. When designing and setting up the new LPIS system in 2009, the Dutch authorities worked closely with the Commission services and followed the Commission recommendations on the methods to measure and identify agricultural parcels.¹⁰⁷ This LPIS experience in 2009 still shapes the role of LPIS Commission guidelines today:

'The letter of the audit of the previous direct payments framework refers to JRC guidance and therefore the [current] LPIS guidance document is considered to be very binding. Indeed the auditors take it into account. (...)'.¹⁰⁸

The officials made similar remarks about the *de facto* binding nature of other implementing and technical guidance documents, whilst repeatedly referring to the possible financial consequences that may occur when the guidelines are not followed. For instance, in relation to a guidance document on the increase of on-the-spot checks, the officials remarked:¹⁰⁹

'The increase of on-the-spot checks [document] is perceived as highly binding from which it is not possible to depart. (...) That could lead to the remark of the Commission that we have not conducted sufficient numbers of controls.'¹¹⁰

Thus, from the interviews it follows that not only the interpretative guidelines, but also the guidelines that outline appropriate implementing measures and technical methodologies, are perceived and used as binding measures. Consequently, the issuing or revision of these guidelines can have far-reaching consequences on the design of the integrated administration and control system.

Nonetheless, despite the strong steering effects, the influence of the technical and implementing guidance generally remains largely invisible. The decisions on the form and design of the different elements of the integrated administration and control system are laid down in internal framework documents.¹¹¹ These internal framework documents guide the implementing practices within the Dutch paying agency, but are not published or accessible to the public. What is more, traces of technical and implementing guidance also do not generally feature in the text of the Ministerial Regulation and policy rules.

107 *Kamerstukken II* 2009/10, 28625, 87, p. 2.

108 Interview 3 – National officials A and B. This also follows from CBb 4 June 2019, ECLI:NL:CBB:2019:227 par. 5.1 and CBb 23 April 2019, ECLI:NL:CBB:2019:161, par. 5.1.

109 DS/CDP/2015/02 FINAL.

110 Interview 3 – National officials A and B.

111 In the context of this research it has not been possible to gain access to the documents, yet information on their role and general content was given to the author during interviews with national officials.

5.5.4 Individualised decisions: guidance as a ‘binding instruction’?

Eventually, the paying agency decides on the eligibility of aid applications and allocates the direct payments to the farmers. The paying agency applies the general rules laid down in the Ministerial Regulation and the policy rules, in individual cases. Also at this final stage of the implementation process, direct payments guidelines play an important role. From the interviews with Dutch officials, a picture emerges that also at this final stage of the implementation process, the Commission guidelines tend to be strictly followed.¹¹² Deviation from guidance documents, also at this stage, is considered ‘not an option in view of the potential financial consequences’.¹¹³

The use of guidelines as a decision-making standard also transpires from rulings of the Dutch Trade and Industry Appeals Tribunal. Some groups of rulings (to be discussed below in section 5.6) reveal that the Minister develops a policy line or takes decisions based on Commission guidelines. Illustrative for the use of guidance as binding decision-making aid are the obvious error rulings and the fifty trees rulings.

Example 1: the obvious error guidelines as basis for a policy line

Generally, the use of guidance documents as a decision-making aid is not mentioned in the text of the individualised decisions.¹¹⁴ There are nevertheless some exceptions. This, according to the Dutch officials, is most clear in the obvious error decisions. These decisions assess whether errors in submitted aid applications can be considered as obvious, in the case of which EU direct payments rules allow the errors to be adjusted.¹¹⁵ The obvious error decisions refer to the guidelines in the obvious error working document that was issued in the year 2002.¹¹⁶

The use of obvious error guidelines as a decision-making aid also transpires from the ‘obvious error rulings’ of the Trade and Industry Appeals Tribunal.¹¹⁷ For instance, the contested decision that is cited in one of the obvious error rulings handed down in 2003 concludes that ‘there is no obvious error as referred to in the working document of the commission, therefore your application (...) cannot be adjusted’.¹¹⁸ From these rulings it also follows that the Minister intends to give binding force to the obvious

112 Interview 3 – National officials A and B and interview 4 – National officials A and C.

113 Interview 4 – National officials A and C.

114 Interview 4 – National officials A and C.

115 See Article 5bis of Article 12 of Commission Regulation 2419/2001; Article 19 in Commission Regulation 796/2004; Article 21 in Commission Regulation 1122/2009; and Article 4 of Commission Implementing Regulation 809/2014.

116 AGR 49533/2002.

117 The obvious error rulings are discussed below in section 5.6.1.

118 CBb 11 July 2003, ECLI:NL:CBB:2003:AI0376, par. 3.

error guidelines (which as we will see is not accepted by the Trade and Industry Appeals Tribunal).¹¹⁹

Later rulings repeatedly note that based on the obvious error guidelines, the Dutch paying agency developed the *policy line* that an error can be classified as obvious 'only if the error is detected as a result of contradictory information which is the result of a mistake and not the intention of the farmer'.¹²⁰ As will be discussed below, the obvious error guidelines not only resonate in decision-making practices, but are also used as a judicial interpretation aid by the Dutch Industry and Appeals Tribunal.¹²¹

Example 2: the use of the fifty trees rule as a binding rule

Other rulings also give an insight into the role that direct payments guidance documents can come to play in decision-making practices. The fifty trees rulings, for instance, show that the Minister adhered strictly to the fifty trees rule laid down in DG AGRI working document.¹²² In line with the Commission's fifty trees rule, the Minister refused the application for aid for the reason that the agricultural parcel contains more than fifty trees per hectare.¹²³ From these rulings, it follows that the contested decision substantiates the refusal of aid with a single reference to the fifty trees criterion laid down in the Commission working document.¹²⁴ In the words of the Tribunal, the Minister uses the fifty trees rule 'as if it were a binding instruction'.¹²⁵

Like the obvious error rulings, the fifty trees rulings show how Commission guidelines can become pivotal for the question whether an agricultural parcel is eligible for aid. As will be discussed in the next section, according to the Trade and Industry Appeals Tribunal, the strict adherence to the fifty trees rule raises problems in light of the underlying legislative provision which states that agricultural parcels that contain trees are eligible if agricultural activities can be carried out in the same way as on parcels without trees.¹²⁶

119 For instance CBb 6 June 2001, ECLI:NL:CBB:2001:AB2130, par. 5. See below section 5.6.1.

120 For instance; CBb 24 June 2005, ECLI:NL:CBB:2005:AT8903, par. 3; CBb 7 July 2006, ECLI:NL:CBB:2006:AX8376, par. 5.4; CBb 2 October 2009, ECLI:NL:2009:BJ9441, par. 5.3; CBb 20 November 2009, ECLI:NL:CBB:2009:BK5141, par. 2.4.1; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6817, par. 5.3; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1829, par. 2.4.1; CBb 18 July 2012, ECLI:NL:CBB:2012:BX5079, par. 5.3; CBb 1 February 2013, ECLI:NL:CBB:2013:BZ4272, par. 2.3.2.

121 Section 5.6.2

122 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249.

123 AGRI/60363/2005-REV, p. 4

124 As already discussed above in section 5.5.1 this fifty trees rule of the European Commission is later transposed into Article 21 of the Ministerial Regulation.

125 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.6.

126 Article 8 of Regulation 796/2004 and later Article 33 of Regulation 1122/2009. The fifty trees rule provides further guidance to this provision.

5.5.5 Conclusion: direct payments guidance as binding rule or standard

From the above sections, a general picture arises that in the Dutch implementation process, direct payments guidance is perceived and used as a *de facto* binding implementation aid. As a result, direct payments guidelines have a strong steering effect on the implementation of EU direct payments legislation in the Dutch legal order.

The main reason, as repeatedly remarked by Dutch officials, for the use of direct payments guidance as a binding implementation aid is the threat of financial consequences when guidance documents are not followed. The Dutch officials learned their lesson after past experience, such as the LPIS in 2009 when Commission guidelines played a role in the decision that the Dutch parcel identification system was not up to date. This binding role of guidelines in practice contrasts with the non-binding and flexible character that guidance documents 'promise' to have when they are issued.

Nevertheless, when studying the use of direct payments guidance more closely, other reasons have been identified that also explain the strict adherence to direct payments guidance documents. It has been found that the tendency to strictly follow guidance given by the Commission services, might also be related to the aim of the Dutch administration to provide for legal certainty as well as to the aim of creating a level playing field. What is more, as the fifty trees rule shows, following direct payments guidelines may also serve the aim for controllability and feasibility of implementing practices.¹²⁷

From the above analysis, it transpires that three types of guidance most clearly leave traces in Dutch implementing practices. These are the guidelines with an interpretative, implementing and technical character. Interpretative guidelines have the strongest effect on Dutch implementing practices. These guidelines steer the operationalisation of EU direct payments rules into the Dutch Ministerial Regulation and in policy rules, and play an important role in individual decisions on the eligibility of individual aid applications. In particular, the guidelines on implementing methods and technical measures leave their imprints on the measures related to the integrated administration and control system.

Traces of the two remaining types of guidance – explanatory guidance and the dissemination of good practices – do not feature among the traces of the use of direct payments guidelines. The invisibility of the use (or effects) of explanatory guidance could be explained in light of the fact that this type of guidance is most apt to be used as background information and does not lend itself for being translated into implementation measures. The Dutch

127 These additional reasons transpire from the above analysis and were also mentioned by the officials during Interview 3 – National officials B and C and Interview 4 – National officials C and D.

officials mentioned that explanatory guidance documents, such as the aid application guidance, are considered a useful implementation aid to understand the complex direct payments rules.¹²⁸

As regards the absence of traces of ‘good implementing practices’, the officials remarked that this type of guidance is perceived as somewhat less binding than the other types of guidance.¹²⁹ The officials noted that ‘it only concerns the dissemination of good practices of other Member States’. These good practices, indeed, do not reflect the ‘best’ method recommended by the Commission services.¹³⁰ This is an indication that guidance in the form of good practices is perceived and used as having less *de facto* binding force than the four other types of guidance.

5.6 THE USE OF DIRECT PAYMENTS GUIDANCE BY THE TRADE AND INDUSTRY APPEALS TRIBUNAL

From the above it follows that the use of direct payments guidance documents as a binding implementing standard has far-reaching consequences on the implementation of direct payments legislation. As argued in the introductory chapters of this book, national courts may play an important role in shaping the role of guidance documents as implementation aid. This section explores the use of direct payments guidance documents in the judicial decision-making process of the Trade and Industry Appeals Tribunal. Does the Tribunal strengthen or downplay the role of direct payments guidance documents as implementation aid?

Nine groups of rulings

This search for explicit references to direct payments guidance documents reveals 220 rulings which refer to various guidance documents.¹³¹ Along the lines of these different documents, nine groups of rulings can be identified. The groups of rulings and corresponding guidance documents, as well as the number of rulings are displayed in Table 5-2.

As transpires from table Table 5-2 the largest group of rulings is the group of rulings that refers to the obvious error guidelines. These obvious error rulings also include the earliest rulings that were found with the search for explicit references: the first obvious error rulings were handed down in 2001. Today, still, the obvious error working document features in the rulings of the Trade and Industry Appeals Tribunal.

128 Interview 3 – National officials A and B.

129 Interview 4 – with National officials A and C.

130 Interview 4 – with National officials A and C.

131 For an overview of these ruling see Annex 1.2.1.

Table 5-2 Groups of rulings that refer to direct payments guidance documents

Groups of rulings	Name of guidance document	No. of rulings
Obvious error rulings	Working document VI/7103/98 Rev2-NL and Working document AGR 49533/2002 on the concept of obvious error.	182
Fifty trees rulings	Working document AGRI/60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) 796/2004.	4
Interpretative note rulings	'Interpretative notes no. 26 and 51'	12
JRC rulings	Information on the Wikicap website of the Joint Research Centre on the measurement method	5
Permanent grassland rulings	Information on the WikiCAP website of the Joint Research Centre on permanent grasslands	10
Active farmer rulings	Guidance document on the implementation of Article 9 of Regulation (EU) 1307/2013, DSCG/2014/29.	2
Observations on notifications	Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) 639/2014 (DS-CDP-2015-04-rev1).	3
LPIS guidance document	Guidance document on the Land Parcel Identification System (LPIS) under Article 5, 9 and 10 of Commission Delegated Regulation (EU) 640, DSCG/2014/33.	2
Guidance on simplification of administrative penalties	Guidance for implementation of Article 19a of Regulation (EU) No. 640/2014 on the simplification of administrative penalties for certain direct payment schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016.	1
Total		222

The other groups of rulings are less numerous, yet also cluster around guidance documents that have various forms. The obvious error rulings and fifty trees rulings relate to 'old' working documents. The interpretative note rulings also reflect 'guidance from the past'.

The active farmer guidance document, the LPIS guidance document, as well as the guidance on administrative penalties, are more recent guidance documents. The active farmer guidance document has a highly explanatory nature: it explains the purpose and context of the active farmer provision in EU direct payments legislation. The document with observations on notifications could be seen as 'guidance in disguise': the title does not reflect that it has been issued for guidance purposes. Both the document with observations on notifications and the active farmer guidance have not been published. Finally, the JRC rulings and the permanent grassland rulings refer to technical guidelines published on the Wikicap website. The JRC rulings, as we will see, reveal a glimpse of how technical guidance may come to play a role in proceedings before national courts.

Two lines of case law

The analysis in this section is structured along the lines of the groups of rulings introduced above. In these rulings, two lines can be discerned that provide insights into the role of direct payments guidelines.

The first line shows that the Trade and Industry Appeals Tribunal does not accept the use of guidance documents as if they were a binding rule by the Minister (section 5.6.1). In this way, the Tribunal provides guidance to the Minister as to how to use, or not use, Commission guidance.

The second line that can be discerned in the rulings is that the Tribunal uses direct payments guidance documents as a judicial decision-making aid. The guidelines, most often, take the role of interpretation aid, yet also reveal traces of the use of other types than interpretative guidelines (see sections 5.6.2 and 5.6.3). However, the Tribunal does not always follow the Commission guidelines as the ‘airports rulings’ show that are discussed in section 5.6.4.

The final section then draws these two lines together. It concludes that the Trade and Industry Appeals Tribunal counterbalances the role of direct payments guidelines as implementation aid whilst at the same time it recognises the authoritative character of the Commission guidelines.

5.6.1 No use of guidance ‘as if it were a binding rule’

The first line that can be identified in rulings of the Trade and Industry Appeals Tribunal is, as mentioned above, that the Tribunal does not accept the use of direct payments guidelines as a binding rule. This section sets out with a discussion of the fifty trees rulings, which are illustrative for the ‘critical approach’ taken by the Tribunal. It subsequently discusses the obvious error rulings and the interpretative note rulings, in which the Tribunal emphasises that when using the Commission guidelines, the Minister still has the responsibility to take account of the circumstances of the case when this is required by the EU legislative rules.

The fifty trees rulings: ‘no use as a binding instruction’

As discussed in sections 5.5.1 and 5.5.4, the Commission’s fifty trees rule laid down in working document 60363/2005-REV1¹³² was strictly followed and applied by the Dutch paying agency. It was first used as a decision-making aid and later transposed into Article 21a of the Ministerial Regulation. The fifty trees rule provides, as said, that agricultural parcels with a density of more than 50 trees/ha should, as a general rule, be consid-

132 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 5.2.1; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3; CBb 13 March 2013, ECLI:NL:CBB:2013:BZ6298, par. 4.2; CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.5.2.

ered ineligible.¹³³ The application of this fifty trees rule has been challenged before the Trade and Industry Appeals Tribunal.

In two rulings of 2010 and 2011, the Tribunal reviews decisions of the paying agency that apply the fifty trees rule in the situation where this rule had not yet been transposed into the Dutch Ministerial Regulation. The use of the fifty trees rule as a decision-making aid transpires from the text of the rulings: the contested decision refuses aid for the reason that the agricultural parcel concerned contains more than fifty trees, and refers to the rule laid down in working document 60363/2005-REV1.¹³⁴ In these rulings, the Tribunal first notes that ‘the Minister could use the working document as a policy reference point [*beleidsuitgangspunt*] when reviewing the eligibility of parcels containing trees’.¹³⁵ However, the Tribunal considers, in the fifty trees case the Minister uses the Commission’s document ‘not as a guideline but as a binding instruction’.¹³⁶ This, the Tribunal makes clear, is not acceptable:

‘In this way, the Minister denies the nature of the working document. It concerns a recommendation of the Commission, which cannot be given the status of a legally binding rule.’¹³⁷

Instead of adhering strictly to the fifty trees rule, the Minister should carry out an individual assessment of the eligibility of agricultural parcels, especially when the farmer has put forward exceptional circumstances.¹³⁸ To this end, the Tribunal refers to Article 8 of Regulation 796/2004, according to which an agricultural parcel that contains trees shall be considered eligible for aid where agricultural activities can be carried out in the same way as on agricultural parcels without trees. This leads to the Tribunal to conclude that the contested decisions are not sufficiently substantiated.

The other two fifty trees rulings deal with the situation where the fifty trees rule has been transposed into Article 21a of the Ministerial Regulation.¹³⁹ Despite the fact that the fifty trees rule is now anchored in a legally binding rule, the Tribunal still does not allow the application of the fifty trees criterion by the Dutch paying agency. The Tribunal again requires the Minister to make an individual assessment and to make sufficiently clear

133 AGRI/60363/2005-REV, p. 4.

134 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.2; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 3; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par 2.3.1.

135 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

136 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

137 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

138 The contested decisions are considered to be in violation with Article 7:12 GALA (see CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.7 and CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3) and in one of the rulings also with Article 3:2 GALA (see CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 5.2.1).

139 CBb 13 March 2013, ECLI:NL:CBB:2013:BZ6298, par. 4.2; CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.5.2.

that on the agricultural parcels agricultural activities cannot be carried out, despite the presence of more than fifty trees per hectare.¹⁴⁰

The approach taken in these rulings is in line with the fifty trees rulings that were handed down before the fifty trees rule was transposed into Dutch legislation. Indeed, in these rulings the Tribunal also requires the Minister to make an individual assessment instead of strictly applying the fifty trees rule. Thus, the fifty trees rulings reflect the Tribunal's critical stance towards the use of the guidance documents as a binding standard by the Minister and paying agency, even when the guidelines have been transposed into a Dutch Ministerial Regulation. At the same time, the rulings leave questions open with regard to the status and even the validity of the fifty trees rule. Indeed, by requiring the Minister to not apply the fifty trees rule, the Tribunal seems to suggest that this rule is not in line with Article 34 of Regulation 1122/2009. It is therefore remarkable that the Tribunal does not refer a preliminary question on the interpretation or validity of the fifty trees rule to the Court of Justice.¹⁴¹

The obvious error working document: 'not the binding force the Minister grants to it'

The fifty trees rulings are not the only rulings in which the Tribunal emphasises the non-binding character of direct payment guidelines. The Tribunal's critical stance also transpires from the obvious error rulings. These rulings represent, as said, the largest group of rulings, and relate to the question whether an error in an application can be considered as 'obvious', in the case of which the aid application can be adjusted after its submission.

Already in the early obvious error rulings issued in 2001, it is made clear that the Minister cannot attach binding force to the obvious error guidelines.¹⁴² The Tribunal considers that:

'the Working Document is not a regulation, directive or decision as mentioned in Article 249 EC (now Article 288 TFEU) and does not have the binding force the defendant [the Minister] intends to attach to it. Moreover, the document does not contain an exhaustive list of possible grounds that allow for an adjustment of the aid application.'¹⁴³ [Emphasis added]

140 In these late fifty tree rulings, the Tribunal takes a less explicit approach. The Tribunal does not explicitly link the need to make an individual assessment to Article 34 of EU regulation 1122/2009 which replaces Article 8 of Regulation 796/2004.

141 See the case note to CbB 16 September 2013, ECLI:NL:CBB:2013:152, AB 2014/187, ann. J.E. Van den Brink and J.C.A. van Dam; See also Van den Brink & Van Dam 2014, p. 20.

142 See for instance CbB 6 June 2001, ECLI:NL:CBB:2001:AB2131, par. 5; CbB 16 January 2002, ECLI:NL:CBB:2002:AD9058, par. 5; CbB 12 March 2003, ECLI:NL:CBB:2003:AF6804, par. 5; CbB 30 March 2005, ECLI:NL:CBB:2005:AT3912, par. 2.5; CbB 29 March 2006, ECLI:NL:CBB:2006:AX8790, par. 5.3.

143 See for instance: CbB 2 May 2001, ECLI:NL:CBB:2001:AB1500, par. 5; CbB 6 June 2001, ECLI:NL:CBB:2001:AB2131, par. 5. Some rulings only mention that the documents do not have binding force. See for instance CbB 12 March 2003, ECLI:NL:CBB:2003:AF6804, par. 5.

The non-legally binding character of the guidelines, does not mean that the guidelines cannot fulfill their role as a decision-making aid:

‘This [the non-legally binding character] does not prevent the *Dienst Regelingen* from developing a policy line on the basis of the guidelines of the European Commission provided that the policy line remains within the limits of EU Regulation (EC) 2419/2001’.¹⁴⁴

In later obvious error rulings, it becomes ‘settled case law’ that the Tribunal considers acceptable that the Minister develops a policy line in light of the Commission guidelines.¹⁴⁵ However, the Tribunal emphasises that when taking account of the guidelines, the Minister should still take account of the circumstances of the case. According to the Tribunal: ‘the obvious error working document formulates the principle that each decision on whether there is an obvious error depends on the facts and circumstances in the individual case’ and that ‘therefore, each case needs to be assessed individually’.¹⁴⁶ As a result, the Minister had to take a more lenient and individualised approach when assessing errors in aid applications.¹⁴⁷ *Interpretative note rulings: Minister, take your responsibility*

The group of twelve ‘interpretative note rulings’ refers to interpretative notes 51 and 26.¹⁴⁸ These interpretative notes give a response to questions raised by the British and Spanish Ministries of Agriculture. Interpretative note 51, which is most extensively referred to in the rulings, was adopted in 1996. It gives guidance – in the form of examples – as to what could constitute ‘exceptional and duly justified cases’ which according to Regulation 2342/1999 are exempted from the rule that non-used premium rights will be returned to the national reserve.

When deciding whether a case is exceptional and duly justified, the Minister ‘let himself be guided by the Interpretative notes 26 and 51’ and assesses whether the cases are similar to the examples given in the interpretative notes.¹⁴⁹ The Tribunal considers that:

144 In Dutch: ‘Dit neemt niet weg dat verweerder de bevoegdheid om aan de hand van het werkdocument, binnen de door Verordening (EG) nr. 2419/2001 getrokken grenzen, een vaste beleidslijn te ontwikkelen, zeker niet ontzegd kan worden.’ See for instance CBb 30 March 2005, ECLI:NL:CBB:2005:AT3912 par. 2.5.

145 See for instance CBb 8 March 2017, ECLI:NL:CBB:2017:83, par. 4.4.

146 CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9418, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9420, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9441, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9445, par. 5.3.

147 See on the *kruisjesproblematiek Kamerstukken II*, 2009/10, 28625, 85, p. 3.

148 CBb 21 March 2004, ECLI:NL:CBB:2003:AF6914; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3571. For the other ten rulings, see Annex 1.3.1.

149 See for instance CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3568, par. 5.6.

Although it is acceptable that the interpretative notes are used as a reference point, the Dutch paying agency *has its own responsibility* to assess in light of the facts and circumstances of each case whether there is an exceptional and duly justified case. The interpretative notes do not contain legally binding rules, but instead elaborate on some hypothetical situations.¹⁵⁰ [Emphasis added]

The Tribunal's response to the use of the interpretative note by the Minister shows similarities to the approach taken in the fifty trees rulings as well as in the obvious error rulings. The Tribunal accepts that the Minister uses the Commission guidance, yet requires the Minister to take his or her responsibility and assess in light of the facts and circumstances of the case whether a case is exceptional and duly justified.

5.6.2 Direct payments guidelines as an (authoritative) judicial interpretation aid

Despite its critical approach to the use of direct payments guidelines as binding rules, the Tribunal does not refrain from using direct payments guidelines as a decision-making aid itself. In several groups of rulings, the Tribunal uses the guidance documents as an aid to interpret and apply the EU direct payments regulations. This section discusses two groups of rulings that provide insight into the use of direct payments guidelines as an interpretation aid. The next section explores the rulings of the Tribunal that reveal traces of other types than interpretative guidance.

The obvious error rulings: 'guidance from an authoritative institution'

One of the groups of rulings where the Tribunal uses Commission guidelines as an interpretation aid are the obvious error rulings. In these rulings the Tribunal uses the guidelines itself as an aid in order to assess the practices of the Minister – which are based on the Commission's guidelines.¹⁵¹ The Tribunal derives from the guidelines the principle that the Minister should take an individualised approach when assessing whether there is an obvious error.¹⁵² In these 'early obvious error rulings', the Tribunal uses the obvious error guidelines as a judicial decision-making aid, without elaborating on the reasons for doing so. This is not exceptional; also in other rulings the Tribunal refers to Commission guidelines without elaborating on the status of the guidelines. A recent example can be found in the LPIS ruling of 4 June 2019, in which the Tribunal found support in the LPIS document on the question of whether a path is eligible.¹⁵³

150 CbB 30 November 2006, ECLI:NL:CBB:2006:AZ3568, par. 5.6.

151 See above section 5.5.4.

152 See CbB 2 October 2009, ECLI:NL:CBB:2009:BJ9418, par. 5.3. See also above section 5.6.1

153 CbB 4 June 2019, ECLI:NL:CBB:2019:227, par. 5.1.

Remarkably, in recent obvious error rulings issued in 2018, the Tribunal takes a more explicit approach and provides some insights into why it takes account of the Commission guidelines.¹⁵⁴ The Tribunal first extensively cites entire paragraphs from the obvious error guidelines and notes that the obvious error guidelines 'have obviously been used' to draft the current obvious error provision in the EU direct payments legislation (Article 4 of Regulation 809/2014).¹⁵⁵ The Tribunal also notes that the wording of this article has changed slightly compared to previous versions and now reflects the wording used in the guidelines.¹⁵⁶ Subsequently, and this is the most interesting part of the ruling, the Tribunal announces that it will take account of the obvious error guidelines, and why it will do so:

'The working document is not in itself binding. However, since the working document is issued by an authoritative institution and used by the defendant [the Minister] for the assessment whether there is an obvious error, the Tribunal will take the working document into account when assessing the appellant's appeal'.¹⁵⁷

In the cited paragraph the Tribunal not only announces that it will take the document into account, it also gives reasons for doing so. The Tribunal refers to the authoritative 'source' of the guidance document (the European Commission) as well as to the use of the guidelines by the Minister. These recent obvious error rulings are much more explicit about the use of the obvious error guidelines than previous obvious error rulings. On the other hand, this paragraph also raises questions. For instance, would the Tribunal also have taken account of the document had it not been used by the Minister? Does this reasoning also apply to guidance documents other than the obvious error guidelines?

154 CBb 24 April 2018, ECLI:NL:CBB:2018:129; CBb 8 May 2018, ECLI:NL:CBB:2018:323; CBb 17 July 2018, ECLI:NL:CBB:2018:360; CBb 8 May 2018, ECLI:NL:CBB:2018:314; CBb 17 July 2018, ECLI:NL:CBB:2018:379.

155 CBb 24 April 2018, ECLI:NL:CBB:2018:129, par. 3.4; CBb 8 May 2018, ECLI:NL:CBB:2018:323, par. 9; CBb 17 July 2018, ECLI:NL:CBB:2018:360, par. 3.4; CBb 8 May 2018, ECLI:NL:CBB:2018:314, par. 5.4.

156 Article 4 of Regulation 809/2014 provides that obvious error should be recognised 'on the basis of an overall assessment of the particular case and provided that the beneficiary acted in good faith', whilst the previous Article 12 in Regulation 2419/2001 only provided that 'in cases of obvious errors' and aid application may be adjusted at any time. This text corresponds to the guidance given in the obvious error guidelines in Working document AGR 49533/2002.

157 CBb 24 April 2018, ECLI:NL:CBB:2018:129, par. 4.1; CBb 8 May 2018, ECLI:NL:CBB:2018:323, par. 10; CBb 17 July 2018, ECLI:NL:CBB:2018:360, par. 3.5; CBb 8 May 2018, ECLI:NL:CBB:2018:314, par. 5.7.

How ‘Observations on notifications’ are given a role as interpretation aid

The obvious error rulings in which the Tribunal takes an explicit approach seem to be the exception rather than the rule. An example is provided in the rulings that refer to the document with ‘Observations on the notifications due by Member States pursuant to Commission Delegated Regulation (EU) No 639/2014’. In these rulings the Tribunal refers to the document with observations such as ‘interpretative document’, without elaborating on the reasons for doing so.¹⁵⁸

These two rulings, however, are also interesting for another reason and that is that these rulings show how a seemingly internal document still features in the rulings of the Dutch highest administrative court. Indeed, the document with observations does not have the title of, nor does it look like, one of the ‘standard’ direct payments guidelines. The document with observations on notification has not been published on the Wikicap website of the Commission.

Dutch officials explained that in this case, the Tribunal was informed about the existence and content of this document in cases where the document was invoked by the Minister in support of his argument.¹⁵⁹ Subsequently, in other cases the Tribunal used the document as interpretation itself. The Court uses it, for instance, to support its reasoning that certain activities included in the ‘negative list’ cannot be considered as ‘not predominantly used for agricultural activities’ and therefore are to be excluded from aid.¹⁶⁰ The Tribunal notes that according to the Observations on notifications ‘only those areas may be included in the list which are *typically* not predominantly used for agricultural activities’ [Emphasis added].¹⁶¹ Thus, via the use of a guidance document by one of the parties (in this case the Dutch paying agency), an unpublished, seemingly internal document is brought to the attention of the Court and subsequently, by that Court, given a role as an interpretation aid.

5.6.3 Beyond interpretation: what roles for other types of guidance?

Direct payments guidance documents not only take different forms, the documents also reflect different ‘types’ of guidance. The groups of rulings discussed above refer to guidelines that provide further interpretative rules. Traces of the other types of guidance were found in three groups of rulings. The ‘active farmer rulings’ show how guidelines with an explanatory char-

158 DS-CDP-2015-04-rev1. Three rulings were found that refer to this document: CBb 9 October 2017, ECLI:NL:CBB: 2017:316, par. 4.2; CBb 25 January 2018, ECLI:NL:CBB: 2018:41, par. 4.2; CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

159 Interview 4 – National officials A and C.

160 CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

161 CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

acter may come to play a role in the judicial decision-making process; the JRC rulings give a glimpse of technical guidance and good practices.

The active farmer guidance: explanatory guidance as an aid to define purpose and context

The active farmer guidance document (DSCG/2014/29) was issued in 2014 and, as the title says, provides guidance on the implementation of the 'active farmer provision' (Article 9 of Regulation 1307/2013).¹⁶² The search for explicit references reveals two rulings in which the active farmer guidance document plays a prominent role.¹⁶³ This is already made clear at the very beginning of the rulings: the Tribunal mentions that in the course of the procedure both parties were informed that the Tribunal would take account of the active guidance document. And, the part of the ruling that outlines the applicable legal framework extensively cites from paragraphs of the active farmer guidance document.

In the next paragraphs of the ruling the Tribunal refers to the active farmer guidance document in order to define the purpose and context of the active farmer provision. The Tribunal, for instance, considers that 'as also follows from the guidance document' the purpose of the active farmer provision is to exclude from aid entities whose main business purpose is not or only marginally aimed at agricultural activities.¹⁶⁴ In the concluding paragraph, the Tribunal again refers to the active farmer guidance. The Tribunal finds support in the guidance for the conclusion that the activities employed in these cases (the operation of 'any sport or recreational activity'¹⁶⁵ or the renting out of some holiday houses¹⁶⁶) cannot be equated with operating a permanent sport or recreational ground. This is one of the activities mentioned in the second subparagraph of Article 9 of Regulation 1306/2013 that are presumed not to be agricultural activities and therefore to be excluded from aid.

The active farmer rulings show how not only interpretative guidelines, but also explanatory guidelines, can help a national court to interpret and explain a provision laid down in Union law. Nonetheless, many rulings in which explanatory guidance plays an explicit role have not been found, at least not in the area of direct payments.

162 DSCG-2014-29.

163 CBb 21 June 2017, ECLI:NL:CBB:2017:239; CBb 21 June 2017, ECLI:NL:CBB:2017:241.

164 See CBb 21 June 2017, ECLI:NL:CBB:2017:241, par. 5.3; CBb 21 June 2017, ECLI:NL:CBB:2017:239, par. 4.3.

165 CBb 21 June 2017, ECLI:NL:CBB:2017:241, par. 5.3.

166 CBb 21 June 2017, ECLI:NL:CBB:2017:239, par. 4.4.

JRC rulings: a glimpse of technical guidance and good practices

Often, direct payments guidance documents go beyond interpretation and explanation. This raises the question whether and how the other types of guidance – such as technical guidance, implementing guidance and good practices – play a role as a judicial decision-making aid. The search for explicit references reveals five JRC rulings that refer to technical guidance and good practices published on the Wikicap website of the Joint Research Centre.¹⁶⁷

In these rulings, the question is whether the Minister used the appropriate method for the measurement of agricultural parcels. In all five cases the Minister follows the measurement method recommended by the JRC and the Commission and, as follows from the text of the rulings, also brought this forward during the legal proceedings. The Minister finds support in the guidance of the JRC as the EU legislative rules do not specify what measurement method is to be followed.¹⁶⁸

The guidelines play a less visible role in the part of the rulings that provides insight into the reasoning of the Tribunal when reviewing the Minister's practices. Only in three JRC rulings does the Tribunal briefly refer to the good practices published on the Wikicap website.¹⁶⁹ In these rulings, the Tribunal first notes that the underlying EU legislation does not specify what measurement method should be followed, and that therefore the paying agency is free to choose between different measurement methods that are 'reasonably justifiable'.¹⁷⁰ Subsequently, the Tribunal refers to the good practices of other Member States to underline that the two-dimensional measurement method used by the Minister is in line with the EU legislative requirements:

'Furthermore, the fact that other Member States that have mountain rich areas, such as Germany and Italy, have also chosen for a two-dimensional measurement method pleads for the defendant's [the Minister's] choice to measure the agricultural parcels in a two-dimensional manner.'¹⁷¹

167 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876; CBb, 11 January 2013, ECLI:NL:CBB:2013:BZ3408; CBb 26 November 2014, ECLI:NL:CBB:2014:440; CBb 17 December 2014, ECLI:NL:CBB:2014:478; CBb 5 March 2018, ECLI:NL:CBB:2018:90.

168 CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.2; CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.4; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.2.

169 This is the case in the following three rulings: CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

170 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

171 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

These JRC rulings thus reveal a glimpse of the role that guidance in the form of good practices could take in the process of judicial decision-making: the fact that the two-dimensional measurement method is widely used, provides an extra argument for the Tribunal that the method is correct or 'appropriate'. It is, however, remarkable that the Tribunal does not explicitly mention that the two-dimensional method is also recommended by the JRC (as emphasised by the Minister).

5.6.4 Commission guidance overruled

Having discussed several groups of rulings in which Commission guidelines are used by Dutch courts as a judicial decision-making aid, the Tribunal does not always apply the Commission's guidelines when interpreting EU direct payments rules. Several rulings show that the Tribunal could also deviate from the Commission guidelines. An example of an implicit 'non application' of the Commission's fifty trees rule has already been identified in the fifty trees rulings, as in these rulings the Tribunal annuls the decision of the paying agency that applies the Commission's fifty trees rule.¹⁷²

A more explicit deviation of Commission guidelines by the Tribunal can be found in the 'permanent grassland rulings' issued in 2013 and 2014.¹⁷³ In these rulings, it is – again – the Dutch Minister who first refers to the Commission guidelines. The Minister argues that grasslands on airports cannot be eligible for aid and emphasises that this 'also follows from the Commission's viewpoint as expressed by the Joint Research Centre'.¹⁷⁴ The Commission expressed this view during several audits, warning the Netherlands that it had unlawfully considered grasslands on airports as not eligible for aid.¹⁷⁵ The Tribunal, in contrast, considers that grassland on airports cannot be precluded from being eligible for aid. 'The remarks made by the Minister about the opinion of the European Commission (...) do not lead to a different conclusion'.¹⁷⁶ Hence, with a few words the Tribunal sets the Commission's opinion aside and follows a different line of reasoning.

It is remarkable that – like in the fifty trees rulings – the Tribunal does not refer a question to the Court of Justice in this case, especially because some years later the Danish Court did refer a question to the Court of Justice that shows similarities to the Dutch airport rulings.¹⁷⁷ In the *Demmer* ruling of 2 July 2015, the Court of Justice considers that, in line with the Tribunal's point of view – grassland on airports cannot per se be excluded

172 See above section 5.6.1

173 See for instance CBb 6 December 2013, ECLI:NL:CBB:2013:300; For the other nine permanent grassland rulings see Annex section 1.3.1.

174 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 4.1.

175 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 4.1.

176 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 6.3.1.

177 See CJEU 2 July 2015, C-684/13, ECLI:EU:C:2015:439 (*Demmer*).

from aid. Following Article 34(a) of Regulation 73/2009, the eligibility of the agricultural parcel depends on whether the parcel is *predominantly* used for agricultural activities and, to this end, account must be taken of the facts of the case.¹⁷⁸

The permanent grassland rulings thus show that the Trade and Industry Appeals Tribunal does not, as a general rule, follow the Commission guidelines. Yet, the cases in which the Tribunal explicitly deviates from Commission guidelines, seem to be the exception rather than the rule.

5.6.5 Conclusion: the Tribunal as counterbalancing actor

Compared to the numerous and various direct payments guidance documents issued by the Commission, only a few guidance documents leave traces in the rulings of the Dutch Trade and Industry Appeals Tribunal. The analysis of the traces of direct payments guidance in the different groups of rulings nevertheless reveals some trends as to the role(s) that different types of direct payments guidelines take in the decision-making process of the Tribunal.

The analysis reveals that most references in rulings of the Tribunal refer to interpretative Commission guidelines. The Tribunal then uses the Commission to interpret provisions in direct payments regulations, and assesses the Minister's practices in the light of those guidelines. Nonetheless, the Tribunal also occasionally uses 'explanatory guidelines' to define the purpose and rationales of provisions in EU legislation (e.g. the active farmer rulings).

The other types of guidance feature less frequently in the reasoning of the Court. It is remarkable that despite the manifold implementing and technical guidance documents adopted by the Commission services, that these types of guidance do not play a prominent role in the Tribunal's decision-making process. A glimpse of technical guidance and good practices can be found in the JRC rulings, where the Court refers to 'good measurement practices' in support of its conclusion that the measurement method chosen by the Minister can be considered 'appropriate'.

The above observations relate to the types of guidance. Does the analysis also give insights into the perspective of the Tribunal on the binding character of direct payments guidelines?

From the rulings it becomes clear that the Tribunal does not view the Commission guidelines as if they were binding rules. Indeed, the Tribunal does not accept the use of direct payments guidance 'as a binding instruction' by the Dutch paying agency. Only the use of the guidelines as a 'policy reference point' is permitted, according to the Tribunal. Thus, the Tribunal plays the role of counterbalancing actor, giving guidance a more modest role as an implementation aid (instead of as an implementing standard) in the implementation process.

178 See CJEU 2 July 2015, C-684/13, ECLI:EU:C:2015:439, par. 73 (*Demmer*).

Yet, this does not mean that the Tribunal does not regard the direct payments guidelines as 'authoritative'. In the recent obvious error rulings, the Tribunal notes that it takes account of the guidelines, for the reason that the guidelines are issued by an authoritative institution (the European Commission), as well as for the reason that the Minister himself adhered to the obvious error guidelines. In other rulings, the authoritative character of Commission guidance documents seems to be 'assumed' by the Tribunal, but is not acknowledged explicitly.

Most of all, however, the rulings of the Tribunal leave questions open as regards the status of the Commission guidelines. It is uncertain whether the Tribunal perceives the Commission guidelines to be a mandatory judicial interpretation aid that in principle should be followed and from which deviation needs to be explained, or whether the guidelines are used and perceived as a voluntary interpretation aid. The role of the guidelines also remains uncertain for the reason that in none of the rulings in the search for explicit references does the Tribunal refer to the *Grimaldi* case law of the Court of Justice. This silence by the Tribunal on the *Grimaldi* case in the direct payments rulings contrasts with a ruling handed down in the field of telecommunication. In the *KPN v ACM* case, the Tribunal referred a question to the Court of Justice on the meaning of the *Grimaldi* formula in relation to a recommendation of the European Commission to the Telecommunications Directive.¹⁷⁹ This reference led to the *KPN v ACM* ruling of the Court of Justice, that is discussed in chapter 3 (sections 3.3.2 and 3.4.2).¹⁸⁰

5.7 CONCLUSION

The main driving force behind the issuing of guidance documents that complement the EU direct payments legislation is the aim to prevent financial corrections. The guidance documents promise to provide clarity and certainty in the implementation of the complex rules laid down in EU regulations. It is, however, the same power of the Commission to impose financial corrections that makes national authorities exposed to strong pressures to act 'guidance-proof'.

This chapter shows that these strong pressures to act guidance-proof are the main factor that gives direct payments guidance documents in the Netherlands the role of a binding rule or implementing standard. Deviation from the guidelines is not considered an option in view of the risk of financial consequences that would arise in that case. Nevertheless, other factors have also been identified that explain the strict adherence to Commission guidance documents. The strict adherence to direct payments guidelines can also be understood in light of the aim to provide for legal certainty, to create a level playing field and the aim of feasibility and controllability.

179 CBb 13 January 2013, ECLI:NL:CBB:2015:4.

180 CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*).

The use of direct payments guidelines as a binding standard occurs at different stages of the implementation process. The steering effect of Commission guidelines is most strong for interpretative, implementing and technical guidelines. Traces of the use of interpretative guidelines can be found in the Dutch Ministerial Regulation, policy rules and in individualised decisions. Traces of implementing and technical guidelines can be found in practical implementing measures and internal guidelines. These guidance documents in particular affect the setting up of the integrated administration and control system and the various administrative and 'on-the-spot' controls.

Finally, this chapter has shown that the role of direct payments guidelines as a binding rule is counterbalanced by the Trade and Industry Appeals Tribunal. The highest administrative court guards the guidelines from being used as a binding rule and that account is taken of the underlying EU direct payments regulations. At the same time, the Tribunal also uses the direct payments guidelines itself as a judicial decision-making aid, in particular for interpretative questions. A clear perspective on the status of the direct payments guidelines does not transpire from the text of the rulings. Are the guidelines used and perceived as a voluntary, or rather as a mandatory interpretation aid? Future rulings of the Trade and Industry Appeals Tribunal might shed more light on this question.

The Habitats Directive, which is the informal name for ‘Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora’, was adopted on 21 May 1992. The Habitats Directive is accompanied by various guidance documents. The first guidance document, on the management of Natura 2000 sites, was issued in 2000 and since then various other guidance documents have followed.

This chapter traces the issuing guidance documents at the EU level and subsequently studies the use of Habitat guidance documents in the Dutch legal order. In the Netherlands, the implementation of the Habitats Directive is infamous for the problems that were experienced during the implementation process. It is, in the words of Van Keulen, ‘a contested case of Europeanisation’.¹ The various Habitat guidance documents seek to address implementing questions and problems experienced at the national level. Are the Habitat guidance documents used as an implementation aid, and what roles do the Habitat guidance documents play in implementation and judicial decision-making processes in the Netherlands?

Before tracing the use of Habitat guidelines in the Dutch legal order, this chapter first describes the ‘EU context’. It describes the features of the Habitats Directive (section 6.1), gives an overview of the forms and types of Habitat guidance documents (section 6.2), and explores whether expectations have been formulated as to the use of guidance by national authorities and courts (section 6.3). The second part of this chapter studies the use of guidance at the national level. It outlines the main characteristics of the implementation process (section 6.4) and traces the use of guidance in the implementation process, in which the Dutch provinces play an important role (section 6.5). The analysis of the use of Habitat guidelines in judicial practices (section 6.6) also leads to studying rulings of various courts: traces of Habitat guidelines feature in rulings of district courts, courts of appeal and of the Council of State.

The empirical findings reveal differences between the use of guidance in different phases of the implementation process and differences as regards the traces of Habitat guidelines in judicial practices. Despite these differences some trends can be observed: Habitat guidelines mostly fulfill a role as interpretation aid, and are guided by a ‘perspective of authoritative-ness’. Nonetheless, the main conclusion is that the role of Habitat guidance

1 Van Keulen 2007.

documents – both in implementing and judicial practices remains largely uncertain (section 6.7).

6.1 THE HABITATS DIRECTIVE

6.1.1 Leaving room for manoeuvre to the Member States

The choice was made, at the time, that EU biodiversity rules would take the form of a directive. This means that Member States are responsible for the result that is to be achieved but that it ‘shall leave to the national authorities the choice of form and methods’ (as follows from Article 288 TEU). This result-based approach is also reflected in the text of the Habitats Directive.² The Habitats Directive sets objectives and obligations for the Member States whilst leaving room for manoeuvre in the choice and forms of the measures that need to be taken in order to fulfill these obligations.³ The room for manoeuvre left to the Member States follows from the aim of the Directive, which is to promote the maintenance of biodiversity whilst taking account of ‘economic, social and cultural requirements and regional and local characteristics’.⁴

The structure of the Habitats Directive consists of two pillars.⁵ The first pillar entails the creation of ‘Natura 2000’, a coherent network of special areas of conservation. These special areas of conservation, or Natura 2000 areas, need to be designated and managed by the Member States. Article 6 of the Habitats Directive is the key provision of the first pillar of the Habitats Directive. The second pillar of the Habitats Directive consists of a system of strict protection for animal species that needs to be set up by the Member States. The central provisions are Article 12 and Article 16. Article 12 requires Member States to take ‘requisite measures’ to set up the system of strict protection and Article 16 lists a number of grounds for derogation from the protection regime.

6.1.2 The Commission as guardian of the Species

Whilst the Member States are responsible for the implementation of the Habitats Directive, the Commission acts as ‘guardian of the Species’.⁶ The Commission – as in other policy areas – has the power to initiate infringement proceedings in case of an alleged violation of the Habitats Directive. As guardian of the Species the Commission has an active role. The Annual Report on the monitoring of the application of Union law, mentions

2 See on the ‘obligation of result’ Clément 2015, p. 9-14.

3 Frederiksen et al. 2017338.

4 Recital 3 and Article 2(3) of the Habitats Directive.

5 Kingston, Heyvaert & Cavoški 2017, p. 418, 419.

6 Schoukens & Bastmeijer 2014;

‘enforcing environmental law’ as of one its focal areas and emphasises that the results of the Fitness check require an active approach in monitoring the implementation of the ‘Nature Directives’.⁷ The report also shows that the infringement procedures in the field of ‘Nature protection’ represent an important share of all 289 infringement procedures that are open at the end of 2018 in the field of environmental law.⁸

As in other policy areas, the Commission not only fulfills its monitoring role with the opening of infringement procedures. The Commission has also taken up the task to support the Member States in the implementation of the Habitat provisions. This approach is reflected by the large number of Habitat guidance documents and contrasts with the more passive approach taken in the years following the adoption of the Habitats Directive. Initially, the Commission was accused of not sufficiently supporting the Member States in the implementation process and of ‘only increasing miscommunication and uncertainty’.⁹

6.1.3 The Fitness check and focus on implementation on the ground

Despite the, now, more active approach of the Commission in assisting the Member States implementing problems remain. This is the conclusion of the Fitness check conducted in 2016 which measured the ‘performance’ of the Habitats Directive and of the Birds Directive.¹⁰ The result of the Fitness check is that ‘as part of the broader EU biodiversity policy, the Nature Directives are fit for purpose’. However, for the full achievement of the objectives of the Birds and Habitats Directives, improvement needs to be made with regard to the *implementation* of the Directives. In particular, more efforts should be made in order for the Directives to deliver practical results ‘on the ground’.¹¹

Based on the results of the Fitness Check, the Commission developed an action plan that ‘aims to rapidly improve practical implementation of the Nature Directives’. The action plan emphasises, on the one hand, the strong territorial dimension of the Directives and, on the other hand, notes that the different approaches in the Member States to implement the Directive ‘can lead to unnecessary conflicts and problems’.¹²

The first priority outlined in this action plan is that the Commission will improve its guidance documents: ‘The Commission will improve its guidance and promote greater understanding of the legislation on the

7 Annual Report of 2018 on the Monitoring and Application of Union law (p. 4) (available at https://ec.europa.eu/info/publications/2018-commission-report-monitoring-application-eu-law_en).

8 See Part II of the 2018 Annual Report on the Monitoring the application of Union Law, Part II: Policy areas, p. 28.

9 Van Keulen 2007, par. 3.3.

10 SWD(2016) 472 final.

11 SWD(2016) 472 final.

12 SWD(2017)139 final, p. 2.

ground to help public authorities apply it better'.¹³ The action plan also emphasises, as part of the second point of priority, the strengthening of compliance by working closely with the Member States, which also includes 'bilateral dialogue'.¹⁴ The Commission intends to promote the exchange of knowledge and to give more recognition to 'good management practices in Natura 2000 areas'.¹⁵ In brief, the action plan 'breathes' the important role of providing guidance documents as part of a broader strategy aimed at improving the implementation of the Habitats Directive at the level of regional and local authorities.

6.2 HABITAT GUIDANCE DOCUMENTS

What does the 'soft regulatory landscape' that accompanies the Habitats Directive look like, and where can Habitat guidance documents be found? To start with the latter question, Habitat guidance documents are published on the website of the Directorate-General for Environment.¹⁶ The webpages refer to various guidance documents that are scattered around on different subpages. The two 'core Habitat guidance documents' are the document on the Management of Natura 2000 sites and the Species guidance document.

This section describes the main features of these two core guidance documents, as well as the other guidance documents that complement the Habitats Directive. I will pay attention to three questions: how are the guidance documents issued?; what are the main driving forces behind the issuing of the guidance documents?; and what types of guidance can be discerned?

6.2.1 Natura 2000 guidance documents

The Managing Natura 2000 guidance document

The first Managing Natura 2000 guidance document (hereinafter also referred to as MN2000 guidance document) bears the name 'The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'. The document was issued in 2002 'following relevant informal discussions held with the nature protection authorities of the Member States'.¹⁷ National authorities were thus consulted prior to, and perhaps also during, the drafting process.

The introductory section of the MN2000 guidance document sheds light on the reasons behind the issuing of the guidance document. At the

13 SWD(2017)139 final, p. 2.

14 SWD(2017)139 final, p. 2.

15 SWD(2017)139 final, p. 2.

16 https://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm. (last accessed 30 September 2019).

17 Managing Natura 2000 sites, p. 6.

time, uncertainty existed with regard to the meaning of Article 6 of the Habitats Directive in practice: 'Many questions have been raised about the significance of this article by Member States and operators.'¹⁸ The drafters see added value in providing further guidance to Article 6: 'At first glance it [Article 6] seems to be broad and not well defined, but a thorough analysis, linking it with the other articles of the Directive, makes it easier to understand and apply.'¹⁹ The environment Commissioner believes that a clear and accessible understanding of key provisions of the Directive will provide the basis for application of the Directive 'on an equal footing'.²⁰

At the same time, the guidelines emphasise that they 'cannot go beyond the directive'. The introductory section explains that this is 'particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures (...)'.²¹ Thus, the MN2000 guidance document seeks to address uncertainty on the one hand, whilst on the other hand intends to leave flexibility to the Member States.

This 'double aim' is also reflected in the way in which the guidance document is drafted. Rather than giving detailed, instructive guidance, the MN2000 document has a highly explanatory character. In different paragraphs, the document explains the logic, purpose and context of Article 6 of the Habitats Directive.²²

Nonetheless, other types of guidance also feature in the MN2000 guidance document. In between the lines of the highly explanatory texts, traces of interpretative guidance can be found. For instance, the document provides interpretative guidance for concepts of 'disturbance' and 'deterioration'.²³ At other places the documents go beyond giving an explanation and interpretation of the openly formulated concepts of Article 6 of the Habitats Directive. The document gives concrete recommendations on the choice and form of 'appropriate' implementing measures – thus providing for 'implementing guidance'. The Commission services, for example, explain that the appropriate assessment should be recorded and that it should be reasoned, otherwise 'the assessment does not fulfil its purpose and cannot be considered 'appropriate''.²⁴ Although not as promi-

18 Managing Natura 2000 sites, p. 6.

19 Managing Natura 2000 sites, p. 6.

20 Managing Natura 2000 sites, p. 3.

21 Managing Natura 2000 sites, p. 6.

22 For instance, section I.I of the guidance document places Article 6 in 'a wider context', section 2.2 elaborates on the 'positive nature' of the obligation to provide for necessary conservation measures, and section 4.2 reflects on the logic between the different paragraphs of Article 6 of the Habitats Directive.

23 Managing Natura 2000 sites p. 28, 29. The Commission services define deterioration as 'a physical degradation affecting a habitat', whereas disturbance is considered to 'not directly affect the physical conditions of a site'. For each concept further indicators are given that could be used in order to identify the deterioration and disturbance of habitats.

24 Managing Natura 2000 sites, p. 36, 37.

nently visible as implementing guidance, good practices can also be found in the MN2000 guidance document, for instance in Annex II that contains 'considerations on management plans'.²⁵

In November 2018 an updated version of the MN2000 guidance document was issued, now with the somewhat more formal title: 'Commission notice C(2018)7621. Managing Natura 200 sites. The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'. This updated version largely follows the same structure as the original version adopted in 2000. As the introductory section states it 'builds upon a series of Commission notes addressing Natura 2000 management, as well as other relevant Commission guidance documents on Article 6'.²⁶

Other guidance documents related to Natura 2000

The Managing Natura 2000 guidance document is the 'main' guidance document related to Natura 2000 sites, yet not the only guidance document. Soon after the issuing of the MN2000 guidance document in the year 2000, the Commission services issued several other guidance documents on Article 6. For instance, the Commission provides further guidance in relation to the carrying out of appropriate assessments²⁷ and on the meaning and design of compensatory measures (Article 6(3) and 6(4) Habitats Directive).²⁸ Other guidance documents give an overview of the most important rulings of the Court of Justice.²⁹ Having a highly explanatory nature, these guidance documents include extracts from the most important Court rulings, explanatory notes, and provide for a list of guidance documents related to Article 6 of the Habitats Directive.³⁰

In addition to these 'general guidance documents' the Commission services have also issued 'sector-specific guidance' on the application of Article 6 of the Habitats Directive in specific policy areas such as wind energy developments, inland waterway transport and forestry.³¹ Particularly interesting is the Frequently Answered Questions section related to forestry.³² This FAQ section places the answers in different categories. For

25 Managing Natura 2000 sites, p. 54, 55. The considerations reflect the conclusions from two seminars where participants (the European Commission, NGO's, Member States and stakeholders) exchanged views on the elaboration of (successful) management plans.

26 Managing natura 200 sites (C(2018)7621), p. 5.

27 Methodological guidance on Article 6(3) and (4) of the Habitats Directive.

28 Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC.

29 Nature and Biodiversity Cases. Ruling of the European Court of Justice. An updated version was published in September 2014.

30 See also the introductory remarks in Article 6 of the Habitats Directive. Rulings of the European Court of Justice, p. 9.

31 Respectively: Wind energy developments and Natura 2000; Guidance document on Inland waterway transport and Natura 2000; Natura 2000 and Forests Part I-II; Natura 2000 and Forests Part III – Case studies.

32 http://ec.europa.eu/environment/nature/natura2000/management/faq_en.htm (last accessed 30 September 2019).

each answer the section clarifies whether the answer refers to: 1) a 'legal obligation' under the Habitats Directive; 2) whether the answer entails a 'recommendation' which aims to 'provide possible options to deal with certain aspects of the directives'; or 3) whether the answer is of an informational character aiming to provide for 'a better understanding of Natura 2000, the Birds and the Habitats Directives'. The idea of organising answers in different categories comes close to the exercise of discerning among the different types of guidance outlined in section 3.2 of this research.

Finally, the website of the European Commission also provides for a section that exhibits examples of good practices relating to the management of Natura 2000 sites. It mentions that 'the Commission has been actively encouraging the exchange of experiences and good practices on the management of different types of Natura 2000 sites'.³³ The Commission considers cooperation with stakeholders necessary in order to find agreement on the 'appropriate ways to conserve species and habitats whilst respecting the local socio-economic and cultural context'.

6.2.2 Guidance on Species protection

In 2007, the Commission services issued the 'Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC' (the Species guidance document).³⁴ This 88-page document gives guidance related to the second pillar of the Habitats Directive: the system of strict protection of animal species to be set up by the Member States. It is the second 'core' Habitat guidance document.

The introduction of the Species guidance document explains that 'up until now, most of the attention regarding the implementation of the Habitats Directive has focused on the establishment of the Natura 2000 network'. However, the implementation of the second pillar has also given rise to questions and problems in practice.³⁵ The species guidance document seeks to address these problems in practice and envisages to ensure *a common understanding* of the relevant provisions among national and regional authorities'³⁶ At the same time, the guidance document seeks to provide for flexibility in implementation practices:

'It [the guidance document] aims to assist in devising pragmatic and flexible ways of applying the provisions and making them effective and practical, while fully respecting the legal framework'.³⁷

33 http://ec.europa.eu/environment/nature/natura2000/management/best_practice_en.htm. (last accessed 30 September 2019).

34 Species guidance document.

35 Species guidance document, p. 4.

36 Species guidance document, p. 4.

37 Species guidance document, p. 4. See also p. 19 and 20.

Like the Managing Natura 2000 guidance documents, the Species guidance document has a dual purpose: promoting uniform implementing practices and leaving room for manoeuvre to the Member States, enabling them to take the specific measures to protect their Habitat Species.

When looking at the content of the Species document, a different picture arises than is the case for the MN2000 guidance document. In contrast to the MN2000 guidance document, the Species guidance document has a highly interpretative character. It provides detailed guidance for the interpretation as well as the application of the prohibitions and derogations spelled out in Article 12 and 16 of the Habitats Directive. Nonetheless, other types than detailed, interpretative guidelines also feature in the Species guidance document. The first paragraph of the document, for instance, has a highly explanatory character, explaining the aim of the Species protection regime and outlining some general principles that are inherent to the Habitats Directive.³⁸ Other paragraphs give concrete recommendations on the form that implementing measures could take³⁹ or spell out examples of good practices and approaches developed in the Member States.⁴⁰

Still today, the Species guidance document is the core guidance document in relation to the second pillar of the Habitats Directive. The website of the Commission does not refer to other Species guidance documents. This is in contrast with the high number and variety of guidance documents related to the first pillar of the Habitats Directive, the Natura 2000 network.

6.3 EU EXPECTATIONS ON THE USE OF HABITAT GUIDANCE DOCUMENTS

Like all guidance documents, Habitat guidance documents lack legally binding force. Despite their non-legally binding nature, Habitat guidance documents might still *de facto* or *de jure* acquire binding effect in practice. In what ways do the Commission and the EU Court of Justice expect national authorities as well as national courts to use Habitat guidance documents?

6.3.1 The Commission: a 'flexible approach'

As already transpires from the above section, a common characteristic of Habitat guidance documents is that the Commission seeks to give guidance to the Member States, whilst leaving the choice and form of implementing measures to the Member States. This is made explicitly clear throughout

³⁸ Species guidance document, p. 17-21.

³⁹ For instance, section II.2.3 elaborates on the content of 'measures to effectively implement the prohibitions of Article 12'. It explains that Article 12 requires the adoption and implementation of 'preventive measures', and provides for concrete examples of the form that such preventive measures could take. Species guidance document, p. 28.

⁴⁰ For instance, as an example preventive measures that could be taken to set up the system of species protection, the Species guidance document presents the 'National Species Actions Plans' in Sweden (see p. 29, 30).

the text of the documents. For instance, the MN2000 guidance document emphasises that Member States are free to choose the appropriate way they wish to implement the practical measures;⁴¹ the Species guidance document notes that it is 'the responsibility of national authorities to define the measures necessary to implement the prohibitions of Article 12'. This latter document also explains that the 'nature' of these measures will differ according to the different national systems.⁴²

In addition to these remarks related to 'leeway' of Member States to adopt implementing measures, Habitat guidance documents contain usual non-binding clauses.⁴³ These clauses stress the non-bindingness of, in particular, the *interpretative* guidelines given by the Commission. The MN2000 guidance document states for instance:

[T]he document reflects only the views of Commission services and is not of a binding nature. It should be stressed that in the last resort it rests with the European Court of Justice to *interpret* a directive. The *interpretations* provided by the Commission services cannot go beyond the directive.⁴⁴ [Emphasis added]

The Habitat guidance documents thus 'breathe' a flexible approach and emphasise their non-binding character. Yet, as discussed in section 6.1.2, in this policy area the Commission also takes an active approach in monitoring the Member States' practices when acting as 'guardian of the Species'. The question now is whether and how the Commission uses its guidance documents to fulfil its monitoring and supervising tasks. Do Habitat guidance documents play a role as monitoring aid to assess whether implementing measures are in accordance with the Habitats Directive? According to Beijen, the Commission takes account of Habitat guidance documents for the question whether to start an infringement procedure.⁴⁵ Nonetheless, further empirical research is needed in order to provide more insights into the use of Habitat guidelines by the Commission services when acting as guardian of the Species.

6.3.2 The CJEU: few references to Habitat guidelines

The next question is whether, and how, expectations as to the use of the Habitat guidance documents have been formulated in the case law of the Court of Justice. A search in the 'InfoCuria' database, only reveals two

41 Managing Natura 2000 sites, p. 6.

42 Species guidance document, p. 28.

43 See for instance Methodological guidance on Article 6(3) and (4) of the Habitats Directive, p. 6, 7; Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, p. 1; Nature and Biodiversity Cases. Ruling of the European Court of Justice, p. 4.

44 Managing Natura 2000 sites p. 6; See in a similar way Species guidance document, p. 4.

45 Beijen 2010, p. 193.

judgments in which the Court refers to a Habitat guidance document:⁴⁶ the *Waddenzee* ruling and the judgment *Commission v Finland* (wolf hunting).⁴⁷ In both rulings, the Court refers to the Habitat guidance documents for the interpretation of the provisions in the Habitats Directive.

The *Waddenzee* ruling refers to the MN2000 guidance document in relation to the question what it means that an appropriate assessment needs to be conducted for a plan or project that is 'likely to have a significant effect' on Natura 2000 sites, as stated in Article 6 of the Habitats Directive. The Court reasons that there needs to be a 'mere probability' for such effects to occur, and considers that this is 'moreover, clear from the guidelines for interpreting that Article drawn up by the Commission'.⁴⁸ The ruling *Commission v Finland* refers to the Species guidance document for the question whether Finland, by authorising wolf hunting, had breached Article 16(1) of the Habitats Directive.⁴⁹ The question is whether, despite the wolf hunting, the conservation status of wolves is maintained. The Court considers that 'following the example of the views formulated by the European Commission (...) it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive'.⁵⁰

The number of two rulings in which references to Habitat guidance documents can be found is not numerous compared to the high number of guidance documents issued in relation to the Habitats Directive. On the other hand, it cannot be ruled out that a guidance document has been consulted or taken into account by the Court, without this being reflected in the text of the judgment.

What is more, as is also shown by Eliantonio, Habitat guidance documents feature more frequently in the text of opinions of the Advocates General. For instance, the opinion on the case *Commission v France* refers extensively to the Species guidance documents. In this case, the Advocate General remarks that he will 'take into account' the Species guidance document in relation to the question is whether France has taken sufficient measures to protect the French Hamster. Although not legally binding, the Advocate General explains, the document 'contains useful guidance on the interpretation of the relevant provisions'.⁵¹

46 The documents were found with the key words 'guidance documents' and the key words 'guidelines' + 'habitat' and by choosing 'environment' as subject matter. Last search conducted at 10 April 2019. See for a discussion of the role of soft law in environmental law in the case law of the CJEU Eliantonio 2018.

47 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482 (*Waddenzee*); CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*).

48 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482, par. 43 (*Waddenzee*);

49 CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*); see also Beijen 2010, p. 193.

50 CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341, par. 29 (*Wolf hunting*).

51 Opinion to the judgment of the CJEU 9 June 2011, C-383/09, ECLI:EU:C:2011:23, par. 28 (*European Commission v. France*). See also Eliantonio 2018, p. 508.

What conclusion can be drawn from the few references to Habitat guidance documents in the rulings of the Court of Justice? The rulings show that references to Habitat guidance documents are the exception rather than the rule. As noted by Eliantonio, the rulings of the Court do not seem to attribute the Habitat guidance documents 'a special authoritative force'.⁵² What is more, the rulings of the Court do not give specific instructions as to how national authorities and national courts should or could use Habitat guidance documents. In this regard the question arises whether the '*Grimaldi* formula' applies in relation to Habitat guidance documents, which prescribes that national courts are bound to take Commission recommendations into consideration. As discussed in section 3.4.2, it is not yet clear whether the *Grimaldi* formula applies to 'other' guidance documents than recommendations. And, as we have seen above, Habitat guidance documents have not been issued in the form of recommendations. Therefore, it is uncertain whether the *Grimaldi* formula applies.

6.3.3 Conclusion: addressing heterogeneity

The above sections show that the Commission guidance documents stress the importance of leaving room for manoeuvre to the Member States. In this way, national authorities can adopt the implementing measures that are needed and appropriate to address the specific geographical and environmental circumstances at the local and regional level. Pressures to act Habitat guidance-proof might result from the active role of the Commission as 'guardian of the Species'. Specific instructions on how to use the Habitat guidelines have not been formulated in rulings of the Court of Justice. Instead, references to Habitat guidelines are hard to find and rather exceptional, which is in contrast to the high number of Habitat guidelines that accompanies the Habitats Directive.

6.4 THE IMPLEMENTATION OF THE HABITATS DIRECTIVE IN THE NETHERLANDS

The Dutch government was initially of the opinion that the Habitats Directive had been transposed correctly into national legislation,⁵³ but it soon became clear that there was a considerable 'misfit' between the Habitats Directive and existing environmental policies in the Netherlands.⁵⁴ On several occasions, the European Commission informed the Netherlands that the implementation measures were not sufficient and not compatible

52 Eliantonio 2018, p. 511.

53 Backes 1995, p. 216.

54 Van Keulen 2007, par. 2.2.2.

with the Habitats Directive.⁵⁵ The implementation of the Habitats Directive also became subject of political and societal debate, whilst national NGOs initiated court cases on inadequate implementing measures. In the words of Van Keulen, the Habitats Directive has been a 'case of contested Europeanisation'.⁵⁶ In brief, the implementation of the Habitats Directive has not run smoothly.

It is against this background that the reception of guidance documents in the Dutch legal order is being studied. This section outlines the main features of the implementation process. It discusses the previous legislative acts that implemented the Habitats Directive, in relation to which traces of Habitat guidance documents can still be found, and that have now been replaced by the Nature Protection Act. It sheds light on the layered system of judicial protection in this policy area and, finally, draws some conclusions on the potential, promising role of Habitat guidance documents as an implementation aid and as a judicial decision-making aid.

6.4.1 Previous legislative acts transposing the Habitats Directive

The two legislative acts that initially transposed the Habitats Directive are the Nature Protection Act 1998 and the Flora and Fauna Act. The 1998 Nature Protection Act transposed the provisions on the designation and protection of special areas of conservation, the Natura 2000 sites. The Flora and Fauna Act transposed the provisions of the Habitats Directive related to the setting up of a strict system of species protection.

The transposition of the Habitats Directive into these legislative acts was not without implementing problems and concerns. With regard to the 1998 Nature Protection Act the main problem was that the initial legal framework transposed the Natura 2000 regime using *existing* legislative acts and provisions. For instance, no specific provisions were introduced that regulated the conservation and management of Natura 2000 sites.⁵⁷ The Commission considered the legal framework insufficient and informed the Dutch government accordingly.⁵⁸ This led to a major revision of the Nature Protection Act in 2005, which aimed to bring the national implementing act in line with the obligations on the designation and management of Natura 2000 sites as laid down in the Habitats Directive.⁵⁹

The problem related to the transposition of the Species protection regime in the Flora and Fauna Act was that the articles in this act implemented different legal regimes. For instance, Articles 8 to 11 of the Flora

55 See for a detailed overview of the interactions between the European Commission and the Netherlands De Boer et al. 2010, p. 51-57.

56 Van Keulen 2007.

57 See *Kamerstukken 2001/02*, 28171, 3, p. 2, 4.

58 See *Kamerstukken 2001/02*, 28171, 3, p. 1, 7.

59 A second important revision of the 1998 Nature Act took place in the year 2009. See *Kamerstukken 2006/07*, 31038, 3, p. 14.

and Fauna Act transposes not only Article 12 of the Habitats Directive, but also the prohibitions in the *Birds* Directive⁶⁰ and, what is more, it sought to implement *national* policy objectives that did not follow from the Habitats Directive.⁶¹ As a result, the provisions in the Flora and Fauna Act raised questions and uncertainty in practice as to their scope and meaning.

The evaluation of the Dutch nature protection legislation in 2008 led to the conclusion that the legal framework had become too complex and intransparent.⁶² The integration of different legal regimes seeking to implement EU provisions and national provisions at the same time clouds the origins of the provisions and renders their application in practice problematic.⁶³ Another problem is that openly formulated provisions laid down in the legislative acts, some of which reflect the provisions in the Habitats Directive, are 'vague and unclear' in practice.⁶⁴ The transposition of the Habitats Directive into Dutch implementing legislation had evolved into a complex legal framework that needed to be more 'transparent', 'consistent', and 'simplified'.⁶⁵

6.4.2 The 2017 Nature Protection Act: decentralised implementation

Following the recommendations in the evaluation, the Dutch government issued a proposal for a new Nature Protection Act. This Act was adopted in 2015 and entered into force on 1 January 2017. With the aim of simplifying the previous legislative framework, the Nature Protection Act 2017 integrates both the Managing Natura 2000 regime and the Species protection regime.⁶⁶ Simplification was also to be achieved by transposing the obligations laid down in EU legislation in a transparent and recognisable manner. The act makes a clearer distinction between the rules that have a European origin and rules that have a national origin, and more directly reflects the formulation used in the *Birds* and *Habitats* Directive.⁶⁷

What is more, a characteristic of the 'new' Nature Protection Act is that it delegates, as much as possible, implementing responsibilities to the Dutch provinces.⁶⁸ The Dutch provinces are considered best capable of making decisions taking into account the specific circumstances and regional and local particularities.⁶⁹ Consequently, the Dutch provinces fulfill different tasks related to the management of Natura 2000 sites and grant derogations from the prohibitions in Article 12 of the *Habitats* Directive.

60 Council Directive (EEC) 79/409 of 2 April 1979 on the conservation of wild birds.

61 *Kamerstukken* 2011/12, 33348, 3, p. 142.

62 *Kamerstukken* 2007/08, 51536, 1.

63 *Kamerstukken* 2011/12, 33348, 3, p. 145.

64 *Kamerstukken* 2007/08, 51536, 1, p. 27.

65 *Kamerstukken* 2007/08, 51536, 1, p. 75; see also Braaksma & De Graaf 2016.

66 *Kamerstukken* 2011/12, 33348, 3, p. 6.

67 Kajaan 2016.

68 *Kamerstukken* 2011/12, 33348, p. 51-55.

69 *Kamerstukken* 2011/12, 33348, p. 52.

This also means that in the implementing measures taken by the Dutch provinces traces of Habitat guidance documents may be found. The various guidance documents on the management of Natura 2000 sites could be used, for instance, for the elaboration of management plans,⁷⁰ as an aid to decide whether an appropriate assessment is needed,⁷¹ or as an aid to examine whether an exception could be made on the basis of Article 6(4) of the Habitats Directive.⁷² The detailed and interpretative guidelines in the Species guidance document could serve as an aid to interpret and apply Articles 12 and 16 of the Habitats Directive: the Dutch provinces apply these provisions, as transposed into the Nature Protection Act, in individualised decisions and are empowered to adopt general derogations in the form of binding provincial regulations.⁷³

6.4.3 A layered system of judicial protection

The Habitats Directive is infamous not only for the problems that have been experienced in implementing practices. Especially in the early years after the transposition date had expired, the Dutch judiciary encountered difficulties in interpreting and applying the openly formulated provisions of the Habitats Directive.⁷⁴ Therefore, Habitat guidance documents could, at least in theory, serve as a helpful judicial decision-making aid for national courts when reviewing the measures that are taken in the context of the implementation of the Habitats Directive. Traces of Habitat guidance documents feature, as we will see in section 6.6, in rulings of various courts. This is not surprising as in the Netherlands, the implementation of the Habitats Directive is subject to a 'layered system' of judicial oversight. District courts are competent to review administrative decisions taken on the basis of the Nature Protection Act, after which appeal is possible before Judicial Division of the Dutch Council of State. What is more, implementing practices, or a lack thereof, of the Dutch government have also been challenged in civil proceedings. The analysis of the rulings of Dutch courts in section 6.6.2, shows that in civil proceedings Habitat guidelines could come to play a role as a judicial interpretation aid as well.

6.4.4 Conclusion: a promising role for Habitat guidance documents

The above sections show that Habitat guidance documents could come to play a role as an implementation aid at different stages and at different levels in the implementation process. The Commission's guidelines could

70 The necessary conservation measures mentioned in Article 6(1) of the Habitats Directive; Article 2.3 Nature Protection Act.

71 Article 2.7(3) and Article 2.8 of the Nature Protection Act.

72 Article 2.8 Nature Protection Act.

73 Article 3.8 Nature Protection Act.

74 Van Keulen 2007, par 2.2.1. See *Kamerstukken 2001/02*, 28171, 3, p. 7.

fulfil their role as an implementation aid in relation to the transposition of the Habitats Directive in formal legislation, currently the Nature Protection Act. The documents could fulfil this role also, or in particular, at the provincial level, as the Dutch provinces are responsible for the implementation of the Nature Protection Act 'on the ground'. What is more, the guidelines could also be used as a judicial decision-making aid to interpret and apply the openly formulated provisions in the Habitats Directive. In brief Habitat guidance documents could be expected to play a promising role, both as an implementation and judicial decision-making aid. Whether and what roles the documents fulfil in practice will be examined in the next sections.

6.5 THE USE OF HABITAT GUIDANCE DOCUMENTS BY NATIONAL AUTHORITIES

This section studies the role or roles of Habitat guidance documents in the implementation of the Habitats Directive. The analysis is structured along the lines of the different stages of the implementation process. It explores the use of Habitat guidance documents in relation to the issuing of the Nature Protection Act and then turns to the level of the Dutch provinces. In what ways are guidance documents used in provincial regulations and policy rules, for the elaboration of management plans, appropriate assessments, and individualised decisions? The final section draws the lines together and explores whether behind the traces of the use of the Habitat guidelines perspectives on their binding character can be discerned.

6.5.1 Translating guidance in the explanatory memorandum to the Nature Protection Act

As described above, the current formal legislative act that transposes the Habitats Directive is the Nature Protection Act that was adopted in 2017. Several provisions of the Nature Protection Act directly transpose (or 'copy paste') provisions of the Habitats Directive, and do not include references or visible traces of the use of the Habitat guidance documents. Does this mean that the Habitat guidelines played no role in relation to the establishment of this act?

The answer to this question is that the guidelines *did* play a role, but not in the drafting of the text of the legislative provisions. The Habitat guidelines played an important, and visible, role during the drafting of the explanatory memorandum that is attached to the proposal for the Nature Protection Act.⁷⁵ This is witnessed by numerous references to Habitat guidelines that feature throughout the text of the explanatory memorandum, which is 312 pages long. The memorandum includes 27 references to the

75 Interview 6 – National official D; The search for explicit references in the text of this act and the explanatory memoranda related thereto is described in Annex section 1.2.2.

Managing Natura 2000 guidance document and 20 references to the Species guidance document.⁷⁶

Most references to Habitat guidelines feature in the sections of the explanatory memorandum that describe the 'European framework',⁷⁷ of which subsections are titled '*interpretation of the Court of Justice and of the Commission*' [Emphasis added].⁷⁸ The guidelines of the Commission have been used to explain, interpret and give guidance on the implementation of the Nature Protection Act to the Dutch provinces.⁷⁹ According to a senior official who was involved in the drafting process, the explanatory memorandum 'in fact serves a reference book' (*naslagwerk*).⁸⁰ The guidelines were used as an aid 'to clarify the origin and meaning of the provisions in the Habitats Directive'.⁸¹ Furthermore, the guidance given in the explanatory memorandum was considered to promote uniformity and consistency in the provincial implementing practices.⁸² In brief, the guidelines were used to address the implementing problems that were experienced under previous legislative acts.

In the explanatory memorandum, references to the different types of Habitat guidance provisions can be found. Mostly, the memorandum refers to Habitat guidelines with an interpretative character.⁸³ At some places, these interpretative guidelines are even literally translated, such as is the case for the part of the memorandum that elaborates on the concept of deterioration in Article 6(2) of the Habitats Directive. The memorandum explains that:

"Deterioration is – according to the guidance document – a physical degradation affecting a habitat. This means all the influences on the environment in the habitats, such as the available space, water, air and soils'.⁸⁴

76 This number of references in the current Nature Protection Act is remarkably higher than the number of references in the explanatory memoranda to the previous legislative acts that transposed the Habitats Directive. The amending act adopted in 2005 that transposed the MN2000 regime in the Nature Protection Act 1998, refers 11 times to the MN2000 guidance document. The explanatory memorandum to the Flora and Fauna was adopted several years before the Species guidance document was issued and therefore in this document no explicit references to the Species guidelines have been found.

77 *Kamerstukken 2011/12*, 33348, 3, p. 70.

78 *Kamerstukken 2011/12*, 33348, 3, p. 109, 136.

79 Interview 6 – National official D.

80 Interview 6 – National official D.

81 Interview 6 – National official D.

82 Interview 6 – National official D; This objective is also pointed out in the explanatory memorandum: *Kamerstukken 2011/12*, 33348, 3, p. 109, 136. p. 52.

83 Cf. Interview 6 – National official D.

84 *Kamerstukken 2011/12*, 33348, 3, p. 100. The explanatory memorandum does not finish here, it continues paraphrasing the guidance provided by the European Commission in the rest of the first half of the paragraph that interprets the concept of disturbance.

The explanatory memorandum also refers to implementing guidance. For instance, the choice for management plans as conservation measures that need to be adopted under Article 6(1) of the Habitats Directive, is explained and justified in light of the Commission's recommendations and good practices on this point.⁸⁵ At other places, the Commission's implementing guidelines are used to give guidance to the Dutch provinces and other actors. It is noted, for instance, that according to the Commission's view the appropriate assessment needs to be recorded and well-reasoned, and that it is recommended to use the methodology envisaged by Directive 85/337/EEC.⁸⁶ Finally, the explanatory memorandum also has a highly explanatory character. Although in these sections references to the Commission's guidelines are not manifold, the structure of the memorandum clearly resembles the Commission's approach in its guidance documents.

6.5.2 Provincial regulations and policy rules: a limited role for Habitat guidance

On the basis of the Nature Protection Act the Dutch provinces take implementing measures related to the management of Natura 2000 areas and the species protection regime. One of these implementing measures is the possibility to adopt provincial regulations providing for general derogations or licences for certain projects and actions.⁸⁷ The Dutch provinces can also adopt policy rules for the exercise of their power to grant derogations and licences.⁸⁸ What role, if any, do the Habitat guidance documents play in relation to the adoption of the provincial regulations and policy rules?

The search for traces of the use of Habitat guidelines in the text of the provincial regulations and policy rules only reveals one reference to one of the Habitat guidance documents.⁸⁹ The explanatory note to the policy rules on nature protection of the province of Noord-Holland cite a section of the Species guidance document for the interpretation of the concept of serious damage in Article 16(1)(b) of the Habitats Directive.⁹⁰ In the provincial regulations and policy rules of the other eleven Dutch provinces, no references to Habitat guidance documents were found.

From the twelve interviews that were conducted with officials from ten Dutch provinces, a similar picture arises. Most officials mentioned that in their view Habitat guidance documents do not play any role, or only fulfill a limited role as an implementation aid when drafting provincial

85 See Article 6(1) Habitats Directive and Article 2.3. Nature Protection Act.

86 *Kamerstukken 2011/12*, 33348, 3, p. 110.

87 Article 2.9(3) and Article 3.8(2) of the Nature Protection Act.

88 The basis for the issuing of policy rules is Article 4:84 of the Dutch General Administrative Law Act.

89 See Annex section 1.2.2.

90 *PB*, 103, p. 15.

regulations or policy rules.⁹¹ The officials indicated that the guidelines may be consulted,⁹² but that in this situation the document is used only as 'background information',⁹³ or that it does not play an 'active role' as an implementation aid.⁹⁴ An explanation given for the limited role of Habitat guidelines is that 'interpretative questions seldom arise when drafting policy rules'.⁹⁵ Another explanation is that thus far, the provinces have not (yet) very often used the possibility to provide for 'general derogations' from Article 12 Habitats Directive. When adopting such general derogations, interpretative questions might arise and the guidance documents could thus fulfill their role as an interpretation aid.⁹⁶

What is more, all officials pointed out that when guidance documents are consulted, this is most likely not mentioned in the explanatory notes to the provincial regulations and policy rules. The reference to the Species guidance document in the policy rules of the Province of Noord-Holland is an exception.⁹⁷ This invisibility of the use of Habitat guidance documents in the provincial rulemaking practices contrasts with the explicit and transparent approach taken in the explanatory memorandum to the Nature Protection Act. On the other hand, the absence of references in the explanatory notes is not surprising in view of the fact that explanatory notes to the provincial regulations and policy rules are usually very short.⁹⁸ One of the officials explained that a very detailed explanation could make the explanatory note unnecessarily complex and mentioned that it 'probably won't be read by anyone'.⁹⁹

6.5.3 Management plans and appropriate assessments: guidance for interpretation only?

Habitat guidance documents not only provide interpretative guidelines, but also give guidance on the form and method of implementing measures, such as management plans (Article 6(1) Habitats Directive) and appropriate assessments (Article 6(3) Habitats Directive). What roles do these types of guidance play in Dutch provincial practices?

91 Interview 11 – National official J; Interview 13 – National official L; Interview 10 – National official M; Interview 15 – National official N; Interview 19 – National official R; Interview 21 – National official T.

92 Interview 12 – National official K; Interview 16 – National official O; Interview 18 – National official Q; Interview 17 – National official P.

93 Interview 12 – National official K; Interview 17 – National official P.

94 Interview 11 – National official J.

95 Interview 16 – National official O.

96 Interview 18 – National official Q; Interview 17 – National official P.

97 Interview 21 – National official T.

98 Interview 17 – National official P.

99 Interview 17 – National official P.

Most officials interviewed for this research could not tell with certainty whether the guidance documents are used for the elaboration of management plans or appropriate assessments.¹⁰⁰ Nonetheless, most officials explained that if the guidance documents are used, this is for interpretative questions. This also seems to be the case when examining appropriate assessments or elaborating on management plans. Interesting is the following remark made by one of the officials:

'I was involved in the elaboration of management plans both for the Ministry of Infrastructure and Water Management and also with the Province of (...) and I can say that in both situations [management plans and appropriate assessments] the guidance was not used to see what the best practices are or how you should approach this. If it [the guidance documents] was used, it was for the meaning of concepts and how you should interpret certain questions.'¹⁰¹

The provincial official cited above further clarified that in the context of the examination of appropriate assessment, the guidance documents are generally consulted when *interpretative* questions arise that relate to the distinction between mitigation measures or compensation measures.¹⁰²

'When we conduct an appropriate assessment and in this process the question arises whether it is compensation or mitigation and whether I interpret these concepts correctly, as well as for the question what risks are involved, it is possible that I might consult the guidance documents. That is dependent on the case and the complexity of the problem concerned'.¹⁰³

In this regard, it is relevant to note that the concept of mitigation measures is not mentioned in the Habitats Directive. Instead, the possibility of including mitigation measures is introduced in the Managing Natura 2000 guidance document. In the Netherlands, the inclusion of mitigation measures in the appropriate assessment of plans or projects has become an established practice.¹⁰⁴ Although it seems reasonable that this practice has been derived from the Commission's guidance documents, no clear indications have been found that there indeed is a causal relationship between this established practice of including mitigation measures and the Commission's guidance documents.

100 Interview 11 – National official J; Interview 13 – National official L; Interview 14 – National official M; Interview 15 – National official N; Interview 17 – National official P; Interview 18 – National official Q; Interview 20 – National official S; Interview 21 – National official T.

101 Interview 16 – National official O.

102 Interview 12 – National official K.

103 Interview 12 – National official K.

104 See Woldendorp & Schoukers 2014. The authors explain that the practice of nature inclusive design has been developed to circumvent to the complicated test laid down in Article 6(4) of the Habitats Directive. See also for instance ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504 (*Briels e.a.*); The inclusion of mitigation measures may also be required by the competent authority as condition for a licence to be granted to a plan or project, see for instance ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5684, par. 2.4.12 (*Elektricity station Eemshaven*).

From the interviews with officials of the Dutch provinces, the general picture thus emerges that guidelines are used particularly for interpretative questions. A similar view is expressed by the senior official of the Ministry of Economic Affairs, who was involved in drafting the Nature Protection Act. According to his experience, the Habitat guidelines fulfill a role as an interpretation aid rather than as an aid to decide on the best implementing method to be followed when:¹⁰⁵

'The method that is used when elaborating management plans is a purely national exercise (...) As far as it concerns the Netherlands, we have not been guided in any way by what the guidance on this point says about the content of management plans.'¹⁰⁶

Here, it seems that a pattern is arising. The Habitat guidelines seem to become particularly relevant when interpretative questions are at stake, even when elaborating management plans or when conducting or examining appropriate assessments. This is in line with the observation that in the drafting of provincial regulations and policy rules Habitat guidance documents are consulted if interpretative questions arise.

6.5.4 Granting derogations and licences: guidance as (silent) interpretation aid

At the final stage of the implementation process, when individualised decisions need to be taken, Habitat guidance documents fulfill their role as an interpretation aid most clearly. This was indicated by almost all the provincial officials who were interviewed for this research.¹⁰⁷ At this stage of the implementation process, it is most likely that interpretative questions arise:

'The guidance documents are generally used more often in relation to licences than in relation to policy questions. Most procedures take place in the sphere of granting derogations and it is there that *questions on the interpretation* of the Directive are most pertinent and where the guidance documents need to be taken account of.' [Emphasis added].¹⁰⁸

105 Interview 6 – National official D.

106 Interview 6 – National official D.

107 Interview 11 – National official J; Interview 12 – National official K; Interview 14 – National official M; Interview 16 – National official O; Interview 17 – National official P; Interview 18 – National official Q; Interview 20 – National official S; Interview 21 – National official T. Only National official N mentioned that in his Province N the guidance documents are not consulted for the granting of derogations and licences.

108 Interview 12 – National official K.

Interpretative questions particularly arise in relation to the granting of licences related to the Species protection regime.¹⁰⁹ Therefore, the guidance document that is used most often as a decision-making aid is the Species guidance document. The officials pointed out that this guidance document could be a helpful interpretation aid in applying and interpreting Article 12 and Article 16 of the Habitats Directive in individual cases.¹¹⁰ This is not surprising in light of the highly interpretative character of the Species guidelines.

What is more, the Species guidance document can be expected to fulfill a more important role as an interpretation aid in the coming years. Indeed, at the time the interviews were conducted, the Dutch provinces had only recently become responsible for the granting of decisions in relation to the Species protection regime. At that time, the application of Articles 12 and 6 of the Habitats Directive, as indicated by one of the officials, was still 'unchartered waters'.¹¹¹ Therefore, the Species guidance documents are likely to be consulted more often in the future by Dutch provincial officials.¹¹²

Silent use of Habitat guidelines

When Habitat guidelines are used as a decision-making aid, it is likely that this is not mentioned in the text of the decisions. All provincial officials interviewed for this research mentioned that generally speaking, individualised decisions do not mention whether or not a guidance document of the Commission has been taken into account.¹¹³ The officials gave answers such as: 'Generally, we never use it [the guidance document] when drafting a derogation or licence';¹¹⁴ or 'Only exceptionally is a reference included in a decision';¹¹⁵ and 'You will actually never see it [the use of a guidance document]'.¹¹⁶ Thus, when Habitat guidance documents are used in decisions on derogations or licences, the documents usually take the role of a silent interpretation aid.

109 Interview 11 – National official J; Interview 14 – National official M; Interview 18 – National official Q; Interview 20 – National official S.

110 Interview 11 – National official J; Interview 14 – National official M; Interview 18 – National official Q; Interview 20 – National official S.

111 Interview 20 – National official S.

112 Interview 20 – National official S; see also National official Q.

113 Interview 16 – National official O; Interview 18 – National official Q; Interview 20 – National official S; Interview 11 – National official J; Interview 17 – National official P; As well as the officials cited below.

114 Interview 13 – National official L.

115 Interview 14 – National official M.

116 Interview 12 – National official K.

Habitat guidelines as 'justification aid' in statements of defence

The interviews with officials from ten Dutch provinces revealed another interesting insight. All officials indicated that Habitat guidance documents could come to play a role when drafting the statement of defence after the granting of a derogation or licence, or the refusal to do so, is challenged. The guidance documents could then act as a helpful aid to explain or defend the decision that has been taken. Furthermore, it is more likely that the statements of defence include explicit references to guidance documents (in contrast to the silent use of guidance in individualised decision-making practices).¹¹⁷ One of the officials responded for instance by saying:

'As far as I can remember it [a guidance document] is not mentioned in the individualised decision but it is mentioned in the statements of defence (verweerschriften).'¹¹⁸

Finally, some officials remarked that Habitat guidance documents can also be referred to before a national court, as is for instance made clear in the following response:

'In an individualised decisions you will not see it [the guidance document]. (...) If necessary you can use it [the guidance document] when you are standing before the Judicial Division [of the Council of State]. When making your plea it is of course helpful to mention it [the guidance document] once in a while.'¹¹⁹

Remarkably, however, the use of guidance documents to justify and motivate decisions on whether to grant a derogation or licence has not become visible in the rulings of the Dutch courts that were found in the search for explicit references. It only follows from two rulings that a Habitat guidance document was invoked by the Provincial Deputy Council or by the Minister.¹²⁰

6.5.5 Different types of guidance, different perspectives?

The above sections provide an insight into the use of the Habitat guidance documents at different stages of the implementation process. The analysis reveals traces, in particular, of the use of interpretative guidelines. The other types of guidance leave their imprints on implementing practices less clearly. The above analysis, however, has not yet provided insights into any

117 Interview 13 – National official L; Interview 14 – National official M; Interview 16 – National official O; Interview 21 – National official T.

118 Interview 11 – National official J.

119 Interview 16 – National official O.

120 See ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*); Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503.

perspectives behind the use of the Habitat guidelines. This section, therefore, explores whether the use, or non-use, of Habitat guidelines is guided by a clear perspective on the binding character of these guidelines. In order to be able to provide insights into any perspectives, I draw on information acquired during the interviews with an official who was involved in the drafting of the explanatory memorandum to the Nature Protection Act as well with officials from the Dutch provinces.

Interpretative guidelines: a perspective of authoritativeness?

The official who was involved in the drafting of the explanatory memorandum to the Nature Protection Act explained that the interpretative guidelines are considered 'most relevant and useful' for the drafting of the explanatory memorandum and are 'certainly considered authoritative'.¹²¹ The authoritative character of Commission guidelines is, in his view, related to the role of the European Commission as guardian of the Treaties:

'The documents are considered authoritative. This has to do with the role of the European Commission, which is to guard over the correct implementation of the Treaties. The European Commission also has the initiative to start infringement procedures, and therefore it is useful to act in line with the interpretation given by the European Commission'.¹²²

Due to this authoritative character, Commission guidelines are, in principle, followed. However, this does not mean that the guidance documents are applied as if they were binding rules:

'I think it would go too far to consider the guidance documents binding. We consider the guidance documents an authoritative interpretation aid that in practice is generally followed unless the EU Court of Justice has given a different interpretation. However, in the situation where it is clear that we do not share the interpretation given by the European Commission, I could imagine that we would choose to not to follow the interpretative guidance given by the European Commission'.¹²³

A similar perspective transpires from the interviews with officials from the Dutch provinces. Most of the interviewed officials also consider the guidelines to be an authoritative aid, and in particular for the interpretation of the provisions of the Habitats Directive. I include some of the answers below, starting with the answer from the official of the Province G:

121 Interview 6 – National official D.

122 Interview 6 – National official D.

123 Interview 6 – National official D.

'The documents are to a certain extent authoritative because they are issued by the European Commission and they give a certain explanation on how you should read and interpret the Directive. This gives a minimum of certainty on how you should explain national legislation.'¹²⁴

The official from the Province H also emphasises the authoritative status of the Habitat guidance documents:

'For me it has a high status. Perhaps it has not the status of the law but it certainly has an authoritative status. I think the Council of State also looks at the guidance documents in this way.'¹²⁵

To the question what the main reason is for taking the guidance documents into account, the official from the Province H answers:

'We do not really have an alternative. It [the guidance documents] comes from the European Commission and that is just *the* interpretation. You can see it in practice, the public authorities or the Council of State, that they take account of it and look at it [the guidance documents] in that way. Somehow it has given itself a status.'¹²⁶

The official from the Province M links the authoritative status to use of the guidance documents by the Council of State:

'I would say that they are authoritative. The Judicial Division of the Council of State also takes them into account for the interpretation of legal questions. Consequently, we also attach importance to them, but this value is not so much that we consult the guidance documents for every licence that is granted. We consult them when we have questions on a specific question. In practice that does not happen very often.'¹²⁷

The official from the Province P compares the status of guidance documents to that of explanatory memoranda at the national level. In his view, the tendency is also to follow the guidance documents of the Commission:

'for the reason that it comes close to a kind of explanatory memorandum to the Directive, an explanation of how Europe explains it. Thus, in that respect you take it very seriously. (...) It is certainly important and authoritative, within an administrative and political context.'¹²⁸

124 Interview 12 – National official K.

125 Interview 13 – National official L.

126 Interview 13 – National official L.

127 Interview 18 – National official Q.

128 Interview 21 – National official T.

One of the officials, the official from the Province K, sheds a slightly different view on the authoritativeness of the Habitat guidance documents. 'Perhaps the European Commission thinks that the guidance documents are authoritative'.¹²⁹ However, he doubts whether the guidance documents indeed have such an authoritative status in practice:

'I think that they [the guidance documents] should be more authoritative than they now are in practice. (...). When you [the European Commission] want[s] guidance documents to be more authoritative than they are now, you [the European Commission] should do more to promote them and to explain and indicate in what way they should be used.'¹³⁰

Nevertheless, still the majority of the answers that were given by the interviewees seem to come close to the perspective of guidance documents as an authoritative interpretation aid that in principle is followed when implementing the Habitats Directive. Thus, from the interviews with Dutch officials, a picture emerges that the interpretative Habitat guidelines are used and perceived as an authoritative source of interpretation.

What perspective for implementing guidance and good practices?

The above sections provide an insight into the perceived authoritativeness of interpretative guidelines. What about the other types of guidance, such as implementing guidance and good practices that also feature in the Habitat guidance documents?

The official involved in the drafting of the explanatory memorandum remarked that 'the guidance on the type and content of implementing measures', is generally followed only in so far as this is in line with Dutch practices and experiences.¹³¹ For instance, the Netherlands has made its own choices regarding the use of management plans as conservation measures and has used its own experiences when designing the management plans.¹³² 'We did not need the guidance provided by the European Commission since we had already developed similar practices'.¹³³ A similar remark was made by one of the officials from the Dutch provinces, who indicated that:

'The guidance documents are not used to see what the best practices are or how you should approach this. If they [the guidance documents] are used it is to clarify the meaning of concepts and how you should interpret certain questions.'¹³⁴

129 Interview 16 – National official O.

130 Interview 16 – National official O.

131 Interview 6 – National official D.

132 Interview 6 – National official D.

133 Interview 6 – National official D.

134 Interview 16 – National official O.

These answers indicate that implementing guidance and good practices do not have the same status or role in implementing practices as the 'authoritative interpretative guidelines' included in the Habitat guidance documents. Rather, these other types of guidance seem to be perceived and used as a voluntary implementation aid: the Commission recommendations and good practices on the form and method of implementing measures are used in so far as they fit in with national implementing policies and experiences.

6.6 THE USE OF HABITAT GUIDANCE DOCUMENTS BY DUTCH COURTS

The above sections show how Habitat guidance documents find their way into the implementing practices of the Dutch provinces. This section explores the use of Habitat guidance documents by the Dutch courts. In order to explore what role Habitat guidance documents play in the judicial decision-making process, I have searched for explicit references to Habitat guidance documents in the rulings of the Dutch courts. This search resulted in 31 rulings by district courts, courts of appeal, as well as the Judicial Division of the Council of State.¹³⁵ Out of the 31 rulings, 20 rulings refer to the Species guidance documents. Six rulings refer to the Managing Natura 2000 guidance document issued in 2000, and four rulings refer to the 'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC'. One document refers to the guidance document on 'Wind energy development and Natura 2000' (see Table 6-1).

This section studies the rulings of the Dutch courts more closely along the two lines of types of guidance and perspectives on their binding character. The analysis is structured along the lines of the guidance documents on Natura 2000¹³⁶ and the Species protection guidance document. It finds that, in particular the Species guidance document leaves traces as an interpretation aid in the rulings of the Dutch courts. The guidance documents on Natura 2000 play a less visible role. Subsequently, these findings are complemented with the insights provided during interviews with judges and a senior official of the Council of State. Do Habitat guidance documents, in practice, play a more important role than transpires from the text of the rulings?

¹³⁵ See for an overview Annex 1.2.2

¹³⁶ The Managing Natura 2000 guidance document issued in 2000 and the 'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC'.

Table 6-1 Number of rulings that refer to Habitat guidance documents

Guidance document	Number of rulings (31)
'Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' (2000)	6
'Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC' (2007)	20
'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC' (2007/2012)	4
'EU Guidance on wind energy development in accordance with the EU nature legislation' (2011)	1

6.6.1 MN2000 guidance: few references in the rulings of Dutch courts

The MN2000 guidance document is one of the two 'core' Habitat guidance documents and is accompanied by various other guidance documents. Yet, the MN2000 guidance documents have received little *explicit* attention in the rulings of the Judicial Division of the Council of State. This section discusses the *Briels* ruling which remains silent on the MN2000 guidance documents; the 'low-level overflight ruling' in which the Council of State mentions that there is no role for the Commission's guidelines; and the *Blankenburg* ruling which seems 'exception to the rule' as in this ruling MN2000 guidelines are given a role as a judicial interpretation aid.

Briels: no role for the MN2000 guidance document?

In the *Briels* ruling, the Council of State assesses the lawfulness of a decision of the Dutch Minister to widen the A2 motorway.¹³⁷ The question is whether the so-called 'mitigation measures' proposed by the Dutch minister can be taken into account in the appropriate assessment for the decision whether or not the plan negatively affects the Natura 2000 site. These measures include the development of a new area of molinia meadows on the Natura 2000 site in order to compensate for the negative effect of the widening of the A2 motorway on another part of that site.

The concept of 'mitigation measures' was introduced and elaborated on in the MN2000 guidance documents of the European Commission.¹³⁸ The *Briels* ruling refers to these guideline documents only once, namely in the part that outlines the view of the appellants. The appellants refer to the fact that the term mitigation measures is only mentioned in the Commission's guidance documents. They argue that if the Council of State decides

137 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504 (*Briels e.a.*).

138 The Managing Natura 2000 guidance document introduces the possibility of taking account of mitigation (p. 37); the Guidance document on Article 6(4) of the Habitats Directive elaborates on the distinction between mitigation measures and compensatory measures (p. 6).

to follow the guidance of the Commission nevertheless, the measures proposed by the Minister do not constitute mitigation measures as defined in this document of the European Commission.¹³⁹

The remaining paragraphs of the ruling are silent on the Commission's guidelines. The Council of State takes the view that the answer to the question whether the proposed measures can be taken into account, cannot be found in the Habitats Directive nor in the case law of the Court of Justice and decides to refer a question for a preliminary ruling to the Court of Justice.¹⁴⁰ The Council of State asks, in essence, whether the integrity of the site is not adversely affected if an area of that natural habitat of equal or greater size is created in another part of the site that is not directly affected by the project.¹⁴¹ The guidance document, however, remains unmentioned.

In the preliminary ruling, the Court of Justice takes a similar, silent approach to the Managing Natura 2000 guidance documents.¹⁴² The Court of Justice considers that the competent national authority is required to take 'into account the protective measures forming part of that project aimed at avoiding or reducing any adverse effects for the site'.¹⁴³ However, the measures proposed by the Dutch government cannot be taken into account in the context of Article 6(3) of the Habitats Directive. The creation of molinia meadows elsewhere, not on the part of the site that is directly affected, tends to compensate and not to mitigate the adverse effects of the widening of the A2 motorway.

By taking this view, the Court of Justice in fact acknowledges the possibility of taking mitigation measures.¹⁴⁴ However, like the Council of State, the Court of Justice does not refer to the Commission's guidance documents. Thus, both in the *Briels* ruling of the Council of State and in the preliminary ruling of the Court of Justice, the MN2000 guidance document does not play a visible role. Does this mean that the Courts have not taken account of the Habitat guidance documents? Have the documents, perhaps silently, played a role in the decision-making process? What status do the Habitat guidance documents have according to the Council of State and according to the Court of Justice? In the *Briels* ruling these questions remain unanswered.

139 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 86 (*Briels e.a.*).

140 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 87.4 (*Briels e.a.*).

141 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 87.7 (*Briels e.a.*).

142 CJEU 15 May 2014, C-521/12, ECLI:EU:C:2014:330 (*Briels e.a. v Minister van Infrastructuur en Milieu*).

143 See also Fleurke 2014, p. 277.

144 As is argued by Woldendorp & Schoukers 2014, p. 4.

Overflying Natura 2000: guidance 'overruled' by the case law of the EU Court of Justice

Although the *Briels* ruling remains silent on the role of the guidance documents on Natura 2000, in the 'Overflying Natura 2000' ruling¹⁴⁵ the Council of State takes a more explicit approach. In this case, the Council of State makes clear that there is no role for the Commission guidelines.

The question in this ruling is whether low-level military flights can be considered a project in the sense of Article 6(3) of the Habitats Directive. The appellants, three environmental organisations, argue for a broad interpretation of the term 'project' that includes non-physical activities such as the low-level military flights. They refer to the Commission's interpretation of the term 'project' given in the MN2000 guidance document in support of their argument.¹⁴⁶

The Council of State does not share the appellants' view that such a broad interpretation is to be employed and considers that for an activity to be considered a project, a physical change in the Natura 2000 site is needed.¹⁴⁷ The Council of State does not derive this interpretation from the Commission's guidelines, but from rulings of the Court of Justice.¹⁴⁸ The guidelines in the MN2000 guidance documents, the Council of State explains, were issued *before* the Court of Justice handed down the relevant rulings in light of which the question in this case could be decided.¹⁴⁹ Moreover, the Council of State adds, 'the interpretation given by the European Commission in the MN2000 guidance document is in line with the case law of the CJEU'.¹⁵⁰

Thus, in this ruling the interpretative question can be solved in light of the case law of the Court of Justice. As a result, the Managing Natura 2000 guidance document has become 'outdated' and has lost its role as an interpretation aid – at least for the question in this ruling.

Post-Briels: towards a more explicit approach?

In the above rulings, the guidance documents on Natura 2000 do not play a prominent role. This, however, does not mean that the MN2000 guidelines could never come to play a visible role in the Council of State reasoning. In a more recent ruling, of July 2018, the Council of State refers to the Commission guidelines as an interpretation aid. In this ruling the Council of State

145 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380 (*Low-level overflight*).

146 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.1 (*Low-level overflight*); Managing Natura 2000 sites, p. 31, 32.

147 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.3 – 3.5 (*Low-level overflight*).

148 The Council of State refers to 17 March 2011, C-275/09, ECLI:EU:C:2011:154 (*Brussels Hoofdstedelijk Gewest*), and CJEU 19 April 2012, C-121/11, ECLI:EUL:2012:225 (*Pro-Braine ASBL*).

149 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.4 (*Low-level overflight*).

150 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.4 (*Low-level overflight*).

refers to the Management Natura 2000 guidance document for a question that – like the *Briels* ruling – touches on the distinction between mitigation and compensatory measures.¹⁵¹ The question is whether compensatory measures need to have exerted their effect before the MN2000 site is negatively affected by the envisaged plan or project.

The Council of State remarks that an answer to this question has not yet been given by the Court of Justice¹⁵² and refers to the document that provides further guidance on Article 6(4) of the Habitats Directive. The ruling cites the paragraph in this guidance document which makes clear that compensatory measures do not necessarily need to be effective at the moment when the MN2000 areas concerned are affected – provided that additional compensatory measures are taken.¹⁵³ In this case, the compensatory measures will have exerted their effect before the area is significantly affected, and therefore pass the test of Article 6(4) of the Habitats Directive.¹⁵⁴

Thus, in contrast to the *Briels* ruling that was issued six years earlier, the Council of State now explicitly refers to the Commission guidelines and uses the guidelines as an interpretation aid. The different approaches towards the Habitat guidance documents indicate that the role that these guidelines play as a judicial interpretation aid are uncertain and unpredictable. What role the Natura 2000 guidelines really play in judicial decision-making practices can be discovered, it seems, only through interviews with judges. Before conducting this ‘reality-check’, the next section first explores the rulings that refer to the Commission’s guidance on species protection.

6.6.2 Species guidelines as judicial interpretation aid

Most references in the rulings of Dutch courts relate to the Species guidance document. This document is referred to in 20 rulings. The general picture that arises from these rulings is that this document fulfills the role of judicial interpretation aid more prominently and visibly than the Natura 2000 guidance documents. The role of the Species guidance documents as an interpretation aid features in different groups of rulings (for an overview of these groups rulings see Annex section 1.3.2). This section will analyse the use of the Species guidance document in these different groups of rulings.

The analysis sets out with a discussion of the foraging area rulings which show how the guidelines can become silently embedded in judicial discourse (*group 1*). Subsequently it discusses the breeding sites rulings where the guidelines are not given a role as an interpretation aid (*group 2*). The two ‘otter rulings’ of the district court of the Hague and the court of Appeal show how the courts, in one case, may deal differently with the Commission guidelines (*group 3*). The ‘incidental killing ruling’ of the

151 ABRvS 18 July 2018, ECLI:RVS:2018:2454 (*Blankenburgverbinding*).

152 ABRvS 18 July 2018, ECLI:RVS:2018:2454, par. 30.3 (*Blankenburgverbinding*).

153 Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC, p. 19.

154 ABRvS 18 July 2018, ECLI:RVS:2018:2454,), par. 30.4 (*Blankenburgverbinding*).

Council of State sheds light on the question whether the Minister is allowed to use the Commission guidelines as an interpretation aid (group 4).

1) *On foraging areas and flying routes: a silent influence of the Species guidelines*

In the foraging area rulings, the Species guidelines serve as an interpretation aid to decide on the question whether foraging areas and flying routes of bats fall within the scope of 'breeding sites and resting places' and therefore need to be protected on the basis of Article 12(d) Habitats Directive. What is interesting about this group of rulings, is that there is one 'leading case'¹⁵⁵ that is subsequently referred to in other foraging area rulings.

The leading case is the ruling of 7 November 2012¹⁵⁶ In which the Council of State first derives from the Species guidelines that Article 12(d) of the Habitats Directive should be interpreted as aiming to safeguard the ecological functionality of breeding sites and resting places. Subsequently, the Council of State assesses the facts of the case in light of this interpretation given in the Commission's guidelines. This part of the foraging area ruling that refers to the Species guidance document, is referred to and even 'copied' in later rulings. These rulings not only copy the reasoning of the Council of State, but also make explicitly clear that this interpretation on the scope of breeding sites and resting places derives from the Species guidance document.¹⁵⁷

Other rulings also refer to and adopt the reasoning of the Council of State in the foraging area ruling of 7 November 2012 *without* however referring to the Species guidance document.¹⁵⁸ In these rulings, that were not found with the search for explicit references, the courts assess whether the ecological functionality of the breeding sites and resting places has been affected, but does not make clear that this criterion has been derived from the Species guidance document. Thus, in these rulings the Dutch courts apply the interpretative guidance given in the Species guidance document in an indirect manner, namely by following the approach set out in the foraging area ruling. In this way, the Species guidance document 'silently' influences the interpretation of Article 12(d) of the Habitats Directive by the Dutch courts.

155 I draw inspiration from Sadl 2015.

156 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464 (*Foraging area*).

157 Rb. Leeuwarden 17 December 2012, ECLI:NL:RBLEE:2012:BY6864, par. 5.6; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503, par. 7.4; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024, par. 14.2; See also Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748, par. 18.

158 For instance: ABRvS 16 September 2015, ECLI:RVS:2015:2938, par. 53.3; ABRvS 26 April 2016, ECLI:NL:RVS:1099, par. 16.5; ABRvS 18 February 2015, ECLI:NL:RVS:2015:487, par. 10.4; ABRvS 10 December 2014, ECLI:NL:RVS:2014:4438, par. 12.2; ABRvS 10 December 2014, ECLI:NL:RVS:2014:4491, par. 20.5; ABRvS 31 October 2014, ECLI:NL:RVS:2014:4013, par. 4.5; ABRvS 16 April, ECLI:NL:RVS:2014:1291, par. 14.5.

2) Birds' breeding sites: the irrelevance of Species guidelines

The foraging area rulings show how the Species guidelines on the interpretation of 'breeding sites or resting places' have become embedded in the judicial discourse of the Council of State. A different trend becomes visible in the 'breeding sites' rulings. In these rulings the question is whether the notion of 'breeding site' in the context of the Birds Directive must be given a broad interpretation, so that it includes the area to which the bird species *lepelaar* (spoonbill) and *grutto* (godwit) return every year.¹⁵⁹

In this group of rulings, again a leading case can be identified. This is the ruling of the Dutch Council of State of 25 February 2009.¹⁶⁰ The appellants argue that according to the Species guidance document, the definition of breeding sites must be given a broad interpretation. The Council of State, instead, considers that the notion of 'breeding site' as laid down in the Species guidance document is not to be interpreted in such a broad manner.¹⁶¹ The area the birds return to is considered too spacious to be considered a breeding site or resting place: Article 11 of the Flora and Fauna Act concerns the protection of species, not of areas.¹⁶² The Council of State does not refer to the interpretative guidelines on this questions in the Species guidance document.

This line of reasoning is reiterated in later rulings, despite other attempts by environmental organisations to convince the Council of State that the Species guidance document leads to a broader interpretation of the birds' breeding sites.¹⁶³ One of the rulings, a civil case, even explicitly 'overrules' the opinion of the European Commission.¹⁶⁴ In this case, the claimant argues that according to the opinion of the Commission, areas where *gruttos* return to should be considered a 'breeding site'.¹⁶⁵ The District Court of Alkmaar considers that the 'non-legally binding opinion of the European Commission (...) does not lead to a different conclusion'. 'Indeed', the Court concludes, 'there already is a clear line in the case law of the Council of State'.¹⁶⁶

159 ABRvS 25 February 2009, ECLI:NL:2009:BH3985; Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647 and in appeal ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561; Rb. Alkmaar, 16 March 2012, ECLI:NL:RBALK:2012:BV8951.

160 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.

161 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.1.

162 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.1.

163 Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; Rb. Alkmaar, 16 March 2012, ECLI:NL:RBALK:2012:BV8951; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561.

164 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951. Strictly speaking, this case is out of the scope of this research as the case does not review 'implementing practices' of national authorities. Nonetheless, I mention this case as it illustrates how the 'leading ruling' of the Council of State is referred to by a lower court.

165 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951, par. 4.6; 4.13.

166 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951, par. 4.13.

This group of rulings on birds' breeding sites and resting places thus shows how the Species guidelines have lost some of their normative force due to the fact that there is an established line of interpretation of the Dutch highest administrative court.

3) *Establishing a system of protection: different approaches towards Species guidelines*

Amongst the rulings that refer to the Species guidance document is the 'otter ruling' of the District Court of The Hague of 22 May 2013.¹⁶⁷ This ruling is peculiar as it extensively elaborates on the role of the Species guidelines as an interpretation aid. The case was initiated by two environmental organisations who claim that the Dutch State has not taken sufficient measures to protect the conservation status of the Dutch otter.¹⁶⁸ In order to be able to answer this question, the District Court needs to determine the scope of the obligation to set up a system of species protection. Should the Dutch State have taken specific measures to ascertain a favourable conservation status of the otter? The Species guidance document is – according to the District Court – one of the sources for the interpretation of the Habitats Directive, in addition to the preambles of that Directive and the case law of the Court of Justice.¹⁶⁹ The Court considers:

'On the basis of the case law of the CJEU and *within the legal boundaries* the Species guidance document gives clarification on the scope of the obligation for the Member States to undertake research and of the obligation to set up a system of protection.'¹⁷⁰ [Emphasis added]

The District Court thus presumes that the Commission's guidelines respect the legal boundaries of the Habitats Directive. This is remarkable, as only the Court of Justice has the final judicial authority to rule on the validity of the Commission's guidance documents.¹⁷¹

Subsequently, after having cited entire sections of the Commission's guidance document, the District Court refers to the opinion in the case *Commission v France* on the protection of the European hamster.¹⁷² In this Opinion the Advocate General concludes that a broad interpretation of Article 12(1) of the Habitats Directive needs to be employed 'in part on the basis of the above mentioned guidelines of the European Commission'.

167 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'the dispute'.

168 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'the dispute'.

169 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'enforceability'.

170 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'enforceability'.

171 See above section 3.4.4.

172 Opinion to the judgment of the CJEU 9 June 2011, C-383/09, ECLI:EU:C:2011:23 (*European Commission v. France*). See also above section 6.3.2

By mentioning that the Advocate General also referred to the Habitats guidance document, it seems that the District Court seeks to underline the possibility of using the guidelines as an interpretation aid. This, however, is not made explicit in the text of the ruling.

Eventually, in light of the interpretation given in the guidance document, the Court reaches the conclusion that in this case the room for discretion of the Dutch State has become confined.¹⁷³ The Dutch Council of State is urged to take specific measures in relation to five 'traffic bottlenecks' that are needed to ensure the conservation status of the otter.

This ruling of the District Court is interesting in light of the explicit way in which the Court uses the Species guidance document. The explicit approach chosen in the ruling of the District Court not only contrasts with the rulings that have been discussed thus far, it also contrasts with the ruling of the Court of Appeal of The Hague in the same case that was delivered after the Minister had appealed against the ruling in first instance. In this ruling, the Court of Appeal does not mention nor refer to the Species guidance document. This is at least remarkable since the Court of Appeal also reflects on the scope of the room for discretion of the Dutch State in the implementation of Article 12(4) of the Habitats Directive. According to the Court of Appeal, the District Court has gone too far with regard to the measures that were required to be taken by the Dutch State.¹⁷⁴

The silence of the Court of Appeal on the Commission's guidelines, however, does not mean that the guidance document did not play any role during the proceedings. One of the lawyers in the 'otter case' was interviewed for this research and explained that:

'The guidance document did play a role during the proceedings before the Court of Appeal, perhaps an even more important role than during the proceedings before the District Court'.¹⁷⁵

Thus, even when Commission guidelines are not explicitly referred to in the text of a ruling, this does not preclude the possibility that the guidelines, in some way, have played a role in the judicial decision-making process.

173 Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593. The room for discretion is limited by the circumstance that with the measures the number of traffic accidents must be reduced in such a way that there is no longer a negative impact on the otter population. In view of the conservation status of the Otter and the number of car accidents heightens the urgency for such measures.

174 Hof Den Haag 4 November 2011, ECLI:NL:GHDHA:2014:3522, par. 3.9 and 3.10 (*Otter, appeal*). In order to reduce the deaths of otters caused by traffic accidents, the Court of Appeal considers it sufficient that the Dutch government is obliged to solve the most urgent traffic bottlenecks. The Dutch State is not required to also take measures solving the non-urgent bottlenecks as was decided by the District Court.

175 Interview 22 – Lawyer A.

4) *Incidental killing? The use of the Species guidelines by the Dutch Minister*

The above sections show that in some rulings the Species guidelines are used as an interpretation aid. In other rulings, the Commission's guidelines are not used as a point of reference for interpretative questions, as the breeding sites rulings show. What is more, the use or influence of Habitat guidance may even be silent, or invisible as shown in the foraging area rulings. As a result, it is difficult to say whether the use of the Species guidelines as an interpretation aid is common practice, or whether the document is used only incidentally.

Furthermore, a clear perspective as to the role or status of the Species guidance document does not transpire from the above rulings either. It remains uncertain whether, and to what extent, the Dutch courts consider themselves bound by the Commission's guidelines. The rulings also do not explicitly reflect on the question whether the Species guidance document could or should be taken into account by the Dutch Minister and/or the provinces.

In one ruling, found with the search for explicit references, the Council of State spends some words on this question. It concerns the 'incidental killing' ruling of 8 February 2012, in which 24 appellants challenge the decision of the Dutch Minister of Economic Affairs and the Minister of Infrastructure and Environment to build 86 wind turbines along the side of the *Noordoostpolder*.¹⁷⁶ In this ruling, which is 74 pages long, the Species guidance document is just briefly mentioned in one paragraph which makes clear that the Species guidance document was invoked by the Ministers during the proceedings before the Court.¹⁷⁷ The Council of State considers that the Ministers were allowed to attach importance to the Species guidance document and in particular to the guidance on page 49 of the document regarding the incidental killing of animals. Furthermore the Council of State adds that in this regard, the Council has taken notice of the value that the Court of Justice attaches to the Species guidance document in the judgment *Commission v Finland*.¹⁷⁸

Thus, the incidental killing ruling clarifies: 1) that the Minister is allowed to use the Species guidance document as a decision-making aid; and 2) that the Council of State considers it relevant that the document is used as an interpretation aid by the Court of Justice. At the same time, by making clear that the Minister is allowed to take the document into account, the question remains whether this is the case irrespective of whether the Court of Justice uses this document as an interpretation aid. Furthermore, the ruling also remains silent on the question as to whether the Council

176 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215 (*Incidental killing*).

177 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*).

178 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*) and CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*). See also above section 6.3.2.

considers the Minister to a certain extent bound by the guidelines of the Commission. Thus, the Council of State not only clarifies the role of the Species guidelines as an interpretation aid, the Court also, and perhaps foremost, leaves questions open.

6.6.3 Beyond explicit references: do the rulings give a misleading picture?

On the basis of the rulings of the Courts, some preliminary conclusions can be drawn with regard to the use of these guidance documents in implementing practices. The MN2000 guidance document seems to be used exceptionally as a judicial decision-making aid, since only a few explicit references were found from which it follows that the Court took this guidance document into account. These rulings also do not provide a clear perspective on the authoritative status of the guidance document. The Species guidance document is mentioned more frequently in the case law of the Courts. This document serves as a judicial interpretation aid. However, also in the case of the Species guidance document, the rulings do not provide for a clear perspective as to how the guidance document is used.

This section complements these findings with insights acquired during interviews with two State Councillors (*staatsraden*), one former State Councillor and a senior official at the Dutch Council of State.¹⁷⁹

A silent role for Managing Natura 2000 guidance document?

Although the above sections reveal little references in the rulings of Dutch courts to the Managing Natura 2000 guidance document, in practice the Managing Natura 2000 guidance document has played an important role when adjudicating on questions related to Article 6 of the Habitats Directive. The State Councillors mentioned that in particular this guidance document on the management of Natura 2000 sites that is consulted quite consistently.¹⁸⁰ Vice versa, although more references were found to the Species guidance document, this does not mean that this document is consulted more often:

The Species guidance document might be referred to a bit more often, but in my view it is not consulted more often. It [the number of references] does not say anything about what happens internally, when reflecting on a case. That is my impression.¹⁸¹

179 The judges' views are not a formal statement as to the use of the guidance documents by the Council of State. The purpose of the interviews is limited to providing a 'reality-check' that puts into perspective the findings of the search for explicit references.

180 Interview 26 – State Councillors C and D.

181 Interview 26 – State Councillors C and D.

The MN2000 guidance document thus plays a 'silent' role in judicial decision-making processes. The invisibility of the use of the MN2000 guidance document might have to do with the highly explanatory character of the guidelines, as is noted by the State Councillors:

"This guideline, on management, was made in the very beginning and gives very useful, yet considerably general instructions and explanations from concepts (...). It is about the logic between the different paragraphs, about the concepts that are used. A larger part of what is included in this [guidance document] plays a role more in the background and less in the direct decision-making process"¹⁸²

On the other hand, the more specific and detailed character of the Species guidance document makes this guidance document more suitable to refer to when interpreting the Habitat provisions. The State Councillors remark:

'[T]he Species guidelines are more specific about the result of derogations that can or cannot be made. The guidelines much more concern the actual decision making with regard to what is and what is not allowed on the basis of the Directive.'¹⁸³

The above answers suggest that the different way in which the guidance documents are used by the State Councillors might be related to the types of the guidelines included in the guidance documents. The highly explanatory MN2000 guidance document is primarily used as an aid to understand the logic and system behind Article 6 of the Habitats Directive, whilst the interpretative Species guidelines visibly fulfills a role as a decision-making aid.

A perspective of authoritativeness

As said in the introduction to this section, the above analysis of the rulings of Dutch courts does not reveal a clear perspective on the degree of bindingness of the Habitat guidance documents. What is the view taken by State Councillors and officials of the Council of State? The State Councillors emphasised the authoritative, yet non-binding character of the Habitat guidance documents:

'It [the guidance documents] is of course issued by the European Commission', but it is also not 'the truth'. Eventually the Court of Justice decides. (...) But authoritative it certainly is'.¹⁸⁴

182 Interview 26 – State Councillors C and D.

183 Interview 26 – State Councillors C and D.

184 Interview 26 – State Councillors C and D.

Now, what does it mean for a guidance document to be 'authoritative'? The State Councillors clarified that the guidance documents are 'more than only useful' and that, in principle, the documents must be followed. There is, however, no obligation to follow the Commission's guidelines: 'it is possible to deviate from the guidelines', but 'the guidance documents cannot be set aside without any reason'.¹⁸⁵ This means that the binding effect of Habitat guidance documents comes close to that of a 'comply or explain' obligation.¹⁸⁶ What is more, the State Councillors emphasised that not only should national courts take account of the Commission guidelines: competent national authorities should also take account of the guidelines and explain a deviation from the guidelines accordingly.¹⁸⁷

Finally, the State Councillors indicated that this 'perspective of authoritativeness' not only encompasses the Habitat guidance documents. It reflects a more general perspective that guides the use of Commission guidelines within the Council of State. It means that the Commission guidelines as an authoritative interpretation aid also encompass guidance documents issued by the Commission in other policy areas.¹⁸⁸

These observations raise the question whether the use of Habitat guidelines by other Dutch administrative courts are driven by a similar perspective. From informal interviews that have been conducted with judges of other courts, a picture arises that in practice indeed differences exist when it comes to their views on the degree of bindingness and status of Habitat guidelines. According to a former Councillor of State, the ways in which guidance documents are used and perceived, might differ from person to person, and from judge to judge.¹⁸⁹ The attitude towards guidance documents might, for instance, be influenced by whether or not the person dealing with the guidance documents has a background in EU law or a background in national administrative law.¹⁹⁰

6.7 CONCLUSION

In the Netherlands, where the implementation of the Habitats Directive has not always been a smooth process, the role of guidelines as an implementation aid is promising. The Habitat guidelines could provide a helpful aid in implementing the openly formulated provisions in the Habitats Directive. In this regard, the aim of the Habitat guidelines to leave 'room for

185 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

186 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

187 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

188 The State Councillors specified that this is the case in so far as it concerns 'unregulated guidance' that do not have a specific legal basis in secondary legislation. See on those unregulated guidance documents section 2.4.1.

189 Interview 27 – State Councillor E.

190 Interview 27 – State Councillor E.

manoeuvre' fits well with the decentralised implementation approach in the Netherlands. The Dutch provinces are responsible for the implementation of the Dutch Nature Protection Act 'on the ground.'

I expected that traces of the Habitat guidelines would be found in particular in the 'provincial practices', as in this phase implementing questions would certainly arise. The result seems somewhat disappointing: the guidelines do not, or not yet, play a prominent role in the provincial practices. Nonetheless, *if* the guidelines are used this is mostly as an aid for the *interpretation* of the Habitat provisions. The guidelines take this role most clearly when individualised decisions are to be taken or defended. A more visible role is given to the guidelines in the explanatory memorandum to the Nature Protection Act. The memorandum refers extensively to the Commission's guidelines with the aim of providing for some consistency in the practices of the twelve different provinces. Here again, it is in particular the interpretative guidelines that are mostly referred to and – at several places – even 'copied' in the text. Although this is not made explicit in the text of the memorandum, interviews with a senior official learned that the guidelines are perceived as an authoritative interpretation aid, that cannot be set aside without giving good reasons for doing so. Interestingly, a similar 'perspective of authoritativeness' was articulated by nearly all officials of the Dutch provinces who were interviewed in the context of this research. Thus, in the implementation process, the Habitat guidelines seem to take a role as an 'authoritative interpretation aid'.

The use of the Habitat guidance documents by the Dutch courts shows similarities with the role of the guidelines in the implementation process. In the rulings of the courts, the guidelines take the role of an interpretation aid. References to the detailed, interpretative Species guidelines feature in rulings of district courts as well as of the Council of State. Other types of guidance are also consulted and taken into account, without this becoming visible in the text of the rulings. This seems to be the case, in particular, for the explanatory guidance in the MN2000 guidance document, which is consulted as 'standard practice', without this becoming visible in the rulings of Council of State.

This silence of Dutch courts also concerns the legal status of the Habitat guidelines; the rulings remain implicit about the 'legal relevance' of the guidelines. The rulings do not state more than that the courts use the guidelines as an interpretation aid, and that the Minister is permitted to take account of the guidelines – as appears from the incidental killing ruling. Again, interviews with State Councillors provide interesting insights: the Habitat guidelines are considered an authoritative source for interpretation. Therefore, guidelines are to be taken into account, and deviation needs to be justified; by both administrative authorities and national courts. The question remains, however, whether this perspective is shared by other courts.

From the above, it follows that the interpretative Habitat guidelines in particular leave traces in Dutch implementing as well as in judicial decision-making practices. A clear perspective on the binding character

of the guidelines does not transpire from the legislative, administrative or judicial branch. Even when in practice the use of guidance is perceived and used as a mandatory interpretation aid governed by a 'comply-or-explain like approach', to the 'outside world' the status of Habitat guidelines as an implementation aid as well as a judicial decision-making aid remains highly uncertain.

This chapter explores the role of guidance documents related to ‘Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ (the Citizenship Directive).

In the policy areas that were previously discussed, that of Direct Payments and the Habitats Directive, guidance documents represent an important part of the EU regulatory landscape. In both areas, the issuing of guidance documents has become an established practice. The area of free movement of persons shows a different picture. In relation to the Citizenship Directive, the European Commission issued only two guidance documents, which is far less compared to the areas discussed previously. The first guidance document is the Communication ‘on guidance for better transposition and application of Directive 2004/38/EC’ and was issued in 2009.¹ The second guidance document, issued in 2014, is the Handbook addressing marriages of convenience.²

Like the previous case studies, this chapter consists of two parts. The first part introduces the two free movement of persons guidance documents (hereinafter FMP guidance documents) and describes the context in which the guidance documents were issued and used (sections 7.1 and 7.2). It is observed that FMP guidance documents are a means for the Commission to enter into dialogue with the Member States, addressing their concerns on the far-reaching implications of the free movement rules. This results in soft pressures to act guidance-proof (section 7.3). The second part of this chapter explores the use of FMP guidance documents in the Dutch legal order, which is characterised by a restrictive immigration policy (section 7.4). The empirical analysis reveals that the use of FMP guidance documents in the implementation process is guided by a ‘cherry picking approach’ (section 7.5). The rulings of the Judicial Division of the Council of State and the District Court of The Hague provide insights in the use of guidance in judicial decision-making practices (section 7.6). The analysis shows that the FMP guidelines are recognised and used as a judicial interpretation aid, and that the guidelines acquire a certain self-binding effect on the Dutch authorities. This leads to the conclusion that whilst the use of FMP documents as an implementation aid is guided by a practice of cherry picking;

1 COM(2009)313 final.

2 SWD(2014)284 final.

the Dutch courts act as facilitating actors, reinforcing the binding effect of the guidance documents on the Dutch authorities (section 7.7).

7.1 THE CITIZENSHIP DIRECTIVE

7.1.1 Free movement of persons: touching on national immigration policies

Free movement of persons is one of the cornerstones of the European integration process.³ The Treaty of Rome of 1957 introduced the free movement of workers as one of the four economic freedoms.⁴ Initially, the right to free movement thus only applied to economically active citizens of the Member States. In the course of the integration process, the right of free movement was gradually extended to other categories. The introduction of the notion of Union Citizenship in the Treaty of Maastricht in 1992 marks a milestone in the extension of the right to free movement beyond those who are economically active.⁵ The Maastricht provisions are still included in the Treaty on the Functioning of the European Union. Article 20 TFEU grants EU citizenship to ‘every person holding the nationality of a Member State’ and Article 21 TFEU provides for the right to free movement: ‘every citizens of the Union shall have the right to move and reside freely within the territory of the Member States’.

The Citizenship Directive, adopted on 29 April 2004, provides for further rules that govern the right to free movement of Union citizens and their family members.⁶ These conditions and limitations form the framework for the Member States that needs to be respected when deciding on applications for residence permits or when taking decisions restricting the right to free movement. Despite the fact that the Citizenship Directive is adopted under the legal framework of EU free movement law, the Directive touches upon the migration laws and policies in the Member States.

Over the years, administrative policies and practices in most EU Member States have shown a tendency towards restrictive immigration policies, especially in the area of family reunification.⁷ This tendency towards more national control contrasts with the developments of the notion of EU citizenship and EU free movement policies, sometimes against

3 Boeles et al. 2014, p. 31.

4 Article 48 of the Treaty establishing the European Economic Community (now Article 45 TFEU).

5 Article 17 of the Consolidated version of the Treaty Establishing the European Community; Boeles et al. 2014, p. 31.

6 The Directive substitutes previous secondary legislation that provided for the rules on free movement and codifies the case law of the Court of Justice of the EU, see Boeles et al. 2014, p. 32.

7 Martinsen 2011, p. 953; Ballesteros et al. 2016, p. 15.

the preferences of the Member States' governments.⁸ This background of political sensitiveness and increased involvement of the European Union makes it interesting to take free movement of persons as one of the policy areas to study the role of Commission guidance documents in the implementation of EU law.

7.1.2 The conditions and limitations governing the right to free movement

The conditions that apply for an EU citizen to obtain a right of residence vary according to the duration of stay of a Union citizen in a 'host' Member State.⁹ The Directive provides that during the first three months, the right of residence in a host Member State is not subject to any conditions or formalities other than the requirement of holding a valid identity card or passport.¹⁰ When a Union citizen resides in another Member State for a period longer than three months, certain conditions must be met.¹¹ For instance, the Union citizen must be a worker or self-employed person in the host Member State, or have sufficient resources. Union citizens who have resided in the host Member State for more than five years are granted a right of permanent residence.¹²

The Citizenship Directive extends the right of residence to the family members of Union citizens that have used their right to free movement, such as the spouses of Union citizens or the partner with whom the Union citizen has a durable relationship.¹³ Consequently, the right to free movement may also be granted to family members of a Union citizen from a non EU Member State ('third country nationals').

Restrictions on the right to free movement can be found in the final chapters of the Citizenship Directive. Article 27 provides that the Member States may restrict the right to free movement on the grounds of public policy, public security and public health and lays down further rules that need to be respected when taking such restrictive measures. For instance, it emphasises that measures taken on grounds of public policy and public security 'shall exclusively be based on the personal conduct of the individual concerned'. A limitation to the right to free movement can also be found in Article 35 of the Directive. Member States may take the necessary measures to refuse, terminate, or withdraw the right of residence 'in the case of abuse of rights or fraud, such as marriages of convenience'.

8 Martinsen 2011.

9 Compare Boeles et al. 2014, p. 51.

10 Article 6 Citizenship Directive.

11 Article 7 Citizenship Directive.

12 Article 16 Citizenship Directive.

13 Article 3(2)(a)(b) (a valid identity card or passport is of course still required).

7.1.3 The Member States' conception of discretionary control

From the above, it already transpires that the Citizenship Directive lays down general rules that contain openly formulated provisions.¹⁴ For instance, the rules that outline conditions to the right to free movement use concepts such as 'sufficient resources', 'unreasonable burden' and 'dependent family members'. The restrictions on the right to free movement also take the form of general rules. Article 27 introduces the grounds on which it is possible to restrict the right to free movement in the form of general principles. Article 35 speaks of 'abuse' without giving a definition and states that in order to tackle abuse the Member States may take 'the necessary measures'.

The general wording and openly formulated provisions of the Citizenship Directive can be explained in light of the wish of the Member States to maintain discretion in the interpretation and application of the Citizenship Directive.¹⁵ Indeed, when provisions are openly formulated this leaves, at least at first sight, room for manoeuvre in implementing practices at the national level. According to Martinsen, immigration policy is one of the areas where the Member States traditionally have wished to maintain political control and administrative discretion.¹⁶ In this area 'Member States have jealously guarded their autonomy to define who are to be members of the national communities'.¹⁷

At the same time, it can be questioned whether this room for discretion, or the conception thereof, will be 'preserved' in practice. Indeed, openly formulated provisions also give rise to questions before the Court of Justice on the interpretation of provisions of the Directive. Through the interpretation of the provisions of the Citizenship Directive, the Court of Justice draws and redefines the boundaries of the room for discretion of the Member States.¹⁸ Martinsen shows how the principle of proportionality is a powerful instrument enabling an extension of Union competences,¹⁹ and Barnard explains the development towards a 'right's based approach' in the Court's rulings, whilst the Member States fear the EU rules enabling 'welfare tourism'.²⁰

One of the rulings of the Court of Justice that has given rise to debate and controversy at the national level is the *Metock* ruling handed down by the Court of Justice in 2008.²¹ The *Metock* ruling not only encountered resistance in the Member States, the ruling also 'triggered' a request from the Member States for the issuing of the first 'FMP guidance document'.

14 Beck 2012, p. 173.

15 Costello 2009.

16 Martinsen 2011, p. 953, 954.

17 Martinsen 2011, p. 945.

18 Compare Barnard 2014, p. 357, 358.

19 Martinsen 2011.

20 Barnard 2014, p. 358-362.

21 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449 (*Metock*).

7.1.4 The Metock ruling and the request for Commission guidelines

The preliminary question that leads to the *Metock* ruling is raised by the Irish High Court and concerns the Member States' competence to restrict the right of free movement of third country family members of Union citizens.²² The Irish High Court asks whether the Citizenship Directive precludes national legislation that only grants a right of residence to a third country national family member of a Union Citizen when the family member has previously lawfully resided in another Member State.²³

The Court of Justice does not accept the Member States' arguments. The right of residence of third country family members of a Union citizen cannot be made conditional on the question whether the third country national previously, lawfully or otherwise, resided in a Member State.²⁴ According to the Court, the Member States do not have an exclusive competence to grant or deny residence to third country nationals.²⁵ Such an exclusive right would go against the rationale of the right to free movement of persons, which is one of the core principles of the internal market.²⁶

The *Metock* ruling encounters resistance and criticism in the Member States, who fear a loss of control over the right of first entry of third country family members as well as an increase in the number of third country nationals claiming a right of residence on the basis of a marriage with a Union citizen.²⁷ During the Justice and Home Affairs Councils of September 2008 and November 2008 the 'Immigration Ministers' express their concerns and underline the importance the Member States attach to protecting the right to free movement from abuses.²⁸ This also led the Member States to request the Commission to issue guidelines:

'Concerned that the provisions of Directive 2004/38 should be fully and correctly implemented in order to improve the prevention and combating of misuses and abuses, whilst adhering to the principle of proportionality, the Council requests the Commission to publish guidelines for the interpretation of that Directive early in 2009.'²⁹ [Emphasis added]

22 Article 3 and Article 2(2) of the Citizenship Directive.

23 At the time when the Irish High Court raised this question, not only Ireland, but also other Member States had provided for similar 'prior lawful residence requirements'. Costello 2009, p. 595.

24 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 80 (*Metock*).

25 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 67 (*Metock*).

26 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 68 (*Metock*).

27 For instance, Denmark accused the Court of creating a 'loophole' in immigration policy making it easier for third country nationals to benefit from the right of free movement by means of marriage to an EU citizen. See; Martinsen 2011, p. 957, 958.

28 Press release 16325-1-08 REV 1, p. 27.

29 Press release 16325-1-08 REV 1, p. 28.

7.1.5 The Commission's response

The European Commission decides to act upon the request from the Council. The Commission announces its intention to publish guidelines in December 2008 in the report on the application of Directive 2004/38. The general conclusion of the report is that '[t]he overall transposition of Directive 2004/38/EC is rather disappointing'.³⁰ In order to ensure the correction transposition and implementation of the Directive, the Commission will 'use fully its powers under the Treaty and launch infringement proceedings when necessary'.³¹ Furthermore, the report mentions that:

'The Commission intends to offer information and assistance to both Member States and EU citizens *by issuing guidelines* in the first half of 2009 on a number of issues identified as problematic in transposition or application, such as expulsions and fight against abuse, in order to offer guidance as to how those may be resolved.'³² [Emphasis added]

Prior to issuing the guidelines, the European Commission creates an expert group and prepares a questionnaire in order to understand the concerns of the Member States 'on the ground'.³³ The Commission asks the Member States to identify issues that require further discussion and clarification,³⁴ which leads to at around 900 questions from the Member States being sent to Brussels.³⁵ Subsequently, the Commission services use the 'input' from the Member States on the transposition and implementation of the Directive in order to draft the guidelines.³⁶ According to Dutch officials, the elaboration of the guidelines in fact constitutes a 'compromise' and serves to 'reassure the Member States' after the concerns that had arisen in response to the *Metock* ruling.³⁷ Thus, by developing the guidelines with the help of the Member States, the Commission takes a dialogical approach.

7.2 THE FMP GUIDANCE DOCUMENTS

7.2.1 The 2009 Communication

In July 2009, as announced, the European Commission issues the first guidelines related to the Citizenship Directive. The guidelines are laid down in the Communication COM(2009)313 on guidance for better transposition and application of Directive 2004/38/EC (hereinafter: '2009 Communica-

30 COM(2008)840 final, p. 3.

31 COM(2008)840 final, p. 10.

32 COM(2008)840 final, p. 10.

33 COM(2008)840 final, p. 10.

34 COM(2008)840 final, p. 10.

35 Interview 7 – National officials E, F, G.

36 Interview 7 – National officials E, F, G.

37 Interview 7 – National officials E, F, G.

tion' or '2009 guidelines'). The Communication is published on the EUR-lex website, where it can be found in 24 different languages.³⁸ It thus has a 'formalised' character compared to the other guidance documents in the policy areas previously discussed.

The text of the guidelines issued by the Commission reflects three types of guidance provisions. Firstly, most introductory sentences of the sections or subsections in the guidance document have a highly explanatory character, paraphrasing general rules and principles formulated in the Citizenship Directive and the case law of the Court of Justice.

The second and main type of guidance that features in the document are the guidance provisions with an interpretative character. The interpretative guidelines may take the form of an interpretative rule, such as the rule that '[in] certain circumstances persistent petty criminality may represent a threat to public policy despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above'.³⁹ However, interpretative guidance is also given in the form of elements or factors that can or should be taken into account when applying the interpretative rules. For instance, in order to assess whether persistent petty criminality represents a threat to public policy, the guidelines state that 'the authorities may in particular take into account the following factors: the nature of the offences, their frequency, and the damage or harm caused'.⁴⁰

Thirdly, the 2009 Communication provides for recommendations on the method that could be followed in order to investigate whether there is a marriage of convenience.⁴¹ The guidelines make clear that the Member States 'may rely on previous experiences' to develop criteria on the basis of which suspect marriages can be detected. Subsequently, the Communication lists possible 'indicative criteria' in light of which it can be examined whether an abuse of EU rights exists and also outlines appropriate investigation methods. The recommendations on these methods given in the 2009 Communication are complemented with best practices in the second FMP guidance document, which is the Handbook addressing alleged marriages of convenience.

7.2.2 The Handbook addressing alleged marriages of convenience

The first request for a 'a handbook on marriages of convenience, including indicative criteria to assist in the identification of sham marriages' is made during the Justice and Home Affairs Council of 23 April 2012. The respon-

38 See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0313> (last accessed 12 August 2019).

39 COM(2009)313 final, p. 12.

40 COM(2009)313 final, p. 12.

41 As we will see, these guidelines come to play an important role in Dutch implementing practices. See section 7.4.3.

sible Ministers take the view that action is needed to respond to increased migratory pressures.⁴² Two and a half years later, in September 2014, the Commission publishes 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'.

The Handbook is laid down in Staff Working Document SWD(2014)284 final and accompanies a Communication that announces and summarises the content of the handbook.⁴³ The Communication and the Staff Working Document emphasise that the document has been requested by the Member States and has been prepared 'in close cooperation' with them.⁴⁴ The Commission thus pursues the 'dialogical approach' initiated some years earlier with the issuing of the 2009 Communication.

The introduction to the Handbook explains that it seeks to complement the guidance on marriages of convenience laid down in the 2009 Communication.⁴⁵ The Handbook 'expounds' the legal framework spelled out in the Communication of 2009 and provides guidance of an 'operational character':

'It [the guidance document] spells out what the application of these rules mean in practice, offering national authorities operational guidance to assist them in effectively detecting and investigating suspected cases of marriages of convenience'.⁴⁶

The 'operational guidance' on detecting and investigating suspected cases of marriages of convenience takes the form of dissemination of good practices (the fifth type of guidance identified in section 3.2.5). These good practices can be found in section 4 of the Handbook that exhibits 'operational measures within national remit'.⁴⁷ From the opening sentence of this section, it transpires that the operational guidance has been drawn from experiences and practices of the Member States:

'This section reflects practices distilled from national practices across the Member States and is not intended as a blueprint for all investigational patterns and processes'.⁴⁸

The operational measures propose a 'double-lock mechanism' which entails that national authorities should detect whether it is possible to identify 'hints of no abuse' before verifying the existence of 'hints of abuse'. In different sub-sections the handbook presents possible hints of abuse as well as inves-

42 8714/1/12 REV 1 EU Action on Migratory Pressures. A Strategic Response, p. 19.

43 COM(2014)604 final.

44 SWD(2014)284 final, p. 2 and COM(2014)604 final, p. 3.

45 SWD(2014)284 final.

46 SWD(2014)284 final.

47 SWD(2014)284 final, p. 32.

48 SWD(2014)284 final, p. 32.

tigation techniques that could be used by national authorities to investigate marriages of convenience. The Handbook also encourages cross-border co-operation as well as the exchange of information between national actors, such as national immigration authorities and national courts.⁴⁹

The Handbook not only provides for 'good investigation practices'. Most pages of the Handbook are devoted to explaining the phenomenon of marriages of convenience and to giving an overview of the legal framework that applies when detecting and investigating marriages of convenience. These reflections can be found in the second and third section of the Handbook and mainly have an explanatory character.

Nonetheless, the operational guidance on detecting and investigating marriages of convenience remains the most innovative part of the Handbook. What is more, this dissemination of good practices can be expected to have the most 'tangible' effect on national investigation practices.

7.2.3 A request for further guidance and a spill-over effect to family reunification

At the time of writing, the two guidance documents that complement the Citizenship Directive are the 2009 Communication and the Handbook addressing marriages of convenience discussed above.

A request for further guidance is made in the 2016 report commissioned by the European Parliament on the implementation of the Citizenship Directive.⁵⁰ The study concludes that issues and problems concerning the implementation of the Citizenship Directive remain, despite the judicial guidelines given by the Court of Justice as well as the guidelines issued by the European Commission. One of the main problems is the risk of inconsistencies in and 'various interpretations' of the openly formulated concepts laid down in the Citizenship Directive.⁵¹ The report recommends the Commission to 'clarify terms' by updating and expanding its guidance 'in order to include the recent developments of the CJEU as well as additional clarifications on aspects of the Directive which were not covered'.⁵²

In addition to the issuing of possible future guidance documents, it is worth noting that the 2009 Communication leaves traces in a guidance document issued in relation to the Family Reunification Directive.⁵³ The Communication on guidance for application of Directive 2003/86/EC on the right to family reunification refers to both the Communication of 2009 and to the Handbook in relation to investigating alleged marriages of convenience. The Communication mentions that despite the different legal regimes, the definitions, investigation and detection techniques are

49 SWD(2014)284 final, p. 45.

50 Ballesteros et al. 2016, p. 136.

51 Ballesteros et al. 2016, p. 11, 15.

52 Ballesteros et al. 2016, p. 11, p. 126, 136.

53 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

the same.⁵⁴ Therefore, section 4.2 of the 2009 Communication may '*mutatis mutandis* be referred to for guidance on definitions'.⁵⁵ Similarly, the guidance in the Handbook 'on investigation tools and techniques on cross-border cooperation' is considered useful in relation to cases of potential fraud and abuse of family reunification.⁵⁶

In light of these 'spill-over effects' of the FMP guidance on detecting and investigating marriages of convenience to the Family Reunification Directive, similar spill-over effects could be found at the national level. In other words, traces of the use of FMP guidelines might be found in relation to the implementation of the Family Reunification Directive.

7.3 EU EXPECTATIONS ON THE USE OF FMP GUIDANCE DOCUMENTS

As we have seen in the previous case studies, expectations formulated at the EU level may influence or shape the role of FMP guidelines in national implementing practices. What expectations as to how national authorities and national courts should use guidance documents related to the Citizenship Directive can be found in the guidance documents, the practices of the Commission and in the rulings of the Court of Justice?

7.3.1 Expectations of the European Commission

Non-binding clauses in the FMP guidance documents

The introductory sections of guidance documents issued by the European Commission often state that the guidelines are not legally binding and 'only' reflect the views of the European Commission. The FMP guidance documents are no exception. The documents include general clauses that emphasise the non-binding character of the Commission guidelines. For instance, the introduction to the 2009 Communication states that:

'The guidelines state the views of the Commission and are without prejudice to the case law of the Court of Justice (...) and its development'.⁵⁷

Similarly, the introductory section to the Handbook makes clear that:

'The Handbook is neither legally binding nor exhaustive. It is without prejudice to existing EU law and its future development. It is also without prejudice to the authoritative interpretation of EU law which may be given by the Court of Justice'.⁵⁸

54 COM(2014) 210 final, p. 27.

55 COM(2014) 210 final, p. 27.

56 COM(2014) 210 final, p. 27.

57 COM(2009)313 final, p. 2.

58 SWD(2014)284 final, p. 4.

The above cited sections in the Communication and the Handbook do not refer to a specific type of guidance. In this regard, it is interesting to note that section 4 of the Handbook explicitly refers to the non-binding character of the good practices in the form of operational guidance:⁵⁹

‘This section reflects practices distilled from national practices across the Member States and *is not intended as a blueprint* for all investigational patterns and processes. Rather, *it should serve as a toolbox of solutions* allowing Member States to set up tailored operational schemes fitting their specific needs and available resources.’ [Emphasis added]

The Commission as guardian of the Treaties

Even when presenting guidance documents as an instrument to give ‘non-binding assistance’ to the Member States, the fact remains that the European Commission is also the guardian of the Treaties. The question therefore is whether the Commission uses the FMP guidelines as an aid or standard to monitor implementing practices of the Member States, formulating (implicit or explicit) expectations vis-à-vis the Member States to act in line with the FMP guidance.

The Citizenship Directive is not the area where the European Commission most actively ‘watches the Member States’.⁶⁰ The number of infringement proceedings in the area of free movement of persons represents a small proportion of all pending infringement cases in the area ‘Justice and Consumers’.⁶¹ Since 2009, the Commission has initiated 32 infringement proceedings for non-compliance with the Citizenship Directive.⁶² According to a study conducted in 2016 on the implementation of the Citizenship Directive, the number of infringement procedures is not sufficient to tackle the problems that still exist and calls for a more active enforcement policy by the European Commission.⁶³

The conclusion that in this policy area the Commission does not have the most active monitoring role, still does not tell us whether the Commission uses its guidelines as an aid or standard when monitoring the Member States’ practices. The impression of a Dutch official interviewed for this research, is that the Commission might take account of the guidelines

59 SWD(2014)284 final, p. 32.

60 Steunenberg 2010 distinguishes between situations where the Commission acts actively as guardian of the Treaties ‘watching the Member States’ and areas where the Commission acts as a ‘silent witness’.

61 See Part II of the 2018 Annual Report on the Monitoring the application of Union Law, Part II: Policy areas.

62 See the database of the European Commission with infringement decisions: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=2&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=Directive+2004%2F38&submit=Search. Last accessed 12 August 2019.

63 Ballesteros et al. 2016, p. 15.

during an infringement procedure. However, in the official's experience, the Commission does not use the FMP guidelines as 'a standard to monitor' national implementing practices.⁶⁴ This might mean that in this policy area there is less pressure to act in conformity with guidance documents than in other policy areas where the Commission uses its powers more actively to initiate infringement proceedings as well as where guidelines serve as a monitoring standard. Further empirical research could provide further insights into the expectations formulated by the European Commission on the use of the FMP guidelines during its monitoring practices.

7.3.2 Silence of the Court of Justice

Even if it is hard to discern clear expectations on the basis of the practices of the European Commission, expectations might still be formulated in the case law of the Court of Justice. In a vast amount of rulings, mostly preliminary references, the Court of Justice has given further clarification the provisions laid down in the Citizenship Directive. Does, in these rulings, the Court refer to the guidelines of the European Commission, and does the Court make it clear how it expects the Member States to use the guidelines?

A search for explicit references in the InfoCuria database reveals two preliminary rulings in which the 2009 Communication is mentioned.⁶⁵ In these rulings, the guidelines do not play a prominent role in the Court's reasoning.⁶⁶ In one of the rulings, the Court of Justice even makes it clear that it does not follow the interpretation given in the 2009 Communication. In the *SM* ruling of 26 March 2019, the Court rules that the an 'adopted child' under the *Kafala* system cannot be considered a 'direct descendent' of a Union Citizen.⁶⁷ The Court considers the interpretation, 'such as that which is apparent from point 2.1.2 of Communication COM(2009)313 final', whereby a child in legal guardianship is a 'direct descendent' of a Union citizen, a too broad interpretation of Article 2(2) of the Citizenship Directive.

Even when the Court's rulings do not explicitly refer to the FMP guidelines, the rulings may still 'silently' adopt or apply the Commission's guidelines. Such a 'linguistic similarity' can be found in the McCarthy ruling in relation to the investigation of alleged marriages of convenience.

⁶⁴ Interview 23 – National official F.

⁶⁵ CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248 (*SM*); CJEU 2 May 2018, C-331/16 and C-366/16, ECLI:EU:C:2018:296 (*K and H.F. v Belgium*). The search was conducted with the terms 2004/38 + 'COM(2009)313' and 2004/38 + Handbook (last search at 29 May 2019).

⁶⁶ In the case *K v Staatssecretaris van Veiligheid en Justitie*, the referring Court asks whether the factors spelled out in the guidelines should be taken into account in the context of a proportionality assessment of a declaration of undesirability. However, in its assessment of the case the Court of Justice does not refer back to these factors nor to the guidelines. See CJEU 2 May 2018, C-331/16 and C-366/16, ECLI:EU:C:2018:296 (*K and H.F. v Belgium*).

⁶⁷ CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248, par. 55 (*SM*).

In this ruling, the Court of Justice considers that an individualistic approach should be taken when investigating a potential case of abuse, that systematic checks are prohibited and that the measures taken should not be automatic in nature.⁶⁸

This interpretation of Article 35 of the Citizenship Directive corresponds with the guidelines in the 2009 Communication. However, the McCarthy ruling does not explicitly refer to the Commission's guidelines. This is different in the case of the opinion of the Advocate General in the McCarthy case. In his opinion, the Advocate General considers that '[a]s the Commission correctly states in its guidelines', the Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse.⁶⁹

The opinion to the McCarthy case is not the only opinion that refers to the 2009 Communication. The search for explicit references revealed references to the 2009 Communication in five other opinions.⁷⁰ Thus, in contrast to the silence of the EU Court of Justice, the Advocate Generals seem more inclined to refer to the 2009 Communication of the European Commission.

7.3.3 Conclusion: soft pressures to act guidance-proof

From the above, it follows that neither the case law of the Court of Justice nor the monitoring practices of the European Commission reveal clear, explicit expectations as to how the FMP guidance documents should be used in national implementing practices. The most explicit expectations feature in the text of the guidance documents that repeatedly emphasise that the documents are not binding. In light of the practices at the EU level, it can thus be concluded that soft pressures are exerted to follow the FMP guidance documents when implementing EU law. The next section explores in what ways the FMP guidance documents are used in Dutch implementing practices. Do these practices, somehow, reflect the soft pressures exerted at the EU level?

68 CJEU 18 December 2014, C-202/13, ECLI:EU:C:2014:2450, par. 52, 55-57 (*McCarthy*).

69 Opinion to the judgment of the CJEU 20 May 2014, C-202/13, ECLI:EU:C:2014:345, par. 127 (*McCarthy*).

70 Opinion to the judgment of the CJEU 6 November 2013, C-423/12, ECLI:EU:C:2013:719 (*Reyes*); Opinion to the judgment of the CJEU 20 May 2014, C-202/13, ECLI:EU:C:2014:345, par. 127 (*McCarthy*); Opinion to the judgment of the CJEU 14 December 2017, C-331/16 and C-366/16, ECLI:EU:C:2017:973, (*K and H.F. v Belgium*); Opinion to the judgment of the CJEU 24 October 2017, C-316/16 and C-424/16, ECLI:EU:C:2017:797 (*Franco Vomero*); Opinion to the judgment of the CJEU 4 February 2016, C-165/14, ECLI:EU:C:2016:75 (*Alfredo Rendón Marín*).

7.4 THE IMPLEMENTATION OF THE CITIZENSHIP DIRECTIVE IN THE NETHERLANDS

Before studying the use of FMP guidance documents in Dutch implementing practices, this section sheds light on the political and legal context in which the implementation of the Citizenship Directive takes place. It sheds light on the restrictive character of Dutch immigration policy, outlines the legal framework that implements the Citizenship Directive and introduces the actors involved in the implementation process as well as the Dutch courts competent to review the implementing decisions.

7.4.1 A restrictive immigration policy

As in many other Member States, immigration policy in the Netherlands has become politicised.⁷¹ In the early 2000s the multicultural society and immigration became a new cleavage in the Dutch political landscape.⁷² Today immigration policy is still high on the political agenda and is characterised by its restrictive character.⁷³ The policy of pursuing a restrictive immigration policy has clashed with the EU rules on free movement and the ‘rights based approach taken by the Court of Justice’ on several occasions.⁷⁴ For instance, as already pointed out above, the *Metock* ruling raised much controversy among Dutch government and officials⁷⁵ and the fight against marriages of convenience is high on the political agenda.⁷⁶

In 2014, Langer and Schrauwen observe that the Citizenship Directive in the Netherlands is implemented in a restrictive manner:

‘The general picture that emerges is that policy makers are looking for the limits of the law; free movement of Union citizens remains as a starting point, but the focus is on strict enforcement of conditions for migration and on a strict interpretation of criteria for residence rights.’⁷⁷

In this respect, the Netherlands is no exception. In 2016, the study on the implementation of the Citizenship Directive concludes that the general tendency in the Member States is to ‘make the most of the permitted restrictions to the rights of entry and residence and to interpret the [Citizenship]

71 See on the politicisation of migration policies Van der Burg 2015; Goudappel & Hoesnaars September 2012.

72 See Pellikaan, Van der Meer & De Lange 2003, p. 24.

73 Zwaan et al. 2016, p. 25.

74 In Europeanisation literature this is denoted a policy misfit Börzel & Risse 2000, p. 5.

75 See above par. 7.1.4.

76 *Kamerstukken* 2015/2016, 32175, 62.

77 Introduction to the presentation of the Dutch FIDE report on Union Citizenship for the Amsterdam Centre for European Law and Governance on 18 February 2014. See <http://acelg.uva.nl/content/events/lectures/2014/02/nl-fide-report.html>. (Last accessed at 1 October 2019. For the report, see Langer & Schrauwen 2014, p. 18-19.

Directive in a restrictive manner'.⁷⁸ In brief, the restrictive character of Dutch immigration policy is part of the context in which the use of FMP guidance documents takes place.

7.4.2 A multi-layered legal framework

In the Netherlands, the Citizenship Directive is implemented via a multi-layered legal framework.⁷⁹ The formal legislative act that lays down the general rules governing Dutch immigration policy is the Aliens Act.⁸⁰ This act is complemented by the Aliens Decree – an instrument of delegated legislation adopted by the Dutch government.⁸¹ The Aliens Decree provides for the actual, detailed transposition of the provisions of the Citizenship Directive. The articles transposing the Citizenship Directive can be found in Articles 8.7-8.35 of the Aliens Decree and reflect, sometimes literally, the provisions of the Citizenship Directive.⁸² The third layer of the legal framework that implements the Citizenship Directive is the *Vreemdelingen-circulaire*, the Aliens Circular. The Aliens Circular contains policy rules for the application of the broad provisions of the Citizenship Directive in individualised decision-making practices.⁸³

Relevant to note is that in 2013 the Aliens Circular was amended in order to simplify the text of the Circular.⁸⁴ The Circular had become a document that was too complex and detailed: it included not only policy rules but also summarised applicable legislation and provided for extensive commentaries and instructions. The amending decision taken in 2013 revises the Aliens Circular so that it contains only policy rules, leaving out the other (explanatory) elements.⁸⁵ The policy rules now, according to the explanatory note on the amendment, are clearly formulated and always explicit about the underlying legal basis. This change of the Aliens Circular in 2013 is interesting since it shows that at the national level similar problems with the issuing of guidance documents are experienced as at the EU level. Similar developments concerning the clear formulation and presentation of guidance can be expected to surface at the EU level.⁸⁶

78 Ballesteros et al. 2016, p. 136.

79 See for an overview in English of the 'layered structure of hierarchical regulations', Klaassen 2015Klaassen 2015Klaassen 2015Klaassen 2015Klaassen 2015 p. 156-157; For a detailed overview in Dutch see Zwaan et al. 2016, p. 33-37.

80 In Dutch: *Vreemdelingenwet 2000*.

81 The Aliens Decree (*Vreemdelingen Besluit 2000*) is an *Algemene Maatregel van Bestuur*, an Order in Council that is established by Royal Decree. It is adopted after consultation of the Dutch Council of State.

82 For instance Article 8.7(4) of the Aliens Decree transposes Article 3(2)(b) of the Directive, using similar wording as the Directive to lay down the rule that the right of residence is extended to the partner with whom the EU citizen has a durable relationship.

83 See chapter B10 section 2 of the policy rules.

84 *Stcrt.* 2013, 8389, p. 108, 109.

85 *Stcrt.* 2018, 8389, p. 108, 109.

86 As is pointed out in the conclusion of this research. See section 9.6.2.

7.4.3 Actors: the Ministry and the Immigration and Naturalisation Service

As we have seen in the previous case studies, the implementation of EU legislation may be organised differently in different policy areas. Whilst in the case of EU subsidies the Netherlands Enterprise Agency, on behalf of the Ministry of Economic Affairs, is responsible for the application of the implementing legislation, the implementation of the Habitats Directive occurs, for a large part, at the level of the Dutch provinces. The implementation of the Citizenship Directive takes place in a more centralised manner that is similar to the case of EU subsidies.⁸⁷

The Ministry that is responsible for immigration policy is the Ministry of Justice and Security. Within that Ministry the State Secretary is responsible for the implementation of the Aliens Act. The State Secretary also has the right to initiate amendments to the Aliens Decree⁸⁸ and takes decisions on changes to the Aliens Circular. Thus, the State Secretary plays an important role in transposing and operationalising the Citizenship Directive and might at this stage use the FMP guidance documents.

The rules laid down in the Aliens Act, the Aliens Decree and the Aliens Circular eventually need to be applied in practice. Individualised decisions, such as the decisions to grant or refuse a residence permit, are taken by the Immigration and Naturalisation Service (*Immigratie- en Naturalisatie Dienst*, IND). The Immigration and Naturalisation Service is part of the Ministry of Justice and Security and acts on behalf of the State Secretary.⁸⁹ The offices of the IND, located at different places throughout the Netherlands, need to apply the same legal framework, policy rules and working instructions.

7.4.4 The competent courts

The two courts that are competent to review decisions on the refusal or termination of a right to residence in the Netherlands, are the District Court of The Hague and the Council of State.⁹⁰ The District Court of The Hague reviews administrative decisions in first instance, after which appeal is possible before the Council of State. The judicial review of decisions taken on immigration applications represent a considerable part of all cases dealt with by these two courts. According to Spijkerboer, almost two-thirds of the cases handled by the Judicial Division of the Council of State concern the review of immigration applications.⁹¹ As discussed, civil courts are competent to decide on direct actions against the lawfulness of legislative acts and

⁸⁷ Klaassen 2015, p. 156.

⁸⁸ The State Secretary also signs the amending acts, yet only after the Advisory Division of the Council of State must be consulted. When, in 2006, the Aliens Decree was amended in order to implement the Citizenship Directive it was the Minister who was responsible for immigration and who, therefore, initiated the amendment.

⁸⁹ Zwaan et al. 2016, p. 44.

⁹⁰ Zwaan et al. 2016, p. 46.

⁹¹ Spijkerboer 2014, p. 10, 11.

policy rules on the ground that the Dutch State committed a wrongful act.⁹² However, traces of FMP guidance documents have not been found in civil cases.

7.5 THE USE OF FMP GUIDANCE DOCUMENTS BY NATIONAL AUTHORITIES

Having outlined the Dutch political and legal context, the next step is to explore the use of the two FMP guidance documents in the implementation process. The analysis is structured along the lines of the different phases of the implementation process. The first two sections explore the role of FMP guidelines in relation to the Aliens Act and the Aliens Decree as well as in relation to the policy rules laid down in the Aliens Circular that complement these acts. The next sections seek to find out what role the guidelines play at a more 'practical' level, for the investigation of alleged marriages of convenience, and how the FMP guidance documents find their way into individualised decisions as well as in internal working instructions. The general trend observed throughout the different stages of the implementation process is that the use of FMP guidance documents is guided by a practice of cherry picking.

7.5.1 The Aliens Act and the Aliens Decree: a limited role for FMP guidance documents

As described above, the Aliens Act and the Aliens Decree lay down the legislative framework that implement the Citizenship Directive in the Dutch legal order. The Aliens Act is the formal legislative act. The Aliens Decree is a delegated act that actually transposes the provisions of the Citizenship Directive into legally binding rules. Both acts do not explicitly refer to the FMP guidance documents. References to FMP guidance documents in the explanatory notes that accompany amending decisions to the legislative acts, are not numerous either. Only in one of the amending decisions to the Aliens Decree was a trace of the Handbook addressing marriages of convenience found. The explanatory note in the amending decision explains that according to the Handbook, a distinction should be made between fraud on the one hand and abuse on the other hand, and cites the definition on abuse given in the Commission's Handbook.⁹³

Does this mean that, generally speaking, FMP guidance documents are not used for the drafting of legislative acts? Interviews with officials working at the Ministry of Justice and Security indeed point to the conclusion that there is only a minor role for FMP guidance documents at this first

92 See above section 4.3.

93 Decision *Stb.* 2016, 86 (p. 27) introduces abuse as one of the grounds on which lawful residence may be denied or terminated, amending Article 8.25 of the Aliens Decree and bringing the Article into line with Article 35 of the Citizenship Directive.

stage of the implementation process. The officials explain: 'In the case of guidelines we generally do not amend our legislation.' This is in contrast to Directives, 'in the case of which legislation must be (directly) amended'.⁹⁴ In a similar way and during a more recent interview, one of the officials indicated that in his view the role of the guidelines in relation to the adoption of the Aliens Act and Aliens Decree is 'non-existent' (in his words: *echt nihil*).⁹⁵ He noted that guidance documents are *not* used as in 'look what is written in the guidance documents; let's now change our policy accordingly'.⁹⁶

An explanation for the minor role of the FMP guidance documents is that the Aliens Decree often literally transposes the provisions of the Citizenship Directive. In other words, the Aliens Decree provides for the general rules that subsequently need to be applied in practice. Therefore, the FMP guidelines could become relevant at the subsequent stages of the implementation process. The next section explores what role FMP guidance documents play in relation to the Aliens Circular.

7.5.2 Transposing FMP guidelines into Dutch policy rules

When looking at the text of the Aliens Circular, one can discern some 'glimpses' of the FMP guidelines. At some places, the text of the Aliens Circular shows similarities to the text of the FMP guidelines,⁹⁷ but the Aliens Circular does not explicitly refer to the FMP guidelines. A more explicit trace of FMP guidelines was found in two amending decisions to the Aliens Circular. These references feature in the decisions amending the policy rules on persistent petty criminality as well as on the concept of a durable relationship.⁹⁸ This section explores the traces of the FMP guidelines in the Dutch policy rules in more depth, and already reveals some first glimpses of the cherry picking approach.

Persistent petty criminality: a perfect fit?

Section B10/2.3 of the Aliens Circular lays down the rule that persistent petty criminality may represent a threat to public policy.⁹⁹ This rule on persistent petty criminality can be found in the exact same wording in the 2009 Communication.¹⁰⁰ The explanatory note to the amending decision to section B10/2.3 of the Aliens Circular clarifies that the Dutch policy rules indeed derive from the Commission's guidance on persistent petty criminality. The amending decision explains that 'in view of the Communication

94 Interview 8 – National officials H and I.

95 Interview 9 – National official H.

96 Interview 9 – National official H.

97 These linguistic similarities can be found in section B10 of the Aliens Circular.

98 See *Strct.* 2013, 8389, p. 120 and *Strct.* 2011, 23324, p. 24.

99 This policy rule in the Aliens Circular complements Article 27(2) of the Citizenship Directive that is transposed in Article 8.25 of the Aliens Decree.

100 COM(2009)313 final, p. 12.

of the European Commission' (...) 'persistent petty criminality may represent a threat to public policy'.¹⁰¹

Officials of the IND explained that the guidelines on persistent petty criminality have been included in the Dutch policy rules for the reason that the guidelines are in line with the preferred implementing policy of the Immigration and Naturalisation Service.¹⁰² In fact, the question whether consistent petty criminality may represent a threat to public policy was one of the questions¹⁰³ sent by Dutch officials to the Commission services prior to the issuing of the 2009 Communication:

'We raised the question about persistent criminality, which eventually was included [in the Communication]. The question was whether an individual who commits minor criminal offences represents a threat to public policy. For us it was helpful that it was included [in the 2009 Communication].'¹⁰⁴

The Commission guidance on persistent petty criminality thus form a perfect fit with the IND's interpretation of provision 27(2) of the Citizenship Directive. The introduction of the Commission guidelines into Dutch policy rules is in line with Dutch implementing preferences.

Defining abuse: a 'silent' use of Commission guidelines?

Section B10/2.3 of the Aliens Circular also defines the concept of abuse in line with the FMP guidelines of the Commission. According to the policy rules, as well as the Commission guidelines, abuse represents 'an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing the conditions laid down by Community law, does not comply with the purpose of those rules.'¹⁰⁵ In this case, however, the amending decision adopted in 2013 that introduces these policy rules does not refer to the Commission's guidelines.¹⁰⁶ Thus, whether the definition of abuse indeed derives from the guidelines remains uncertain.

Defining a durable relationship: an 'imposed' change of the Aliens Circular

The third, perhaps most interesting trace of FMP guidelines relates to features in section B10/2.2 of the Aliens Circular that indicates how the Dutch IND interprets and applies the concept of a durable relationship (laid down in Article 3(2)(b) of the Citizenship Directive). In this case, the

101 *Strct.* 2013, 8389, p. 120.

102 Interview 7 – National officials E, F, G.

103 See above section 7.1.3.

104 Interview 7 – National officials E, F, G.

105 See COM(2009)313 final, p. 12 and COM(2014)604 final, p. 8.

106 *Strct.* 2013, 8389.

Dutch policy rules were brought in line with the Commission guidelines as a response to the ruling of the Dutch Council of State of 6 September 2011.

In this ruling, the Council of State reviews the Minister's policy line that requires the durable character of a relationship to be evidenced with a declaration of registration in the local authority register for at least six months or with the birth of a child.¹⁰⁷ In support of this policy line, the Minister argued that the Commission's guidelines COM(2009)313 allow national rules to refer to a 'minimum amount of time' as criterion for whether a partnership can be considered as 'durable'. The Council of State acknowledges that the guidelines accept a minimum amount of time as criterion, yet also notes that in that case the guidelines require that the national rules foresee that other relevant aspects are taken into account.¹⁰⁸ Therefore, the Minister also has to accept other means of evidence. The Council of State concludes that the Minister's policy line adopts a too restrictive interpretation of the concept of a durable relationship.¹⁰⁹

The State Secretary subsequently changes the policy rules that now adopt a less restrictive interpretation of the concept of a durable relationship.¹¹⁰ The amended policy rules allow for other means of evidence than the municipality registration and the birth of a child, such as joint mortgage to buy a home.¹¹¹ According to the amending decision, 'the policy rules are now in line with the Commission's guidelines'.¹¹² As we will see, the ruling of 6 September is only one of many other rulings in which the Dutch Council of State assesses a contested decision in light of the guidelines laid down in the Commission's 2009 Communication.¹¹³

Conclusion: the guidelines as an aid to justify policy decisions

The above analysis does not point to the conclusion that the Commission's interpretative rules are always transposed into Dutch policy rules. In contrast, the analysis shows that the Commission's guidelines are used to justify policy rules that serve Dutch implementing objectives. This conclusion is in line with the insights provided by Dutch officials. Officials of the Ministry of Justice and Security clarified that '[with the guidance] it is possible to justify a policy decision' and that 'we do not feel bound by the guidelines'.¹¹⁴ They noted that generally the guidelines of the European Commission only lead to a change in the policy rules if this is in line with

107 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.3.1.

108 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.1.

109 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.2. The ruling is also discussed below in section 7.5.1

110 *Stcrt.* 2011, 23324, p. 24. See also COM(2009)313 final, p. 12.

111 See *Stcrt.* 2011, 23324, 15.

112 *Stcrt.* 2011, 23324, p. 24.

113 See section 7.6 below.

114 Interview 8 – National officials H and I; Interview 9 – National official H.

Dutch implementing practices: 'We are cherry picking, you take something when it is to your advantage'.¹¹⁵ Thus, it can be concluded that the FMP guidelines serve as an aid for the drafting of policy rules, but only in so far as this is in line with Dutch implementing policy decisions.

7.5.3 Implementing guidance and alleged marriages of convenience

FMP guidelines are not used only for the interpretation of provisions in the Citizenship Directive; the guidelines are also used as an aid to make decisions on the form of implementing measures. This becomes visible in the practices of the Immigration and Naturalisation Service to detect and investigate marriages of convenience.

Marriages of convenience are, as already explained above, a form of abuse. This follows from Article 35 of the Citizenship Directive that provides that in the case of marriages of convenience, Member States may adopt the necessary measures restricting the right to free movement. The Citizenship Directive does not give further rules on what methods could or should be used in order to detect and investigate alleged marriages of convenience. As discussed above, the 2009 Commission guidelines, as well as the Handbook, provide for extensive guidance on the methods that could be used in order to effectively detect marriages of convenience within the limits of the legal framework.¹¹⁶

The methodology used by the IND to detect marriages of convenience, has been inspired by the guidelines laid down in the 2009 Communication.¹¹⁷ In order to detect 'susceptible' marriages that could be concluded only with the aim of obtaining the right to free movement, the IND developed a methodology of using 'pilots'. These pilots select marriages with certain characteristics and subsequently investigate these marriages.¹¹⁸ Officials of the IND explain that the Commission guidelines given in the 2009 Communication were used as a 'reference point':¹¹⁹

'On the basis of the guidelines we developed the pilots. We needed an objective indication to start an investigation that could serve as a justification for further investigation. (...) The guidelines provided for indicators which we could use.'¹²⁰

115 Interview 7 – National officials E, F, G. Confirmed in Interview 9 – National official H.

116 See above sections 7.1.1 and 7.1.2

117 Interview 7 – National officials E, F, G.

118 This also follows from rulings of the District Court of The Hague. For instance, a ruling of 27 January 2011 makes clear that the IND uses the indicative criteria laid down in the guidelines for the selection of the group of marriages to be further investigated. See Rb. Den Haag 27 January 2011, ECLI:NL:RBSGR:2011:BQ2080, par. 2.7 and Rb. Den Haag 4 March 2014, ECLI:NL: RBDHA:2014:7818, par. 3.1.

119 Interview 7 – National officials E, F, G.

120 Interview 7 – National officials E, F, G.

The officials clarify that the use of the guidelines on the investigation of marriages of convenience is guided by a practice of cherry picking:

'I think it again boils down to cherry picking. (...) We used the part of the guidelines which provides that it is possible to investigate cases when relying on a profound analysis. We only filtered those parts that are useful for our implementing practice'.¹²¹

Traces of this cherry picking approach can also be found in rulings of the Dutch Council of State. For instance, the ruling of July 2016 the Dutch Council of State refers to a letter of the State Secretary from which the Council infers that the State Secretary does not apply section 4.2 of the guidelines as a 'policy line' and that, as a consequence, the State Secretary does not consider himself bound by the Commission guidelines.¹²²

A limited role for the operational measures laid down in the Handbook

From the above it follows that the Commission guidelines in the Communication adopted in 2009 have been used to detect and investigate marriages of convenience. The question remains whether the guidance given in the Handbook, adopted in 2014, has also influenced Dutch investigation practices. This Handbook, as stated above, provides for 'operational tools' derived from good practices developed in the Member States.

The role of this Handbook in the IND's investigation practices and techniques seems more limited than the role of the 2009 Commission guidelines. The officials indicated, in the first place, that the methodology spelled out in the Handbook largely reflects practices that in the Netherlands were already common practice before the Handbook was issued.¹²³ In their view, the Dutch methodology to detect marriages of convenience influenced the guidance laid down in the Handbook rather than the other way round.¹²⁴

Secondly, officials of both the Ministry and the IND remarked that the limited usefulness of the Handbook is related to the fact that the guidelines laid down in the Handbook were made public. By making the Handbook accessible to the public, 'it risks becoming a handbook for citizens on how to successfully conclude a marriage of convenience without being caught, instead of a handbook on how to successfully fight marriages of convenience'.¹²⁵ Due to the publication of the Handbook it was not possible to include in the book useful, but secretive, information on how to address

121 Interview 7 – National officials E, F, G.

122 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.2; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

123 Interview 7 – National officials E, F, G; Interview 10 – National official F.

124 Interview 8 – National officials H and I; Interview 9 – National official H.

125 Interview 8 – National officials H and I; Interview 7 – National officials E, F, G.

marriages of convenience.¹²⁶ This second remark shows how transparency might actually hamper the effectiveness of guidance documents as an implementation aid.

7.5.4 The 2009 guidelines as an aid to justify individualised decisions

The above sections show that the Dutch Aliens Circular reflects traces of interpretative Commission guidelines and that implementing guidelines have influenced the method to detect alleged marriages of convenience. This section turns to the final stage of the implementation process when individualised decisions are taken.

According to officials of the Immigration and Naturalisation Service, it is not common practice to apply the guidelines of the European Commission in individualised decision-making practices.¹²⁷ In contrast, the use of the guidelines as a decision-making aid differs from one case to the other, and whether the guidelines are explicitly referred to in the text of the decision varies as well: 'the individual motivation differs from one decision maker to the other'.¹²⁸ This varied use of the Commission guidelines is the consequence of the fact that tailored decision making (*maatwerk*) is being encouraged.¹²⁹ In the words of the interviewee:

'Tailored decision making cannot be standardised (...). 'In an organisation with thousands of decision makers who are encouraged to make tailored decisions, you cannot prevent that individual factors are weighed and applied in the exact same manner'.¹³⁰

A varied use of the guidelines also transpires from rulings of the Council of State. In some groups of rulings, it is made explicit that the guidelines have been used as a decision-making aid.¹³¹ In other rulings no reference is made of the guidelines as a decision-making aid for the contested decision. The Council of State also notices this occasional use of guidance documents. In a ruling that reviews a decision that there is a genuine, present and sufficiently serious threat to public policy, the Minister argues that he is not bound by the Commission guidelines. The Council of State nevertheless takes account of the guidelines, and remarks that: 'also the Minister himself occasionally refers to them [the guidelines] in order to justify policy decisions'.¹³²

126 Interview 8 – National officials H and I; Interview 7 – National officials E, F, G.

127 Interview 7 – National officials E, F, G; Interview 10 – National official F.

128 Interview 10 – National official F.

129 Interview 10 – National official F.

130 Interview 10 – National official F.

131 Such as the rulings on marriages of conveniences (see section 7.5.3 below).

132 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. This ruling is discussed in section 7.5.1.

7.5.5 FMP guidelines in working instructions

The policy rules in the Aliens Circular are complemented by the IND's working instructions.¹³³ The most recent version of the working instruction 2018/4, adopted in March 2018, refers to the Commission's guidelines at several places. Section 3.2.1.1 that elaborates on the definition of 'the spouse', gives a glimpse of the explanatory guidelines in COM(2009)3131. Whilst referring to the Commission's guidelines, the working instructions explain that arranged marriages are not the same as forced marriages and that the latter are not protected by Union law.

Particularly interesting, though, is section 5.6.2.3 on a 'genuine and present threat'. This section notes that 'although the guidelines are not legally binding, they can still be used as an aid to explain the so-called criterion of public policy in Union law'.¹³⁴ Here, the working instructions refers to the ruling (to be discussed below) in which the Council of State acknowledges this role of the guidelines as an interpretation aid for the first time.¹³⁵ The same section summarises the 2009 Commission guidelines on whether the individual poses a threat to public policy or public security. This part of the Commission guidelines has become embedded in Dutch case law, as will be discussed below in section 7.6.2.

The working instructions thus show how rulings of the Council of State that refer to Commission guidelines, may in turn influence administrative and decision-making practices. It is a first indication of the 'facilitating role' the Council of State plays in reinforcing the role of the FMP guidelines in the IND's decision-making practices.

7.5.6 Conclusion: a practice of 'cherry picking'

The above analysis reveals that FMP guidance documents leave traces at different stages of the implementation process. What conclusions can be drawn on the use of FMP guidance in light of the two lenses: the types of guidance and the perspective on their binding force?

First, the traces of the FMP guidelines mostly relate to two types of guidance: interpretative guidance and implementing guidance. Interpretative FMP guidelines leave their imprints in the policy rules in the Aliens Circular, as well as in individualised decision-making processes of the Dutch Immigration and Naturalisation Service. Traces of implementing guidance have been found in the context of addressing alleged marriages of convenience. The Commission's implementing recommendations have

133 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 1. (accessible at <https://ind.nl/over-ind/Cijfers-publicaties/Paginas/Werkinstructies.aspx>).

134 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 32.

135 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 32, footnote 156 refers to ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584. This ruling is discussed in section 7.6.1

inspired the 'Dutch method' to detect and investigate marriages of convenience. Explanatory guidance and guidance in the form of good practices play a less prominent, or in any case a less visible role, in the implementation process.

Second, the analysis shows that the use of FMP guidelines is best described as a 'practice of cherry picking'.¹³⁶ This practice of cherry picking entails that the guidelines are used in so far as this is supportive of, or in line with, Dutch implementing policy and practices.¹³⁷ According to Dutch officials interviewed for this research, the guidelines represent a voluntary implementation aid that is taken into account but from which deviation is possible.¹³⁸ Nonetheless, these days a deviation from the guidelines is more motivated than when the guidelines had just been issued. The main reason for this 'motivated use of guidance documents' is that this is required by the Council of State. In the words of one of the officials: 'The Council of State considers that you cannot simply disregard the Commission's guidelines; they are authoritative'.¹³⁹ This final remark leads us to the next section that explores the use of the FMP guidelines in the rulings of Dutch Courts.

7.6 THE USE OF FMP GUIDANCE DOCUMENTS BY NATIONAL COURTS

Having explored the role of FMP guidelines in the implementation process, this section sheds light on the use of the FMP guidance documents in judicial practices. In what ways do Dutch courts use the FMP guidelines as a judicial decision-making aid? And, do the courts allow, or even expect, the Minister and IND to take account of the guidelines?

In order to find an answer to these questions, this section takes as a starting point the rulings that were found with the search for explicit references to the FMP guidance documents. This search reveals a total number of 91 rulings handed down by the Judicial Division of the Council of State (28 rulings) and the District Court of The Hague (63 rulings).¹⁴⁰

The vast majority of 88 rulings refers to the Communication COM(2009)313 that was issued in 2009. Only three rulings refer to the Handbook on marriages of convenience issued in 2014. Within this relatively high number of rulings that refer to only two guidance documents, different groups of rulings can be identified. These groups of rulings are presented in table Table 7-1. As transpires from this table, some rulings

136 Interview 7 – National officials E, F, G; Interview 10- National official F.

137 From a Europeanisation perspective, this comes close to the effect of 'absorption', the lowest degree of domestic change, See Börzel & Risse 2000, p. 10.

138 Interview 10- National official F.

139 Interview 10- National official F.

140 See Annex par. 1.3.3.

refer to the guidelines in relation to the Family Reunification Directive, thus showing the spill-over effect that was expected above in section 7.2.3.¹⁴¹

The analysis in this section sets out with a discussion of the two ‘2011 rulings’ and subsequently analyses how these rulings have shaped the use of the FMP guidelines in later rulings of the Council of State and of the District Court. It subsequently shows how, through the Courts’ rulings, the guidelines acquire a certain (self) binding effect for the State Secretary. Finally, it is concluded that in this area the Dutch courts take a role as ‘facilitating actor’, promoting the use of the FMP guidelines in the IND’s decision-making practices.

Table 7-1 Groups of rulings that refer to FMP guidance documents

Group	Issue	No. of rulings
Group 1	Rulings that refer to the concept of a durable relationship (section 2.1.1 of COM(2009)313)	8 rulings
Group 2	Rulings that refer to the concept of sufficient resources (section. 2.3.1. of COM(2009)313)	9 rulings
Group 3	Rulings that refer to the concept of genuine, present and sufficient serious threat (section 3.2 of COM(2009)313)	24 rulings
Group 4	Rulings that refer to the definition/investigation of a marriage of convenience (section. 4.2 of COM(2009)313)	28 rulings
Group 5	Rulings that refer to the concepts of fraud and abuse (section 4 of COM(2009)313); other than marriages of convenience	9 rulings
Group 6	Rulings that refer to the Handbook addressing marriages of convenience (SWD(2014)284)	3 rulings
Group 7	Rulings that refer to the guidelines in the context of the family reunification directive	6 rulings

7.6.1 The 2011 rulings: setting the scene

The first 2011 ruling

In the first 2011 ruling of 6 September 2011, the Commission guidelines come to play a role in relation to the question whether a relationship can be considered as ‘durable’.¹⁴² In this case, the guidelines are referred to by the Minister in support of his policy line that a ‘durable relationship’ can only be demonstrated by the birth of a child or by a shared household for at least six months, evidenced with a formal ‘registration’ at the municipalities. The Minister takes the view that this ‘six months criterion’ is not in violation with the Citizenship Directive and refers to the COM(2009)313

141 For instance Rb. Den Haag 9 January 2019, ECLI:NL:RBDHA:2019:155, par. 4.5; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2492, par. 19.

142 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.2.2. This case was already mentioned above in section 7.6.1.

guidelines. These guidelines, he argues, ‘explicitly allow for national rules to set a minimum amount of time as criterion for whether a partnership can be considered as durable’ (see section 2.1.1. of the guidelines).¹⁴³

The Council of State subjects the Minister’s policy line to a test of ‘reasonableness’.¹⁴⁴ First, the Council notes that the concept of a durable relationship is not defined by the Citizenship Directive and that therefore the Minister has a certain margin for manoeuvre in the assessment whether a durable relationship exists.¹⁴⁵ Subsequently, the Council of State reflects on the role of the guidelines as an interpretation aid:

“Although the guidelines that are referred to by the Minister are not binding in themselves, the guidelines serve as *an aid to the interpretation of the provisions of the Directive*. In this regard, the guidelines *cannot be considered to not to have any effect, the more since the Minister himself refers to the guidelines as a justification for his policy decisions*”.¹⁴⁶ [Emphasis added]

This phrase of the Council of State includes three elements that shed light on how the Council views the role of the Commission’s guidelines. From this paragraph it follows that: 1) the guidelines are an interpretation aid; 2) that the guidelines exert a certain legal effect; and 3) that the Council considers it relevant that the Minister himself refers to the guidelines in support of his policy line. This third element points to a self-binding effect of the use of the guidelines on the Dutch Minister.

Finally, the Council of State concludes that the Minister employs a too restrictive approach, and finds support for this conclusion in the Commission’s guidelines. In response to this ruling by the Council of State, the Minister changes his policy rules laid down in the Aliens Circular – bringing the policy rules more in line with the Commission guidelines (see above section 7.5.2).

The second 2011 ruling

The second 2011 ruling, which can be considered a follow-up on the first 2011 ruling, is handed down a few months later, in December 2011. In this ruling, the Council of State again refers to the guidelines as an interpretation aid, but now in the situation where the minister does not refer to the

143 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.3.

144 The policy rules are reviewed in an indirect manner (a so called test of ‘reasonableness’). See for a critical discussion of the exclusion of direct review of policy rules as well as of generally binding rules Voermans 2017, see also above section 4.1.

145 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.

146 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.1. In Dutch : ‘*Hoewel de door de Minister aangehaalde richtsnoeren op zichzelf niet bindend zijn, bieden zij een handvat bij de interpretatie van bepalingen in de richtlijn. Gelet hierop kan, temeer nu de Minister de richtsnoeren aanhaalt ter rechtvaardiging van zijn beleid, aan de richtsnoeren niet elke werking worden onttrokken*’.

FMP guidelines. The Minister, instead, complains that in first instance, the District Court of The Hague mistakenly ‘attributed binding force’ to the 2009 Commission guidelines.¹⁴⁷ In first instance, the District Court considered ‘also in light of the Commission’s guidelines’ the contested decision insufficiently substantiated.¹⁴⁸

In response to the Minister’s argument, the Council of State reiterates that despite their lack of legally binding force, the guidelines still serve as an aid to interpret the provisions of the Citizenship Directive. The Council of State reiterates the formula used in the above discussed 2011 ruling. Paragraph 2.4.1. of the ruling reads as follows:

“Despite the fact that the guidelines are not binding in themselves, they serve as an aid to the interpretation of the provisions of the Directive. In this respect, the guidelines are not deprived of any significance. The Minister himself also occasionally refers to the 2009 Commission guidelines as a justification for his policy decisions (see for instance the ruling of 6 September 2011 (...)) [the first 2011 ruling].”¹⁴⁹

Subsequently, the Council of State considers that the District Court based its decision partly, though not solely on the guidelines without taking account of the relevant case law of the Court of Justice. Furthermore, the Minister has not made clear how the District Court by using the guidelines disregarded the case law of the Court of Justice.¹⁵⁰ Therefore, the Minister’s argument fails.

7.6.2 The FMP guidelines as a judicial interpretation aid: settled case law

The formula first introduced in the 2011 rulings by which the Council of State acknowledges the role of the 2009 guidelines as an interpretation aid, opens the door for the courts to refer to the guidelines. Later rulings reiterate that despite the lack of legally binding force, the guidelines serve as an aid to interpret the provisions of the Citizenship Directive. A search at www.rechtspraak.nl reveals 17 rulings that reiterate or refer to the ‘2011 formula’. Some rulings even go so far as to say that it has become ‘settled’ case law that the guidelines serve as an interpretation aid.¹⁵¹ However, not all rulings explicitly reiterate or refer to the ‘2011 formula’. Most of the rulings ‘just’

147 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.

148 Rb. Den Haag 13 January 2011, ECLI:NL:RBSGR:2011:BP2584, par. 25.

149 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. In Dutch: ‘*Hoewel de minister terecht erop wijst dat de richtsnoeren op zichzelf niet bindend zijn, bieden zij een handvat bij de interpretatie van bepalingen in de richtlijn. Gelet hierop kan aan de richtsnoeren niet elke betekenis worden ontleend. Ook de minister zelf haalt in voorkomend geval deze aan ter rechtvaardiging van zijn beleid*’.

150 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1.

151 See for instance ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1.

use the Commission's guidelines as an interpretation aid, without explicitly mentioning the role of the guidelines as an interpretation aid.¹⁵²

The 2011 rulings thus mark the beginning of several lines of case law by which the use of the 2009 guidelines as a decision-making aid becomes embedded in the case law of the Council of State and the District Court. This section and the next section discuss these lines of case law and show that although the guidelines are referred to as an interpretation aid, the courts also refer to guidelines with an explanatory character as well as to implementing guidelines.

A sufficient serious threat? Commission guidelines as an interpretation aid

In the first group of 24 rulings, the Commission guidelines fulfil their role as an interpretation aid for the question whether the personal conduct of the individual concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.¹⁵³

These rulings continue the line set out in the second 2011 ruling. The Commission guidelines are referred to for different 'sub-questions', such as whether the threat must be present,¹⁵⁴ whether a previous criminal conviction can be taken into account¹⁵⁵ and whether the decision is based on an assessment of the future conduct of the individual concerned.¹⁵⁶ Most cited is section 3.2 of the guidelines on 'persistent criminality'.¹⁵⁷ The courts take the approach in line with the guidelines that persistent petty criminality may under certain circumstances represent a threat to public policy.¹⁵⁸ The courts also apply the factors that according to the guidelines should be taken into account in order to assess whether there is persistent petty criminality.¹⁵⁹ For instance, the Council of State considers:

'According to section 3.2. of the guidelines in certain circumstances persistent petty criminality may represent a threat to public policy (...). National authorities must show this and in their assessment take into account the nature of the offences, their frequency and the damage or harm caused.'¹⁶⁰

152 See for instance Rb. Den Haag 14 August 2017, ECLI:NL:RBDHA:2017:9297, par. 14, par. 15.2; ABRvS 25 July 2017, ECLI:NL:RVS:2017:2031, par. 2.1.

153 Article 27 of the Citizenship Directive provides that on this ground the right to free movement may be restricted.

154 Rb. Den Haag 11 June 2015, ECLI:RBDHA:2015:11329, par. 3.4.

155 Rb. Den Haag 9 December 2011, ECLI:NL:RBSGR:2011:BU8209, par. 2.10.

156 Rb. Den Haag 24 January 2014, ECLI:NL:RBDHA:2014:8681. Par. 5.5.

157 COM(2009)313 final, p. 11.

158 See for instance Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 2.3; Rb. Den Haag 15 February 2013, ECLI:NL:RBDHA:2013:CA1559, par. 3.6; ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.3; ABRvS 14 November 2017, ECLI:NL:RVS:2017:3163, par. 2.2.

159 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV3857, par. 2.17; Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 5.1.

160 ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.3.

Thus, the rulings show how, also after the second 2011 ruling, the guidelines continue to be used as an interpretation aid and also serve as an aid to assess the Minister's practices. In several rulings, the courts consider the contested decision of the Minister insufficiently substantiated in light of the factors and guidelines laid down in the 2009 Communication.¹⁶¹

Defining a durable relationship: the silent influence of Commission guidelines

Like the second 2011 ruling, the first 2011 ruling also leaves traces in the subsequent case law of the Council of State. In the first 2011 ruling discussed above, the Council of State applies the 2009 guidelines in order to review the policy line of the Minister to assess whether there is a durable relationship.¹⁶² In light of the 2009 guidelines, the Council of State concludes that the Minister adopted a too restrictive interpretation of the concept of a durable relationship.

The 2009 guidelines on the interpretation of the concept of a durable relationship continue to be reflected in the case law of the District Court of The Hague. In two rulings, the District Court explicitly refers to the 2009 guidelines and uses the guidelines as an aid for the interpretation of the concept of a durable relationship.¹⁶³ In other rulings, the reasoning of the Council of State as set out the first 2011 ruling is 'copied', without referring to the Commission guidelines.¹⁶⁴ The District Court only refers to the first 2011 rulings and concludes that the Minister employs a too restrictive interpretation by (apparently, again) applying the criterion that there can only be a durable relationship in the case of a shared household for six months.

Thus, these rulings by the District Court 'silently' reflect the interpretation on the concept of a durable relationship as derived from the guidelines in the first 2011 ruling. A similar silent influence of the Commission guidelines on judicial discourse became visible in the foraging area rulings in the Habitats Directive.¹⁶⁵

161 Rb. Den Haag 12 March 2012, ECLI:NL:RBSGR:2012:BV8686, par. 2.29; Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 5.1; Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV3857, par. 2.17; ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.7.

162 This first 2011 ruling (ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678) is discussed in the section 7.6.1.

163 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627, par. 2.24; Rb. Den Haag 11 February 2015 ECLI:RBDHA:2015:1506, par. 3.2-3.4.

164 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627, par. 2.17; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7317, par. 8.3; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7323, par. 8.5; ABRvS 26 October 2011, ECLI:NL:RVS:2011:BU3404; Rb. Den Haag 7 March 2013, ECLI:NL:RBDHA:2013:13760; Rb. Den Haag 6 October 2016, ECLI:NL:RBDHA:2016:16812.

165 See section 6.6.2.

What are sufficient resources? Explanatory guidelines as an interpretation aid

According to Article 7 of the Citizenship Directive, students and inactive Union citizens must have sufficient resources in order to not become a burden on the social assistance system of the host Member States. The Dutch courts use section 2.3.1 of the 2009 guidelines in order to decide whether the Union citizen concerned has ‘sufficient resources’.

Particularly interesting are two rulings that show how guidelines with a highly explanatory character may become embedded in Dutch judicial discourse.¹⁶⁶ The District Court refers to the guidelines to explain the concept of sufficient resources: ‘according to the guidelines the concept of sufficient resources must be interpreted in light of the aim of the Citizenship Directive’.¹⁶⁷ The Court also recalls that *the guidelines* mention that Article 8(4) of the Citizenship Directive prohibits Member States from setting a fixed amount as sufficient resources; national authorities instead need to take account of the personal situation of the individual concerned.¹⁶⁸

Here, the guidelines are referred to in order to reiterate the rule laid down in the Citizenship Directive. The risk arises that it is unclear what is laid down in the guidelines, and what is ‘binding EU law’. This risk clearly arises, as the same paragraph subsequently cites an interpretative rule that is *not* included in the Citizenship Directive (which is not made explicit in the text of the ruling). The Court derives from the Commission’s guidelines that if necessary national authorities may ‘undertake checks as to the existence of the resources, their lawfulness, amount and availability’ as well as that the means of evidence to prove sufficient resources cannot be limited.¹⁶⁹

The guidelines again feature in the concluding paragraphs. ‘In light of the guidelines’, the Court concludes, the Minister has not sufficiently investigated¹⁷⁰ and not sufficiently substantiated¹⁷¹ that the applicant has sufficient resources. The Minister should not have applied a fixed amount as a standard for sufficient resources and has not shown that account has been taken of the personal circumstances of the individual.¹⁷² The Court thus again refers to the guidelines, whilst in fact applying the rule laid down in Article 8(4) of the Citizenship Directive.

166 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 8; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 11.

167 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

168 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

169 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

170 The Court concludes that there is a violation of Article 3:2 GALA. See Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 15.

171 The court concludes that there is a violation of Article 7:12(1) GALA. Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 12.

172 Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 14; Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 11.

From the above it follows that the text of the ruling suggests that the guidelines play an important, interpretative, role in the reasoning and conclusion of the court. When looking more closely at the part of the ruling that refers to the guidelines, it becomes clear that the guidelines for a large part just recall the rule laid down in the guidelines. The interpretative role that the guidelines are suggested to play, is at least partly an explanatory one.

7.6.3 Reviewing the method of investigating marriages of convenience: beyond interpretation

The above section shows how the FMP guidelines in COM(2009)313 play a role as a judicial interpretation aid. However, as discussed before, the FMP guidelines not only take the form of interpretative or explanatory rules. The guidelines also give guidance on the appropriate methodology to detect and investigate alleged marriages of convenience. Section 7.4.3 already discussed that with the help of the 2009 guidelines, the Dutch IND developed pilots to detect and investigate marriages where there is a well-founded suspicion of abuse.

Relevant for this section is that the Commission guidelines on marriages of convenience also play a prominent and visible role in rulings of the Council of State and of the District Court of The Hague. The courts refer to the guidelines, first, for the *interpretation* of the framework within which the assessment of whether there is abuse of EU law must take place. It is noted, for instance, that from the guidelines it follows that ‘the Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse, yet that systematic checks are prohibited’.¹⁷³ Other rulings refer to the guideline that the burden of proof lies on the authorities of the Member States¹⁷⁴ or to the guidelines that give a definition on marriages of convenience.¹⁷⁵

Second, the rulings on marriages of convenience not only refer to the Commission’s interpretative guidelines but also to the *implementing* guidelines. The courts use the guidelines in order to assess whether the State Secretary has lawfully detected and investigated suspicious cases.¹⁷⁶ The courts follow the approach – as set out in the guidelines – that the State Secretary can use indicative criteria to detect cases for further investigation. However, the indicators must sufficiently rely on previous analyses and

173 See for instance Rb. Den Haag 27 February 2014, ECLI:NL:RBDHA:2014:4388, par. 3.3; ABRvS 28 June 2012, ECLI:NL:RVS:2012:BX0615; Rb. Den Haag 27 January 2011, ECLI:NL:RBSGR:2011:BQ2080, par. 2.6.

174 See for instance Rb. Den Haag 25 July 2012, ECLI:NL:RBSGR:2012:BX4356.

175 See for instance Rb. Den Haag 21 October 2010, ECLI:NL:RBSGR:2010:BO2122; Rb. Den Haag 14 August 2017, ECLI:RBDHA:2017:9297.

176 See for instance Rb. Den Haag 27 February 2014, ECLI:NL:RBDHA:2014:4388, par. 4.1; Rb. Den Haag 4 March 2014, ECLI:NL:RBDHA:2014:7818; par. 3.1- 3.3. ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.2 and 3.3.

experience, thus showing a correlation between proven cases of abuse and certain characteristics of such cases.¹⁷⁷ Once it is established that a suspicious marriage has been lawfully detected, the guidelines are used to assess the lawfulness of investigation techniques. The District Court of The Hague, for instance, considers the practice mentioned in the guidelines for holding a separate interview with each of the two spouses ‘an appropriate method’ to investigate whether a marriage is one of convenience.¹⁷⁸

Despite the formula introduced in the 2011 rulings that the guidelines serve as an interpretation aid, these rulings show that Commission guidelines may also serve as assessment standard to examine the lawfulness of the method that is followed to detect and investigate alleged marriages of convenience.

Finally, it is remarkable though that in the rulings little traces can be found of the ‘operational tools’ and good practices included in the Handbook on marriages of convenience. Is this the consequence of the minor role of the Handbook in decision-making practices (see above section 7.4.3)? Are judges not acquainted with this Handbook? The role of good practices in the reasoning of Dutch courts remains, as also in the other two policy areas, uncertain.

7.6.4 A (self) binding effect? Courts as facilitating actor

The above groups of rulings show how interpretative, explanatory and implementing FMP guidelines fulfil a role as a judicial decision-making aid. The courts use the Commission’s guidelines for the interpretation of legislative provisions and as a standard of assessment. This section explores whether the rulings also provide insight into the Courts’ *perspective(s)* on the binding character of the guidelines (the second ‘lens’ or axis of the analytical framework).

No binding rule...

In the 2011 rulings, the Council of State introduces the 2009 guidelines as an interpretation aid, and considers that the guidelines have ‘some significance’ (see section 7.6.1). The question now is what this role of the guidelines as an interpretation aid entails: does it mean that the courts, to some extent, consider the guidelines a binding interpretation aid for themselves and/or for national authorities?

As a starting point, it can be noted that from the court’s rulings the picture emerges that the Commission guidelines are not perceived or used as binding rules that need to be followed and from which deviation is not

177 COM(2009)313 final, p. 16, 17.

178 Rb. Den Haag 23 August 2013, ECLI:NL:RBDHA:2013:11310; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 3.1; See also ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.2.

possible. This already becomes clear in the second 2011 ruling in which the Council of State considers that the District Court had not based its conclusion solely on the guidelines and that there was no indication that the Court had not taken account of the relevant case law of the Court of Justice. Therefore, the District Court had not attached binding force to the guidelines, as the Minister argued in this case.¹⁷⁹ These considerations indicate that in the Council's view, the guidelines may be used as an interpretation aid, but that the case law of the Court of Justice, and not the guidelines, provide for the authoritative interpretation of the Directive.

Further indications that point in the same direction can be found in rulings of the District Court of The Hague. The District Court remarks that the guidelines 'only give an indication of how the Citizenship Directive may be interpreted' in one of the rulings that refers to the guidelines on the concept of sufficient resources.¹⁸⁰ More explicit about the non-binding character of the guidelines is a ruling handed down in 2013.¹⁸¹ In this ruling, the guidelines are invoked by the appellant, who argues that the guidelines have binding force and therefore should be followed by the Court.¹⁸² The District Court makes clear that this view is incorrect and considers that the guidelines 'instead are an *aid* for the interpretation of provisions in the Citizenship Directive' [Emphasis added]. To this end, the District Court refers to the first 2011 ruling that for the first time referred to the 2009 guidelines as an interpretation aid.¹⁸³

...But a (self) binding effect for the State Secretary?

From the above it follows that the Council of State and the District Court do not use the guidelines as binding rules of EU law. Still, the way in which the Dutch courts use the Commission guidelines gives these guidelines a certain binding effect on the State Secretary or IND.

The guidelines can acquire a binding effect, in the first place, where the Courts use the guidelines as an interpretation aid or as a standard to assess the Minister's practices. For instance, from the rulings on whether the individual represents a threat to public policy it follows that the courts require the Minister to take account of the interpretative rules and of the factors laid down in the guidelines, and to substantiate the decision in light of these guidelines. Similarly, the courts also use the guidelines to assess whether the Minister applied the correct method to investigate suspected marriages of convenience, whether the Minister correctly interpreted the concept of sufficient resources and whether the Minister sufficiently took account of

179 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. See section 7.6.1. above.

180 Rb. Den Haag 22 December 2016, ECLI:RBDHA:2016:17144, par. 5.4.

181 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326.

182 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326, par. 5 and par. 5.2.

183 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326, par. 5.2.

the individual circumstances of the case when assessing the durability of a relationship.

Secondly, the courts acknowledge a binding effect of the guidelines in the situation where the State Secretary uses the guidelines as an aid to justify implementing decisions. Such a self-binding effect already transpires in the first 2011 ruling, where the Council of state considers that the guidelines have some significance *all the more* since the Minister himself used the guidelines as a justification aid.¹⁸⁴ In two rulings handed down in 2016, the Council of State again, explicitly, recognises a self-binding effect of the guidelines.¹⁸⁵ Before the Court, the Minister argues that section 4.2 of the guidelines on marriages of convenience is not used as a policy line, and that therefore the State Secretary does not consider himself bound by the guidelines.¹⁸⁶ The Council of State does not accept this argument. The Council considers that: '[s]ince the State Secretary used the section concerned for his own decision-making process in this case, the Council will also take account of this part of the guidelines for its assessment of the case in appeal'.¹⁸⁷

What is more, it cannot be ruled out that the binding effect of the guidelines reaches beyond the situation where the guidelines have been used by the State Secretary. The ruling of the Council of State of 7 November 2018 points in this direction. In this ruling, the Council of State annuls the contested decision of the State Secretary that the applicant had become an unreasonable burden to the Dutch social assistance system. Subsequently, the Council of State makes clear that the 'new' decision should take account of the factors that are spelled out in the 6th recital of the Directive as well in the guidelines in document COM(2009)313.¹⁸⁸

Beyond explicit references: an obligation to 'comply or explain'?

The interviews with State Councillors also point in the direction of a more general obligation for national authorities to take account of the FMP guidelines. The State Councillors interviewed for this research, explain that the guidelines have an authoritative character and cannot be set aside by the State Secretary without, convincingly, giving reasons for doing so.¹⁸⁹ 'We assume that the administrative authorities also take account of the document when taking a decision that concerns a question that is addressed in these documents'.¹⁹⁰

184 See above section 7.6.1.

185 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120.

186 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1.

187 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

188 ABRvS 7 November 2018, ECLI:NL:RVS:2018:3584, par. 5.

189 Interview 26 – State Councillor C and D; Interview 28 – State Councillor C.

190 Interview 28 – State Councillor C.

What is more, officials and judges of the Council of State also take account of the guidelines when interpretative questions arise. The guidelines then serve as a judicial interpretation aid. Deviation from the guidelines is the exception rather than the rule: there should be a good reason to do so.¹⁹¹ This, however, does not mean that the guidelines are (to be) used as a binding rule: 'we do not blindly follow the guidelines, but take them very seriously. They are an additional interpretational instrument'.¹⁹²

In brief, the role of the guidelines comes close to that of a 'mandatory interpretation aid', both for national courts *and* for the Minister. The Commission guidelines should in principle be followed, whilst deviation from the guidelines should be well reasoned. In other words: comply, or explain.

Courts as facilitating actors

From the analysis of the rulings of the Council of State and the District Court of The Hague, the general picture emerges that in this policy area the Courts act as 'facilitating actors'. The courts promote the use of the guidelines as an interpretation aid or implementation aid in several ways: 1) by using the guidelines as an interpretation aid or assessment standard; 2) by recognising a certain self-binding effect of the guidelines on the State Secretary (and IND); and 3) in a more general manner, by expecting administrative authorities to take account of the guidelines (although this expectation is not (yet) explicitly reflected in the case law).

The question now is whether, and to what extent, this facilitating role of Dutch courts 'influences' Dutch implementing practices which are generally guided by a 'cherry picking approach'. As already mentioned,¹⁹³ one of the officials of the IND indicated that over the years the IND's approach towards guidelines has changed slightly. Individualised decision makers now tend to explain (more) why Commission guidelines are used or are deviated from in a specific case.¹⁹⁴ This is due to the case law of the Council of State, which – in the words of the interviewee – 'sometimes requires the IND to take account of the Commission guidelines'. 'In this way', the official remarked, 'the guidelines have a positive effect: difficult questions are discussed more thoroughly and in a more nuanced way. It [the guidelines] forces you to think and explain why you made a certain choice or decision.'¹⁹⁵ Still, the official considers the guidelines a voluntary interpretation aid rather than a mandatory interpretation aid.¹⁹⁶

191 Interview 24 – Official A at Council of State; Interview 28 – State Councillor C.

192 Interview 28 – State Councillor C.

193 See section 7.5.6.

194 Interview 10- National official F.

195 Interview 10- National official F.

196 Interview 10- National official F.

7.7 CONCLUSION

This chapter shows that the issuing and use of FMP guidance documents is governed by a 'dialogical approach'. The two FMP guidance documents that accompany the Citizenship Directive were requested by the Member States and seek to address the Member States' concerns that had arisen after the Court of Justice handed down the *Metock* ruling. The Member States feared loss of discretionary control and an increase in the number of third country nationals entering the national legal order. The guidance documents do not seem to play a prominent role in the monitoring practices of the Commission, nor do they frequently feature in the case law of the Court of Justice. This has resulted in the exertion of 'soft pressures' to act guidance-proof.

These soft pressures, in combination with the tendency to implement the Citizenship Directive in a restrictive manner, has led to a use of the guidelines that is characterised by a 'cherry picking approach'. The Dutch State Secretary as well as the Immigration and Naturalisation Service use the FMP guidance documents as an aid to justify and support decisions, choices and practices that suit Dutch implementing preferences. Traces of the FMP guidelines have been found in Dutch policy rules, in the IND's working instructions, in the methods and practices to investigate marriages of convenience and finally, in individualised decisions.

The role of FMP guidelines as a 'voluntary aid' in the implementation process contrasts with the approach that is taken by the Dutch courts. The two competent courts, the Council of State and the District Court of The Hague, do not shy away from taking account of the guidelines. The courts use the guidelines as an interpretation aid or as a 'standard' to review the practices of the Dutch State Secretary. The rulings of Dutch courts also show that the guidelines have acquired a certain self-binding effect on the State Secretary. Since the State Secretary uses the guidelines to justify (policy) decisions, the Council of State also uses the same guidelines to review the implementing practices.

Interviews with State Councillors clarified that the binding effect of the guidelines even goes beyond that of a self-binding effect. The use of the guidelines as a judicial interpretation aid is guided by a perspective of guidance as a mandatory interpretation aid. According to this perspective, not only national courts but also the Minister is in principle expected to take account of the Commission guidelines. Deviation from these guidelines is only possible when this is explained and duly justified: the Dutch authorities need to either comply, or explain. The Dutch courts thus reinforce the role of the FMP guidelines in implementing practices, and require a more transparent and substantiated approach when Commission guidelines are used as an implementation tool.

The three previous chapters of this book explored the role of guidance documents in three policy areas. This chapter brings the findings in the three policy areas together, and derives from these findings general trends or patterns in the issuing and use of guidance documents at the EU level and the use of guidance documents at the national level. It finds that at the EU level the issuing and use of guidance documents is governed by various dynamics (section 8.1), and that at the national level various roles of guidance as an implementation aid can be discerned (section 8.2). National courts act in a number of ways as facilitating or counterbalancing actors, reinforcing or downplaying the role of guidance documents in implementation processes (section 8.4).

The second part of this chapter analyses the findings on the use of guidance documents in implementing and judicial decision-making practices in light of the four promises outlined in the section 2.5 of this book. These four promises are the ‘ideal effects’ that the use of guidance documents should bring about in order to positively interact with legal principles governing the implementation of EU law.

Like the results of the research of the role of guidance documents, the analysis in light of the four promises reveals a differentiated picture. It identifies implementing practices that enable guidance documents to fulfill their promises in practice, but also reveals implementing practices that do not serve, or even actually detract from, the promises of guidance (section 8.5). Similarly, Dutch courts use guidance documents in ways that positively interact with the four promises. However, the analysis also finds situations where the use of guidance documents in judicial decision-making practices hampers the promises to be fulfilled in practice, giving rise to problems in light of the legal principles (section 8.5). The chapter concludes that a mixed picture arises, in relation to the roles of guidance as well as its legal implications in practice (section 8.6).

8.1 GUIDANCE AS AN INFORMAL REGULATORY TOOL: UNITED IN DIVERSITY

The first, ‘EU part’ of the three case studies, provides insights into the issuing and use of guidance documents at the EU level, with the aim of outlining the context in which the use of guidance documents at the national level is studied. What insights does this first part of the case studies provide on the issuing of guidance as an informal regulatory tool of the European Commission?

8.1.1 The frequency, form, issuing process and types of guidance

The analysis reveals differences as regards the frequency with which guidance documents are issued and revised, the form of guidance documents, the 'bottom-up' or 'top-down' issuing process, as well as the types of guidance included in these documents. This section outlines the main differences observed in relation to these four aspects.

Frequency

In the area of direct payments, the guidance documents are issued with high frequency. Particularly since the last reform in 2013, the issuing of direct payments guidance documents has become one of the core activities of the Commission services; their issuing, revision and amendment being a continuous process. In the area of the Habitats Directive, the issuing of guidance documents has also become common practice, although the core Habitat guidance documents are changed less often. For instance, the Managing Natura 2000 guidance document that was issued in 2000 was not updated until 2019. A different picture arises in the analysis on the guidance documents issued in relation to the Citizenship Directive. At the time of writing, this Directive has been complemented by only two guidance documents: the COM(2009)313 guidelines and the Handbook addressing the fight against marriages of convenience.

Form of guidance

The three case studies also reveal that the form of guidance documents varies in the different policy areas. The widest range of guidance documents was identified in the area of direct payments. The Commission's guidelines vary from letters, notes and working documents on specific questions, to more general guidance documents. In the area of the Habitats Directive, the two core guidance documents take the form of 'guidance documents' but are complemented by various other documents and good practices that do not follow the same format. The two guidance documents related to the Citizenship Directive are more formalised. The guidelines adopted in 2009 take the form of a Communication (COM(2009)313) which has been translated into 22 different languages. The Handbook addressing marriages of convenience is a Staff Working Document,¹ but is also accompanied by a Communication.²

1 SWD(2014)284 final.

2 SWD(2014)284 final.

Issuing process

Thirdly, from the case studies a picture arises that the issuing of guidance documents is often governed by a 'bottom-up' process where Member States ask for guidance documents to be issued by the European Commission. The Member States requesting guidance has led to the two FMP guidance documents and is also common practice in the area of direct payments guidance documents. In relation to the Habitat guidance documents similar bottom-up trends have been identified. For instance, in the context of the Fitness check Member States, among which the Netherlands, have requested more and updated guidance documents. On the other hand, the issuing of guidance documents can also follow a 'top-down logic'. The Commission then issues guidance documents even when this has not been requested by the Member States. This 'proactive' issuing of guidance documents has been observed most clearly in the area of direct payments. The issuing of guidance documents on the initiative of the Commission seems to be part of a broader trend in which the Commission concentrates on assisting the Member States on 'good implementation' of Union law.³

Types of guidance

Differences have also been observed when it comes to the types of guidance that feature in Commission guidance documents. The greatest variety in types of guidance has – again – been found in the area of direct payments. Direct payments guidance documents include interpretative and explanatory guidance, provide an abundance of implementing and technical guidance *and* disseminate 'good implementing practices'. Some variety as to the types of guidance can also be found in relation to the Habitats Directive. The Natura 2000 guidance documents, in particular, also include other types than interpretative guidelines. The FMP guidelines that accompany the Citizenship Directive mostly have the character of interpretative guidance, but also provide implementing guidance where they spell out the appropriate methodology to detect alleged marriages of convenience. The more recently issued Handbook elaborates on the COM(2009)313 guidelines and disseminates good practices that have been developed in the Member States.

8.1.2 Driving forces and pressures to act guidance-proof

Once guidance documents have been issued, expectations are formulated in different ways at the EU level as to the use of guidance documents at the national level. These expectations are shaped by the driving forces behind

3 SWD(2017)350 final, p. 33 and Better Regulation Toolbox accompanying SWD(2017)350, p. 281, 282.

the issuing of guidance documents and result in various forms of pressures to act 'guidance-proof'.

In the area of direct payments, the main rationale behind the issuing of guidance documents is the prevention of financial corrections. By issuing direct payments guidelines the DG AGRI services make clear how they expect direct payments regulations to be implemented at the national level. For the Commission, the guidelines are a means to prevent and reduce irregularities in implementation practices. By applying the Commission guidelines, Member States run less risk of corrective measures from the European Commission. What is more, direct payments guidelines often have a detailed and instructive wording: the guidelines give clear instructions to the Member States. This detailed character allows the Commission auditors to use the guidelines as a tool to supervise and monitor implementing practices of the Member States. As a result, direct payments guidelines exert strong steering pressures on the Member States to act guidance-proof.

In contrast, in the area of free movement of persons the issuing of guidance documents is governed by the rationale of enabling or enhancing a dialogue between the European Commission and the Member States – which is expected to be favourable to a smooth and correct implementation of the Citizenship Directive. This dialogic function of the FMP guidelines is also reflected in the wording of the guidelines, which is less compelling and instructive than the direct payments guidelines. This approach leads to soft pressures on the Member States to act guidance-proof.

Finally, the issuing of Habitat guidelines is governed by yet another rationale which is to address and respect heterogeneity in the implementation of the Habitats Directive at the level of the Member States. The guidelines are drafted with the aim of providing clarity and promoting a common understanding of Habitat provisions, whilst also respecting the discretionary powers of the Member States. In this area, the Commission guidelines explicitly leave room for manoeuvre to the Member States and emphasise that the guidelines should be used in a way that suits the environmental and geographical circumstances at the national level. Due to the 'active' role of the Commission as guardian of the Treaties in these areas, pressures are still exerted to act in conformity with the guidelines.

8.2 ROLES OF GUIDANCE AS IMPLEMENTATION AID

The previous section shows how, at the EU level, the issuing and use of guidance documents is governed by various dynamics. What happens at the next stage of the process of governance through guidance, when guidance is received in the national legal order? The analysis of the use of guidance in Dutch implementing practices reveals different roles of guidance. These roles become visible when studying guidance practices in light of two analytical lenses: the perspectives on their binding character

and different types of guidance. This section presents the roles of guidance that have been identified along both lines of the analytical framework, and shows how these roles are shaped by contextual factors rather than by a clear and common perspective on the role or status of guidance documents in implementing practices.

8.2.1 Perspectives on bindingness

The analysis of the use of Commission guidelines in the implementation process shows that the use of guidance documents is guided by different perspectives on their binding force. These perspectives range from the use of guidance as a 'binding rule' to the use of guidance as a 'voluntary implementation aid'. Interestingly, the perspectives on bindingness not only differ between different policy areas but can also differ between the different stages of the implementation process.

Commission guidelines exert the strongest 'binding effect' in the implementation of EU direct payments regulations. The findings of this research indicate that the guidelines are perceived and used as a binding rule throughout all stages of the implementation process. Moreover, this perspective of *de facto* bindingness encompasses nearly all types of guidance. Only the dissemination of good practices of other Member States does not exert the same binding, and thus steering, effect as the other types of guidance. Dutch officials noted repeatedly that the role of direct payments guidelines as a binding implementation aid is guided by the aim of preventing financial corrections. It is a response to the strong steering pressures exerted at the EU level. Nonetheless, it has been found that 'Dutch implementing objectives', such as promoting legal certainty, consistency, and feasibility also promote strict adherence to the Commission's direct payments guidelines.

In the area of free movement of persons, the use of the FMP Commission guidelines is characterised by a cherry picking approach. This use of guidance documents as an authoritative, but voluntary implementation aid has been detected at different stages of the implementation process. It encompasses, in particular, the interpretative and implementing guidelines laid down in the first FMP guidance document, COM(2009)313. The good practices that are disseminated in the Handbook addressing marriages of convenience seem to be considered less relevant as an implementation aid. The cherry picking approach observed in this policy area can be explained in light of the dialogic approach that governs the issuing of guidance documents as well as the 'soft' steering pressures to act in accordance with guidance documents exerted at the EU level. On the other hand, it also reflects the tendency to search for the limits of the EU free movement rules that is guided by the restrictive approach in Dutch immigration policies.

The Habitats Directive is a more difficult case when it comes to defining the perspective that guides the use of Habitat guidance documents. Here it seems – as follows from the various interviews conducted in this area – that

the interpretative guidelines are mostly perceived as an authoritative aid that in principle needs to be followed and that can only be deviated from in exceptional cases. Interestingly, this role of Habitat guidance as an authoritative and mandatory aid applies to interpretative guidance in particular. The interviews conducted with Dutch officials involved in the implementation of the Habitats Directive, indicate that the use of other types of Habitat guidance, such as implementing guidance and good practices, is guided by a more voluntary approach. To make the findings even more ‘puzzling’, the survey of the use of Habitat guidelines reveals little traces of the use of guidance at the provincial level, despite the ‘perspective of authoritative-ness’ of the Dutch provincial officials.

The various perspectives on the binding character of Commission guidelines have implications for the normative, steering effect of guidance provisions. The following sections describe how, driven by the perspectives outlined above, guidance documents take different roles in practice, and how these roles affect Dutch implementing practices at different stages of the implementation process.

8.2.2 Guidance as an aid to interpret provisions of EU law

The first role of guidance documents that has been observed in implementation practices is that of an aid to interpret the provisions of EU law. This role of guidance as an ‘interpretation aid’ manifests itself at different stages of the implementation process.

Traces of interpretative guidelines can, firstly, be found in *implementing legislation*. In the area of direct payments, the role of guidelines ‘as binding interpretation aid’ leads to a strong regulatory effect on the provisions of the Ministerial Regulation that transposes the EU direct payments regulations. The provisions sometimes literally transpose the Commission’s guidelines, without however explicitly referring to these guidelines.

Secondly, interpretative guidelines could also be used to draft *Dutch policy rules*. For instance, the Aliens Circular copies the FMP Commission’s guidelines on persistent petty criminality that accompany the Citizenship Directive – without however referring to the guidelines in the text of the policy rules. An even more ‘silent’ influence can be found in the area of direct payments. Article 5 of the Dutch policy rules that provides further rules on the young farmers payment scheme has been brought in line with guidelines given in unpublished *letters* sent by the DG AGRI services to the Dutch paying agency.

Thirdly, even when guidelines do not feature in the text of implementing legislation nor in policy rules, the guidelines may still be used to draft the *explanatory notes or memoranda* to these rules. The explanatory memorandum to the Nature Protection Act that transposes provisions of the Habitats Directive, uses the Commission’s interpretative and implementing guidelines to give further guidance to the Dutch provinces on the implementation of the Nature Protection Act. In the text of the explanatory

memorandum, Commission guidelines play a visible role: references to the Species guidance document and the Managing Natura 2000 guidance document feature in different parts of the memorandum.

Finally, interpretative guidelines are often used as an aid to apply provisions in implementing legislation and policy rules in individual cases. When used as a *decision-making aid*, interpretative guidelines may affect the outcome of individualised decisions. This is the case for guidelines that have a highly detailed character, in combination with strict adherence to these guidelines. For instance, the strict adherence by the Dutch paying agency to the Commission's fifty trees rule in the on-the-spot check working document, leads to the refusal of aid for parcels with more than fifty trees. On the other hand, interpretative guidelines that 'only' spell out decision-making criteria and factors, could more indirectly influence decision-making processes. The FMP guidelines on petty criminality, for instance, provide that account must be taken of the 'the nature of the offences; their frequency; damage or harm caused'.⁴ The rulings on persistent petty criminality show that these guidelines influence the decision-making process rather than the outcome of individualised decisions.

8.2.3 Guidance as an aid to understand and explain EU law provisions

The second role that guidance documents could take in implementing practices is that of an 'explanatory aid'. Commission guidelines with a highly explanatory character are used as an aid to understand and explain EU legislative provisions.

Sometimes, the use of explanatory guidance leaves traces in implementing practices. For instance, parts of the Managing Natura 2000 guidance document seem to be reflected in the explanatory memorandum to the Nature Protection Act. Traces of explanatory guidance have also been found in explanatory notes to the policy rules that implement the young farmer provisions in EU direct payments regulations. And, some FMP explanatory guidelines on 'arranged marriages' are referred to in the (internal) working instructions of the Dutch Immigration and Naturalisation Service. Most often, though, explanatory guidance is used as a silent, invisible aid to understand EU legislative provisions. This is not surprising in light of the fact that explanatory guidance does not give concrete, hands-on guidance that could be used to draft implementing regulations, policy rules or individual decisions. Thus, explanatory guidelines could, visibly or invisibly, shape the understanding of EU law by the actors involved in the implementation process.

During interviews, Dutch officials indicated that they often consider Commission guidelines to be a useful explanatory aid to understand complex regulations, such as in the area of direct payments, or to explain

4 COM(2009)313 final, p. 12.

and interpret openly formulated provisions. However, the analysis also shows that explanatory guidelines risk being considered superfluous or unnecessary where the guidelines only repeat what is stated in legislation. What is more, explanatory guidance risks 'mystify' the line between 'guidance' on the one hand and 'legislative provisions' on the other hand.⁵

8.2.4 Guidance as an aid to take decisions on implementing measures

The third role that guidance documents can take is that of an aid to decide on the appropriate form of implementing measures. Traces of the use of guidance as an 'implementing aid' have been identified in the three policy areas. The analysis has shown that this role is shaped by the different perspectives on the binding character of implementing guidance.

In the area of direct payments implementing guidance, the various implementing guidance documents are given a *de facto* binding role as implementation standard. The Commission's implementing guidelines are used as a template to design the integrated administration and control system that needs to be set up by the Member States. In these areas, implementing and technical guidelines are 'translated' into internal framework documents of the Dutch paying agency. The Habitat and FMP guidance documents, on the other hand, are not used as a blueprint to make choices on implementing measures. In these policy areas the implementing guidelines are used as a *voluntary* implementation aid. Implementing guidelines are used to pursue the preferred implementing practices and policies. For instance, the guidelines on detecting marriages of convenience have been used by the Immigration and Naturalisation Service to develop the methodology for conducting 'pilots' to effective and lawful identification of alleged marriages of convenience. It is another example of the cherry picking role Commission guidelines play in this policy area.

Nonetheless, implementing guidelines may remain unapplied if good implementing practices or methods have already been developed at the national level. Officials involved in the management of Natura 2000 sites indicated for instance that the implementing guidance related to the elaboration of management plans has had little consequence for Dutch implementing practices. The Netherlands had already developed its own – similar – methodology for these plans before the Commission guidelines were issued.

8.2.5 Guidance as an aid to take decisions on the form of technical measures

Commission guidelines not only provide recommendations on the form of implementing measures, but also issue guidelines that have a highly

5 See for instance the discussion of the sufficient resources rulings in section 7.6.2.

technical character. The issuing of technical guidance documents is common practice in the area of direct payments. Technical guidelines are issued by the DG AGRI Commission services as well as by the Joint Research Centre. The various technical guidance documents form an entire 'guidance species' that is adopted after discussions with technical experts in the Member States. In Dutch implementing practices the numerous technical direct payments guidelines play an important role. Dutch officials use and perceive technical guidelines as being a binding standard: by following technical guidelines, they will be on the safe side during audits carried out by the Commission services. The role of technical guidelines has become particularly important after the 'LPIS experience' in 2009 where, according to Dutch officials, the non-use of Commission technical guidelines resulted in financial corrections. After that, the technical guidelines were strictly followed and led to substantial changes in the design of the land parcel identification system. In brief, the Dutch paying agency uses the guidelines as instructions or templates to take decisions on the design and form of technical implementing measures.

Technical guidance documents have not (yet) been issued in relation to the Habitats Directive or Citizenship Directive. In these policy areas, no traces have been found of the use of technical guidelines as implementing aid.

8.2.6 Guidance as an aid to develop good implementing practices

The dissemination of good implementing practices is the most recently developed type of guidance. Good practices for instance are shared at workshops with experts from the Member States on the implementation of direct payments regulation, can be found in the form of a 'toolkit of hands-on guidance' in the Handbook addressing marriages of convenience, and are manifold in relation to the management of Natura 2000 areas.

However, the empirical analysis reveals few traces of the use of 'good practices' in implementing practices. From interviews with Dutch officials, it transpired that good practices are generally considered not to have the same binding or authoritative status as the other types of guidance. The good practices of other Member States do not have the same 'normative' force as this only concerns 'good practices'. These good practices do not reflect the Commission's normative view on how to best implement and interpret provisions in EU regulations and directives.

The finding that good practices disseminated by the Commission play little role in implementing processes, might need be seen in a 'Dutch context'. The Netherlands is one of the founding EU Member States and has much experience in implementing EU legislation. For the 'newer' Member States, the dissemination of the good practices of other Member States might be more useful and relevant. In these Member States, this type of guidance might play a more important role as a source of inspiration for developing good implementing practices.

8.3 NATIONAL COURTS AS FACILITATING OR COUNTERBALANCING ACTORS

Having outlined the roles of guidance in the implementation process, this section outlines what trends can be discerned as regards the use of guidance documents in judicial decision-making practices. In what ways do national courts use the Commission's guidelines and how does this use 'shape' the role of guidance documents in the implementation process? The three case studies show that – at least in the three policy areas included in this research – Dutch courts fulfil the role of a facilitating and counterbalancing actor, reinforcing or downplaying the role of guidance documents as an implementation aid. What role the courts play depends on:

- whether, and in what way, the courts use guidance documents in order to interpret or apply EU law provisions;
- whether the courts provide guidance to national authorities on how they should deal with guidance documents;
- the type of guidance concerned.

8.3.1 National courts as a counterbalancing actor

National courts could have a counterbalancing role when they mitigate the binding effect of guidance documents for national authorities. In this research, the following three situations have been identified.

No use as a binding rule

The case study on the role of direct payments guidelines most clearly reveals a role for a national court as a counterbalancing actor. In several groups of rulings, the Trade and Industry Appeals Tribunal makes clear that the Dutch minister cannot use Commission guidance documents as binding rules or instructions. This follows not only from the fifty trees rulings in which the Tribunal considers that by using Commission guidelines as if they were 'a binding instruction', the Dutch paying agency disregards the guidelines' non-binding character. A similar picture emerges from the early obvious error rulings as well as the interpretative note rulings of the Tribunal. In those rulings, the Tribunal emphasises that the Commission guidelines do not have legally binding force. It is the responsibility of the paying agency to take account of the facts and circumstances of the case and to apply the guidelines within the limits of the EU legal framework.⁶

However, the fact that the Tribunal does not allow the paying agency to use Commission guidelines as binding rules, does not mean that the guidelines cannot play a role as an implementation aid. The Tribunal clarifies that it accepts the use of Commission guidelines as 'policy reference points'.⁷

6 See section 5.6.1.

7 See section 5.6.1.

In the numerous obvious error rulings, it has become settled case law that the Tribunal considers it acceptable that the minister develops a policy line in light of the Commission guidelines.

Thus, the Tribunal counterbalances the general trend of the Dutch minister and paying agency to use Commission guidelines as binding rules, yet allows the use of Commission guidelines as an implementation aid. A similar, explicit counterbalancing role of the Dutch courts was not found in the two other policy areas studied for this research. This is not surprising as in these policy areas there is less indication that the Commission guidelines are used as *de facto* binding interpretative rules or standard. In these policy areas, as will be discussed below, the courts instead primarily play a role as facilitating actor.

Ignorance or irrelevance of Commission guidelines

National courts also have a counterbalancing role in the situation where they consider Commission guidelines irrelevant or where they ignore Commission guidelines when interpreting or applying EU legislative rules. In that case, the courts do not promote or reinforce the role of guidelines as an implementation aid.

Although not manifold, some rulings were found in which the courts are *explicit* about the irrelevance of Commission guidelines as a judicial interpretation aid. Illustrative is the Overflying Natura 2000 ruling. In this ruling, the Council of State takes the view that the question on the scope and definition of the term 'project'⁸ can be solved on the basis of the case law of the Court of Justice. The Council of State explicitly notes that the Managing Natura guidelines were issued prior to the relevant case law, from which it follows that the guidelines have become 'outdated'.⁹ Another example is given by the rulings on breeding sites and resting places of birds. In these rulings, the Council of State and District Courts do not use the Species guidelines of the Commission as a reference point for the interpretation of the scope of *gruttos*' breeding sites, despite several attempts by the appellants who argue that on the basis of these guidelines, a broad interpretation of the term 'breeding sites' should be applied.¹⁰ The Courts, instead, infer a more narrow interpretation of the term 'breeding sites' from the logic of the Species protection regime.

It is also possible that the text of a ruling ignores the mere existence of Commission guidelines on a specific question. An example is the *Briels* ruling of the Council of State which elaborates on the possibility of including mitigation measures in the appropriate assessment. The *Briels* ruling does not refer to the Managing Natura 2000 guidance documents,

8 Article 6(3) of the Habitats Directive.

9 See section 6.6.1.

10 Section 6.6.2.

despite the fact that the concept of ‘mitigation measures’ is introduced in and elaborated on in the Commission guidelines.¹¹ Of course, it may still be possible that the Commission guidelines have played a ‘silent role’ in the reasoning of the court. But, when this does not transpire from the text of the ruling, no indication is given that the court attaches importance to the guidelines or that the guidelines are to be taken into account by national authorities when implementing EU law. The findings in this research do not reveal many rulings in which a Dutch court ignores Commission guidelines. Yet, the practice of ignoring Commission guidance might occur more often than the findings in this research suggest. Indeed, it is likely that these rulings will not be found by searching for explicit references to guidance documents in national courts’ rulings.

Commission guidelines overruled

The third way in which courts act as a counterbalancing actor is by explicitly overruling or deviating from guidance documents. The most explicit and critical approach is reflected in rulings of the Trade and Industry Appeals Tribunal. For instance, in the permanent grassland rulings, the Tribunal takes the view that grassland on airports is not *per se* to be excluded from being eligible for aid.¹² The observation that the Commission takes a different view – which it also made clear during audit missions in the Netherlands – does not lead the Tribunal to a different conclusion. The fifty trees case provides another example. The Trade and Industry Appeals Tribunal deviates from the Commission guidelines by not using the fifty trees rule as an assessment standard. Nonetheless, the results of this research only reveal a small number of rulings where Dutch courts explicitly overrule or deviate from Commission’s guidance documents. The rulings where courts explicitly deviate from Commission guidelines thus seem to be the exception rather than the rule. It is however possible that rulings have not been included in the analysis where courts do deviate from guidelines without explicitly mentioning it.

8.3.2 National courts as a facilitating actor

The analysis of the use of guidance documents by national courts also shows that national courts can play a role as a facilitating actor. National courts then interact with Commission guidelines in a way that reinforces their role in implementing practices. This section outlines how national courts play a facilitating role by using guidelines as an interpretation or explanatory aid to assess the lawfulness of (technical) implementing practices, and by recognising a self-binding effect for national authorities.

11 Section 6.6.1.

12 Section 5.6.4.

Guidance as an interpretation aid

The use of guidance as an interpretation aid was observed in all three policy areas. The Habitat guidelines – and in particular the Species guidelines – serve as an interpretation aid in rulings of the Council of State as well as in rulings of several District Courts. The Council of State and the District Court of The Hague refer to the Commission's FMP guidelines to interpret concepts such as a 'durable relationship', 'a sufficient serious threat' or the notion of 'abuse'. Most of the rulings that refer to Commission guidelines as an interpretation aid were handed down by The Trade and Industry Appeals Tribunal, of which the large majority refers to the obvious error working document. The Tribunal takes account of Commission direct payments guidelines to interpret EU direct payments provisions and assesses the minister's practice in light of these.

Where national courts use Commission guidelines as an interpretation aid, the guidelines to a larger or lesser degree influence the interpretation of EU legislative provisions in light of which the implementing practices will be assessed. The question, however, is whether the courts also consider the interpretative guidelines as having an authoritative, or even binding effect on the national courts in general (not only in the specific cases where guidelines are used as an interpretation aid).¹³

In most of the rulings, the courts do not motivate why they take account of Commission guidelines. This is the case in particular for the rulings that refer to guidance documents related to the Habitats Directive and the EU direct payments regulations. A more explicit approach is taken by the Dutch Council of State in the rulings that refer to the COM(2009)313 guidelines to the Citizenship Directive. In the '2011 rulings' the Dutch Council of State considers that these guidelines 'serve as an aid for the interpretation of the Directive' and that the guidelines 'cannot be regarded as not having any significance'.¹⁴ The analysis in section 7.6.2 has shown that this has become settled case law.

Other types of guidance as a decision-making aid

From the above it follows that Dutch courts, in all three policy areas, mostly refer to guidelines having an *interpretative* character. Although other types than interpretative guidance feature less frequently in the rulings of the courts, the analysis has shown that these types of guidance may also come to play a role as a decision-making aid.

13 The question whether and to what extent national courts clarify the legal status of Commission guidelines is discussed below in section 8.5.1.

14 See section 7.6.1.

Some rulings have been found that refer to guidelines with a highly explanatory character. The sufficient resources rulings of the District Court of The Hague¹⁵ and the active farmer rulings of the Trade and Industry Appeals Tribunal¹⁶ both refer to explanatory guidance documents in order to define the purpose and context of legislative provisions. These rulings show that even explanatory guidelines might 'steer' the interpretation adopted by the courts.

Traces of the use of implementing guidance documents as a decision-making aid feature most clearly in rulings that assess the method that is followed when investigating the marriages of convenience. In these rulings, the method proposed in the guidelines is considered an appropriate investigation method and used by the courts to assess whether the minister's decision can be upheld.¹⁷ It is remarkable, though, that these types of implementing and technical guidance leave no traces in the rulings in the area of direct payments. Indeed, in this area these types of guidance play an important role in implementation processes. Only the JRC rulings reveal some glimpses of technical guidance as well as of good practices. These rulings show that good practices of other Member States can be used by the Tribunal as an additional argument in favour of the 'appropriateness' of the measurement method used by the Dutch paying agency.¹⁸

A 'self-binding' effect for national authorities?

From the analysis, a picture emerges that Dutch courts acknowledge and accept that national authorities use Commission guidelines as an interpretation aid or as a decision-making aid. This is made explicitly clear in several groups of rulings by the Trade and Industry Appeals Tribunal. The Tribunal considers it acceptable that a Dutch paying agency develops a policy line on the basis of the Commission's obvious error guidelines and that it uses the on-the-spot check working document as an interpretation aid.¹⁹ The Council of State takes a similar view. For instance, in the rulings on marriages of convenience the Council acknowledges the fact that the minister has followed the method of investigation as spelled out in the Commission guidelines.²⁰ And in the incidental killing ruling, the Council considers that the minister is allowed to attach importance to the Species guidelines.²¹ Yet, it should be remarked that in this ruling the Council also refers to the fact that in the 'wolf hunting case' the Court of Justice also uses these guidelines as an interpretation aid.

15 Section 7.6.2.

16 Section 5.6.3.

17 Section 7.6.3.

18 Section 5.6.3.

19 Section and 5.6.1.

20 Section 7.6.3.

21 Section 6.6.2.

What is more, the rulings of Dutch courts also indicate that the use of the guidelines as a decision-making aid at the implementation stage can generate a self-binding effect of the guidelines on the minister. This self-binding effect becomes visible in the rulings of the Council of State related to the Citizenship Directive. In the 2011 rulings, for instance, the Council of State states that it will take account of the guidelines 'all the more since the minister himself also occasionally uses the guidelines as justification for policy decisions'.²² Signs of a certain self-binding effect are also given in the most recent 'direct payments rulings' on the concept of obvious error. The Tribunal indicates that it will take account of the obvious error guidelines as an interpretation aid, as these guidelines are issued by an authoritative institution *and* for the reason that the minister himself also refers to the guidelines.

In brief, it seems that the courts acknowledge a certain self-binding effect of the guidelines on national authorities. However, the courts do not elaborate on the reasons for recognising such a self-binding effect of the guidelines. Could a parallel be drawn with the self-binding effect of national policy lines via legal principles such as legal certainty and legitimate expectations?

22 Section 7.6.1.

Table 8-1 Use of guidance as an implementation aid: perspectives on bindingness

Degree of bindingness Type of guidance	Use as an interpretation aid	Use as an aid to understand and explain EU law provisions	Use as an aid to take implementing measures	Use as an aid to take technical measures	Use as an aid to develop or find inspiration for good implementing practices
Use of guidance as a de facto binding rule	Interpretative direct payments guidelines	Explanatory direct payments guidelines		Most technical direct payments guidelines	
Use of guidance as an authoritative, mandatory implementation aid, comply or explain practice	Habitat guidelines, in particular Species guidelines	Habitat guidelines, in particular Natura 2000 guidelines	Habitat guidelines, in particular Natura 2000 guidelines		
Use of guidance as a voluntary implementation aid, practice of cherry picking	FMP guidelines COM(2009)313, when there is a good fit with national implementing policy	FMP guidelines COM(2009)313 guidelines, when there is a good fit with national implementing policy	FMP guidelines COM(2009)313 guidelines, when there is a good fit with national implementing practices		
No use as an implementation aid, e.g. due to irrelevance or outdated, the existence of guidance unknown	Interpretative guidelines that remain unknown to national authorities, e.g. letters			Technical direct payments guidelines (exceptional, when too costly and bad fit)	Good practices on the implementation of direct payments guidelines, Habitat guidelines as well as free movement of persons

Table 8-2 Uses of guidance in implementing measures

Type of guidance	Interpretative guidance	Implementing guidance	Technical guidance	Explanatory guidance	Dissemination of good practices
Direct payments: Responsible Ministry and paying agency	Basis for provisions in Ministerial Regulation, policy rules, and individualised decisions	Standard setting for practical implementing measures integrated administration and control system	Standard for the form and design of technical measures (e.g. land parcel and identification system)	Use as an aid to understand the complex direct payments provisions, sometimes referred to in explanatory notes	No traces found of use in implementing measures
Habitats Directive: responsible Ministry	Translation in text of the explanatory memorandum to Natura protection act	Justification aid for choice of management plans in explanatory memorandum to Nature Protection Act	x	Use as an aid giving explanatory guidance in the explanatory memorandum to the Natura Protection Act	Use of good practices of other MS to explain choice for management plans in explanatory memorandum
Habitats Directive: Dutch provinces	Provinces: (silent) interpretation aid when making individualised decisions	Provinces: Little use for design of management plan and appropriate assessments	x	Little/ no indication of use in provincial practices	Little indications of use of good practices, little influence on methodology of management plans
Citizenship Directive	Transposition into policy rules in the Aliens Circular and working instructions, when good fit with national policy and practices	Use as reference point for the methodology to detect and investigate marriages of convenience, good fit with national implementing policy	x	Traces of guidelines on marriages of convenience in working instructions	No indication of the use good practices to tackle marriages of convenience on the ground: overlap with existing practices

Table 8-3 *Uses of guidance by Dutch courts: degree of bindingness*

Type of guidance	Interpretative guidance	Implementing guidance	Technical guidance	Explanatory guidance	Dissemination of good practices
Direct payments: Trade and Industry Appeals Tribunal	Use as a judicial interpretation aid, but no allowance of use as binding rules by paying agency	No indication of use of implementing guidance as a judicial decision-making aid	No indication of use of technical guidance as judicial decision-making aid	Use as aid to explain the logic of active farmer provision	Good practices of other Member States as 'supportive argument' for appropriateness of measurement method
Habitats Directive: Council of State, Courts of Appeal and District Courts	Use as a judicial interpretation aid (no clear perspective)	No indication of use of implementing guidance as a judicial decision-making aid	x	Use as of guidance in MN000 guidance documents as 'silent' explanatory aid (no references in rulings)	No indication of the use of good practices as a judicial decision-making aid
Citizenship Directive: Council of State and District Court of The Hague	Use as a judicial interpretation aid 'that is not deprived of any significance'	Use as standard to assess lawfulness of methodology to detect and investigate marriages of convenience	x	Use of explanatory guidance to explain and interpret the concept of sufficient resources	No indication of the use of good practices in Handbook as a judicial decision-making aid

8.4 GUIDANCE AS AN IMPLEMENTATION TOOL: THE PROMISES FULFILLED?

The first part of this chapter distinguished between different uses of guidance documents in Dutch implementing processes as well as in judicial decision-making processes. The second part of the analysis explores the relationship between the use of guidance and legal principles governing the implementation of EU law. To this end, it examines whether and how the use (or non-use) of guidance documents achieves their promises in practice. The promises (see section 2.5) can be summarised as the ideal situation where guidance documents contribute to predictability, consistency and transparency in the implementation process, whilst respecting the primacy of EU hard law. It was presumed that in order to positively interact with legal principles, guidance documents should be used in a 'predictable, transparent and consistent manner whilst taking account of their non-legally binding character'.

This section analyses the implications of the use of guidance in implementing practices. Does the use (or non-use) of guidance documents as an implementation aid contribute to the fulfilment of the promises in practice? And, if possible, what circumstances or factors can be discerned that contribute to, or perhaps hamper, the use of guidance documents in line with the promises? The next section then proceeds to explore the use of guidance documents by national courts.

8.4.1 Enhancing (un)certainty in the implementation of EU legislation?

The first 'promise' of guidance documents is to enhance predictability in the implementation of EU law. As outlined in the introduction, in order for this promise to be fulfilled, guidance documents should be used in a 'predictable manner': there should be clarity as to the role that guidelines fulfil in implementation processes.

From the analysis, a picture emerges that the role of Commission guidance documents in the three policy areas remains largely uncertain. There is no common understanding or policy line as to how guidance documents are treated in Dutch implementing practices. Instead, the role of the guidelines differs according to different policy areas, ranging from that of a *de facto* binding rule or standard in the area of direct payments, an authoritative interpretation aid in relation to the implementation of the Habitats Directive, to a voluntary implementation aid in the area of free movement of persons. Furthermore, the empirical analysis also indicates that the authoritativeness of guidance documents differs along the lines of the different types of guidance. For instance, in the area of the Habitats Directive interpretative guidelines are considered to be highly authoritative whilst other types of guidance (such as implementing guidance and good practices) seem to be perceived and used as a voluntary implementation aid.²³

23 As discussed above in section 8.2.1.

Even if the role of the guidelines is uncertain, limited ‘predictability effects’ can still arise when the Commission’s guidelines are used to draft implementing legislation or policy rules. The guidelines then indirectly generate predictability effects through Dutch rulemaking instruments. Such a predictability effect is most visible in the area of direct payments, where the interpretative guidelines are used as a basis to draft provisions in the Ministerial Regulation and the policy rules. Predictability effects have also been found in relation to the Citizenship Directive: interpretative FMP guidelines are used as an aid to draft the policy rules in the Aliens Circular.

However, also in the situation where guidelines are used as an aid to draft Dutch binding regulations or policy rules, the uncertain binding effect of the guidelines remains problematic. Indeed, the guidelines might still be used by national authorities as an aid to take individualised decisions on the basis of the implementing rules. What is more, the guidelines’ binding effect also becomes relevant when decisions taken on the basis of the implementing rules are challenged. What weight will or must be given to the guidelines by national authorities?

From the above it can be concluded that the ability of guidance documents to contribute to a predictable implementation of EU law is limited, due to the fact that the perceived binding effect of Commission guidelines in implementing practices is highly uncertain.

This raises the question how this divergence and uncertainty in the role of Commission guidelines can be explained. In the first place, this can be linked to the plethora of expectations on the use of guidance documents formulated at the EU level. The different types of steering pressures exerted by the Commission on the Member States to act guidance-proof, seem to be reflected in national implementing practices. On the other hand, uncertainty in the role of guidance may be further increased by a lack of knowledge or by multiple interpretations of the expectations formulated at the EU level by national officials involved in implementing practices. This uncertainty might further be related to the fact that national courts are not always clear about their view on the role of guidance documents.²⁴

8.4.2 Promoting (in)consistency in the implementation of EU law?

The second promise of guidance documents is that – when used at the national level – the guidelines could promote consistency in the implementation of EU law. This effect of consistency arises when Commission guidelines are applied in a consistent manner when interpreting and applying provisions of EU law. Has this effect been observed in the study of the use of guidance documents in the three policy areas?

24 As will be discussed below in section 8.5.1.

The greatest ‘consistency effect’ can be observed in the area of direct payments, where the guidance documents are used as a binding rule and are strictly followed. This leads, as said, to the transposition of these guidelines into the Dutch Ministerial Regulation and policy rules. The guidelines then generate consistency through the application of the Dutch implementing rules. But also in the situation where the direct payments guidelines are not transposed into implementing legislation, they are still applied as binding rules, and as a consequence are strictly followed in decision-making practices.

The analysis, however, also reveals a factor that may jeopardise the ability of direct payments guidance documents to promote a consistent implementation of direct payments regulations. This is the high frequency with which guidance documents are issued as well as the changing nature of direct payments guidance documents and the changing views of the Commission on the interpretation of its guidelines. These changes usually resonate throughout implementing rules and practices at the national level. The Ministerial Regulation and policy rules are regularly amended in response to the adoption or revision of guidance documents.²⁵

Whilst direct payments guidelines – despite their changing character – promote consistency in implementing practices, the cherry picking approach that guides the use of FMP guidelines leads to a different conclusion. This cherry picking approach could give rise to the risk of an inconsistent or arbitrary implementation of the provisions Citizenship Directive. The use of the guidelines then depends on whether the ‘individual decision maker’ considers guidelines a useful aid to support or justify the policy decision in question. This risk might arise, for instance, in relation to the use of the guidelines on marriages of convenience. The guidelines on marriages of convenience are not used as a policy line nor does the State Secretary consider himself bound by the guidelines. This is made clear in a letter from the Dutch State Secretary that is referred to in a ruling of the Council of State in July 2016.²⁶

The risk of inconsistency related to a cherry picking approach is mitigated in the situation where the FMP guidelines are transposed into the policy rules laid down in the Aliens Circular.²⁷ Indeed, these policy rules must, in principle, be followed by the Immigration and Naturalisation Service in decision-making practices. The Aliens Circular for instance trans-

25 An example is provided by the criteria that are adopted to define the maintenance obligation in section 2.2. of the Ministerial Regulation and the revision of the Ministerial Regulation in response to the change of the EFA layer guidance document. See above section 5.5.1.

26 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.2; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

27 According to Article 4:84 GALA deviation from policy rules is only possible if due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purpose of the policy rule. See section 4.2.2.

poses the guidelines on persistent petty criminality which spell out criteria or factors that can be taken into account. Via the Dutch policy rules, the guidelines then promote a consistent effect on the decision-making process, rather than directly influencing the outcome of the decisions taken by the Immigration and Naturalisation Service.

Finally, the least consistency effects have been observed in the area of the Habitats Directive. In this area, a consistent implementation of the Dutch Nature Protection Act is encouraged in the explanatory memorandum which also adopts the Commission guidelines to give guidance to the Dutch provinces. However, no indications of a consistent use of Habitat guidelines have been identified at the level of the Dutch provinces. The guidelines have not been transposed into decentralised provincial regulations or provincial policy rules, nor have traces been found of a consistent application of the guidelines in individualised decision-making practices.

8.4.3 Giving rise to problems of transparency in the implementation of EU law?

The third promise of guidance documents is to enhance transparency of decisions made during the implementation processes and of the decision-making criteria that are applied when implementing general provisions of EU law. This promise is considered to be fulfilled, as outlined in section 2.5.6. if it is communicated and made explicit whether and how Habitat guidance documents are used, or not used, when implementing provisions of EU law. In brief: guidance documents should be used in a transparent manner.

The above analysis of the use of guidance documents in implementation processes does not radiate transparency. In fact, from the analysis a picture emerges that, generally speaking, the use of guidance documents remains highly invisible. This invisibility encompasses all types of guidance and runs throughout the different stages of the implementation process.

The interpretative guidelines that are used for the drafting of implementing regulations or policy rules generally remain invisible in the text of the regulatory acts. In the area of direct payments, the explanatory notes to the Ministerial Regulation and policy rules only exceptionally reveal some traces of direct payments guidelines. A more transparent approach, and thus an exception to the rule, or trend, is the explicit approach that is taken in the explanatory memorandum that complements the Nature Protection Act. Here, the guidelines are explicitly referred to and used to give further guidance to the interpretation of Habitat provisions as transposed into the Nature Protection Act.

Similarly, from the analysis, a picture arises that the use of guidance documents is generally not mentioned in the text of individualised decisions. In all three policy areas, the explicit mention of guidance documents in individualised decisions appears to be the exception, rather than the

rule.²⁸ Interestingly, however, when individualised decisions need to be defended at the objection stage or in court, it is much more likely that traces of Commission guidelines will feature in the statements of defence. The guidelines then serve as an aid to justify decisions that have been taken.

The situations outlined above concern, in particular, the use of *interpretative* guidelines in rulemaking practices and in individualised decision-making practices. The analysis reveals that the use of other types of guidance remains even more implicit or invisible. This is remarkable since the analysis has also shown that implementing and technical guidance documents can play an important role as an implementation aid. For instance, in the area of direct payments guidance where implementing guidance and technical guidance play an important role for the setting up and the design of the integrated administration and control system.²⁹ Here, the guidelines are used to draft internal framework documents which as their name suggests are *internal* and not accessible to the general public.

Finally, the lack of transparency that surrounds the use and effects of Commission guidelines is further reinforced by the fact that Commission guidance documents are often not published or in any case not made accessible to the general public. This, again, is particularly true in the area of direct payments where the largest part of numerous guidance documents is not made accessible or published. Only some of the guidance documents can be found on the Wikicap website of the Joint Research Centre.

Thus, the general conclusion is that in many respects the promise of transparency of guidance documents remains largely unfulfilled in the three policy areas. It could even be said that the 'invisible use' of the guidelines gives rise to problems of transparency, instead of enhancing transparency in implementation processes.

8.4.4 Challenging the promise of non-bindingness: legality at risk?

The fourth promise of the Commission guidance documents is 'the promise of non-bindingness'. This promise entails that due to their non-legally binding character guidance documents can only fulfil their role as an implementation aid complementary to EU law: the guidelines should be used in such a way that respects the primacy of Union law. Guidance documents cannot be used to create rights and obligations that go beyond, detract from or change EU legislative rules: implementing measures should always, eventually have a basis in and be in line with EU legislative rules.³⁰ What

28 An exceptional 'explicit use' of guidance document can be found for instance in decisions on the concept of obvious error laid down in direct payment regulations. See section 5.5.4.

29 See section 5.5.3. Another example is the use of the COM(2009)313 guidelines for the methodology to investigate and detect marriages of convenience which does not transpire from the IND's working instructions, see section 7.5.3.

30 See section 2.5.7.

does the analysis of the use of guidance documents in the three policy areas tell us about this promise of non-bindingness? The analysis shows that this promise is challenged at various stages of the implementation process.

Guidelines as a basis for implementing legislation

In the first place, legality concerns arise in the situation where direct payments guidelines are used as a basis to draft provisions of implementing legislation. The analysis reveals that the Dutch Ministerial Regulation on direct payments is brought in line with the *de facto* binding direct payments guidelines. Due to the strict adherence to the guidelines and their detailed character, direct payments guidelines risk becoming used as a basis for obligations laid down in Dutch binding rules that cannot be traced back to, or that deviate from, underlying EU direct payments rules.

The ‘famous’ fifty trees cases are illustrative, as they show that the transposition of the fifty trees rule into the former Dutch Ministerial Regulation is problematic in light of the underlying EU direct payments regulation. By transposing the fifty trees rule into a legally binding act, the Dutch paying agency risks refusing aid for parcels with more than fifty trees whilst, on the basis of the EU regulation aid, it could in fact have been granted.³¹ The fifty trees rule is not the only provision that raises questions in light of the underlying direct payments provisions. Examples can also be found in the Ministerial Regulation that is currently in force. Article 2.15(3) of the Ministerial Regulation, for instance, transposes the Commission’s guideline that light tillage is allowed on sensitive permanent grassland. It is questionable whether this is in accordance with Article 45(1) of Regulation 1307/2013, which imposes a ban on ploughing on sensitive grassland.³²

Finally, the transposition of direct payments guidelines into implementing legislation can also be problematic in light of the ‘procedural rules’ formulated by the Court of Justice that define the conditions within which EU regulations can be ‘operationalised’.³³ In particular, the legislative provisions may risk giving ‘binding interpretations’ of EU regulations, which according to the Court’s case law is not permitted.³⁴

Policy rules and policy lines

Legality concerns also arise at later stages of the implementation process. Just as for implementing legislation, guidelines could be used as a basis for policy rules or lines that give rise to questions in light of legally binding provisions in EU laws. The analysis reveals the trend that when Commis-

31 See section 5.5.1.

32 See section 5.5.1.

33 These procedural requirements were discussed in section 2.5.7.

34 CJEU 31 January 1978, C-94/77, ECLI:EU:C:1978:17, par. 27 (*Fratelli Zerbone*).

sion guidelines are used to develop a policy rule or line, guidelines tend to be strictly or rigidly adhered to by Dutch administrative authorities.

This trend has been observed most clearly in the area of free movement of persons. The Commission's guidelines are used as an aid to develop policy rules or policy lines that fit with Dutch restrictive implementing objectives. An example of a use of the guidelines that in the eyes of Dutch courts leads to a too restrictive interpretation of the Citizenship Directive, is the policy line that adopts a too restrictive interpretation of a durable relationship.³⁵ Another example is the application of the policy rule in the Dutch Aliens Circular that transposes the Commission guidelines on persistent petty criminality in individualised decisions. When applied in practice, these guidelines tend to be interpreted and applied in a restrictive manner whilst the facts and circumstances of the individual case are not sufficiently taken into account. This follows from the rulings of the District Court of The Hague and the Council of State.³⁶

A similar risk arises where direct payments guidelines are translated into policy rules or policy lines. For instance, the policy line developed by a Dutch paying agency on the basis of the obvious error guidelines takes a systematic, not sufficiently individualized approach, when assessing whether aid applications contain an obvious error. According to the Trade and Industry Appeals Tribunal, the paying agency does not sufficiently take account of the facts and circumstances, whilst this is required by the same obvious error guidelines.³⁷

Individualised decisions

Finally, legality questions could arise where guidelines are used as a basis or aid for taking individualised decisions. In fact, such questions generally come to the fore at this final stage of the implementation process, since it is only the individualised decisions that can be directly challenged before Dutch administrative courts. The use of guidelines is problematic when decisions are based on the Commission's rules, whilst no account is taken of the legally binding Union rules. In that case, as the early fifty trees rulings show, the guidelines cannot uphold a decision that is not in accordance with underlying Union rules. Problems also arise when guidelines are used as an aid to justify decisions that 'search for the limits of the law'. These cases have been identified in the area of free movement of persons, where guidelines are used to support 'restrictive' implementing decisions.

35 See section 7.6.1.

36 See section 7.6.2.

37 See section 5.6.1.

8.5 NATIONAL COURTS: PROMOTING THE PROMISES OF GUIDANCE?

National courts not only play a role in shaping the role of guidance documents in national implementing practices as a facilitating or counterbalancing actor. The way in which national courts use Commission guidelines also influences the ability of guidance documents to exert their promises in the implementation process. This section explores whether from the analysis of the use of guidance in judicial processes, a picture emerges that Dutch courts act as the guardian of legal principles. Do Dutch courts use guidance documents in a way that promotes or hampers the ability of guidance documents to fulfil their promises in practice?

8.5.1 Clarifying or mystifying the status of Commission guidelines?

Section 8.4.1 concluded that the role of direct payments guidelines in implementing practices is governed by uncertainty. The guidelines take different roles in practice that are shaped by contextual factors rather than by a shared, common perspective on the role of guidelines as an implementation tool. The question now is whether Dutch courts play a role in clarifying the role that guidance documents could or should play in implementing practices.

The analysis of the use of guidance documents in judicial practice reveals that in most rulings in the three policy areas, the courts do not examine the legal effects of the guidelines. Only as an exception do the courts' rulings explicitly elaborate on the role of the Commission guidelines as an implementation aid and as a judicial decision-making aid.

The Council of State takes the most explicit approach in the 2011 rulings. In these rulings the Council refers to the FMP guidelines as 'an interpretation aid that is not deprived of any significance' and considers this all the more so, 'since the Minister himself also occasionally refers to the guidelines as a justification for his policy decisions'.³⁸ The Trade and Industry Appeals Tribunal takes a similar approach, as the Tribunal considers that Commission guidelines can be used as a 'policy reference point' when interpreting and applying the provisions of direct payments regulations. What is more, in recent obvious error rulings the Tribunal reasons that it will take account of the Commission guidelines 'since the guidelines are issued by an authoritative institution', as well as in light of the fact that the minister himself uses the obvious error guidelines.³⁹ On the other hand, as already discussed above, the Trade and Industry Appeals Tribunal does not accept the use of the guidelines as if they were binding rules.

These 'formulas' give some indication as to the role and status of guidance documents, but also leave questions open. What does it mean that guidance documents can be used as an interpretation aid? Are the

38 See section 7.6.1.

39 See section 5.6.2.

guidelines binding to a certain extent on national authorities or not? Do the national courts derive their formulas from the *Grimaldi* case law of the Court of Justice? Is the use of the guidelines by the Court of Justice relevant for the question whether national authorities are allowed to use the guidelines, as the incidental killing ruling suggests?⁴⁰ And, if guidance documents can be used as an interpretation aid, what about other types of guidance?

Interviews with State Councillors at the Judicial Division of the Council of State provided further insights and answer into these questions.⁴¹ The State Councillors clarified that in their view, Commission guidelines are an authoritative source of interpretation. This means that if a question arises for which Commission guidelines give relevant guidance, the guidelines in principle need to be taken into account. The guidelines cannot be set aside or disregarded without good reason or a justification. This 'perspective of authoritativeness', giving guidelines the role of a mandatory implementation aid, applies to both national courts and the minister. This perspective of authoritativeness is thus considered to be the main approach that guides the use of Commission guidelines at the Dutch Council of State. It is, however, uncertain whether this perspective is shared by other (lower) courts as well as the Trade and Industry Appeals Tribunal. This could be explored in further research.

The conclusion that can be drawn from the findings of this research is that national courts only play a limited role in clarifying the status of Commission guidelines. The role of guidance documents as an implementation aid as well as a judicial decision-making aid thus remains largely uncertain.

8.5.2 Promoting an (in)consistent use of Commission guidelines?

The analysis of the use of Commission guidelines in implementing practices reveals a mixed picture when it comes to the promise of the guidelines to contribute to consistency in implementing practices.⁴² In the area of direct payments the application of the, often detailed, guidelines leads to a high degree of consistency in implementing practices, whilst the cherry picking approach that guides the FMP guidelines risks resulting in an inconsistent use of Commission guidelines in decision-making practices. The Habitat guidelines have the least 'consistency effects', due to the limited role of the guidelines at the level of the Dutch provinces.

The question now is how the 'guidance practices' of Dutch courts relate to this promise of consistency. On the basis of the rulings of Dutch courts, practices can be identified that promote the promise of consistency, as well as practices that detract from the promise of consistency.

40 The incidental killing ruling is discussed in section 6.6.2.

41 Interview 26 – State Councillor C and D; Interview 28 – State Councillor C. See also section 6.6.3.

42 Section 8.4.2.

In the first place, a consistent use of the guidelines is promoted in cases where the courts, in an explicit manner, require the minister to use Commission guidelines in a consistent manner. This is the case where Dutch courts recognise a certain self-binding effect of the guidelines on the administrative authority.⁴³ Such a self-binding effect transpires most clearly from rulings that refer to the FMP guidelines.⁴⁴ Illustrative are the two rulings issued in 2006 concerning the use guidelines on marriages of convenience. In these rulings, the minister argues that the guidelines are not used as a fixed policy line and therefore are not binding. The Council of State, instead, considers that it will nevertheless assess the minister's practices in light of the guidelines since the minister himself used the guidelines as a decision-making aid.⁴⁵

Secondly, the courts promote consistency, where they use Commission guidelines as a judicial interpretation aid and/or as an aid to assess implementing practices in a consistent manner. Several groups of rulings have been identified, in all three areas, where the courts, it seems, consistently refer to similar parts of the Commission guidelines. A first example are the foraging area rulings where the Council of State and lower courts refer to the Species guidelines to interpret the scope of breeding sites and resting places of bats.⁴⁶ In the area of direct payments, the numerous rulings on the concept of obvious error show that over a period of almost twenty years, the Tribunal refers to the obvious error guidelines as an interpretation aid. Similarly, the different groups of rulings of the District Court of The Hague and Council of State also show how the FMP guidelines are referred to – it seems on a regular basis – to assess the contested implementing decisions.⁴⁷

Vice versa, by referring to guidelines in an inconsistent manner, the courts leave room for the inconsistent use of guidelines in implementing practices. One example can be found in the area of the Habitats Directive where the District Court of The Hague and the Court of Appeal of The Hague take a different stance towards the Species guidelines.⁴⁸ In the ruling of the District Court the Species guidelines play a prominent, visible role as an interpretation aid, whilst in the ruling of the Court of Appeal the guidelines are not referred to even once. These different approaches not only give rise to uncertainty as to the role and status of the guidelines, they do not encourage national authorities to refer to and use the Species guidelines in a consistent manner either.

43 Thus acting as a 'facilitating actor' as described in section 8.3.2.

44 See section 7.6.4.

45 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

46 This group of rulings also is an example of where – after a while – the interpretation given in the Species guidelines becomes silently in embedded in the discourse of the courts. See section 6.6.2.

47 See section 7.6.2.

48 See section 6.6.2.

Furthermore, national courts can also interact with the Commission's guidelines in a way that mitigates the consistency effect of the use of guidelines in implementing practices. This is the case where national courts require national authorities to not apply Commission guidelines in a too strict manner and to pay more attention to the facts and circumstances of the case. Such an individualised approach is likely to lead to more variety in the outcome of individualised decisions. This mitigating effect can be found in rulings that refer to the FMP guidelines. For instance, in the rulings on persistent petty criminality, the Council of State requires the minister to substantiate his decision in light of the factors laid down in the Commission's guidelines.⁴⁹

Other examples can be found in the area of direct payments rulings. The Trade and Industry Appeals Tribunal guards that when using direct payment guidelines, the minister takes account of the individual circumstances of the case if this is required by the EU legislative rules or by Commission's guidelines. For instance, in the fifty trees rulings, the Tribunal requires in light of the underlying EU regulation, that the minister assesses whether agricultural activities are possible, despite the presence of more than fifty trees per hectare on the agricultural parcel. In the obvious error rulings the Tribunal reasons that the Dutch paying agency should take account of the facts and circumstances of the case as this is one of the principles outlined in the Commission's obvious error guidelines.⁵⁰

To conclude, the analysis of the rulings of Dutch courts reveals a mixed picture. The courts on the one hand contribute to a consistent use of Commission guidelines by using the guidelines as a judicial interpretation aid and assessments standard, as well as by recognising a certain self-binding effect of the guidelines on the minister. On the other hand, the courts hamper a consistency effect by using guidelines in an inconsistent manner or mitigate a consistency effect by requiring the minister to take a more individualised approach.

8.5.3 Promoting (a lack of) transparency through Commission guidelines?

In the implementation process the use of guidance documents is often surrounded by secrecy, rather than transparency. This is the conclusion of section 8.4.3 which analyses the role of guidance documents in the implementation process in light of the promise of transparency. The question is whether, and to what extent, national courts promote a more transparent role of guidance documents in the implementation process.

The analysis of the use of guidance documents in judicial practices reveals two ways in which the courts positively interact with the promise of transparency. This is the case, first, in rulings where the courts use Commis-

49 See section 7.6.2.

50 See section 5.6.1.

sion guidelines as an aid to interpret and apply the provisions laid down in EU legislative rules and where this is explicitly mentioned in the text of the rulings. The use of Commission guidelines then promotes the transparency effects of those guidance documents: the courts indicate whether the guidelines are expected to be used as a decision-making standard in the implementation of the EU law provisions. Examples of the use of Commission guidelines as an aid to interpret and apply provisions of EU law have been found across the three policy areas and – as previously remarked⁵¹ – mostly relate to interpretative guidelines.

The second way in which the use of the Commission guidelines positively interacts with the promise of transparency, is where the courts require national authorities to be explicit about the use of guidance documents in implementing practices. Examples can be found in rulings that refer to the FMP guidelines. In this area, the Council of State as well as the District Court of The Hague not only use Commission guidelines to interpret provisions of the Citizenship Directive. The Court also uses Commission guidelines to assess the contested decision in light of the guidelines. For instance, in rulings on persistent petty criminality, the courts assess the contested decisions in light of the factors spelled out in the Communication COM(2009)313. Decisions that have not been sufficiently substantiated in light of these factors are being annulled. As a consequence, in these cases the Courts in fact require the minister to be transparent about the role of Commission guidelines as a decision-making aid.

From the above, it follows that Dutch courts promote a transparent role of Commission guidelines in two ways: by using the guidelines as a judicial decision-making aid in a transparent manner; and by requiring the minister to be explicit about the role of Commission guidelines in individualised decisions.

In most rulings, however, the role of Commission guidelines remains invisible and, as a consequence, uncertain. Often, the courts do not clarify whether and how guidelines should be used as criterion or standard when implementing EU law provisions.⁵² The invisibility of guidelines may be the consequence of the silent adoption of an interpretation that has already been derived from Commission guidelines in another, previous, ruling. Illustrative are the foraging area rulings, where the Habitat guidelines are explicitly referred to in the first rulings. The follow-up rulings silently adopt the interpretation based on the guidelines, without this becoming visible in the text of the rulings.⁵³

There are many reasons that can explain the lack of transparency surrounding the silent use of Commission guidelines in judicial decision-making practices. For instance, guidelines may be considered not relevant

51 See section 8.4.3.

52 Such as is the case in the *Briels* ruling discussed in section 6.6.1.

53 See section 6.6.2.

for the outcome of the case; the guidelines may simply not be known by the courts; or the guidelines may be inaccessible to the courts (as is the case for many direct payments guidelines). Another possible reason that was mentioned during interviews, is that judges might also purposefully not refer to Commission guidelines. The judges might be uncertain as to the status of the guidelines or have the intention not to attach too much (legal) weight to the guidelines.

These factors, and possibly there are many more, hamper a transparent role for Commission guidelines in judicial decision-making practices. A lack of transparency is problematic for many reasons. It not only jeopardises a role for these guidelines in enhancing the transparency of implementation processes, it also interacts with other promises, increasing the risk of an uncertain and inconsistent role for Commission guidelines in both implementing and judicial decision-making practices.

8.5.4 Promoting a legality-proof use of guidance or challenging the promise of non-bindingness?

The role of national courts is to ensure that Union law is correctly applied and implemented at the national level, whilst the Court of Justice has the final say on the interpretation of EU law. National courts have the power (or duty when no appeal is possible) to refer questions on the interpretation and validity of Union acts, including Commission guidelines, to the Court of Justice.⁵⁴ As a consequence, national courts should use the guidance documents in a way that respects the non-legally binding character of these documents and ensure that this promise of non-bindingness is respected when guidance documents are used as an implementation aid.⁵⁵ Now, what does the analysis of the use of guidelines tell us about the role of national courts in relation to this fourth promise of guidance documents?

The analysis shows, in the first place, that Dutch courts acknowledge the non-legally binding character of guidance documents of the European Commission. This is the case, most clearly, in the area of direct payments where the Trade and Industry Appeals Tribunal acts as a counterbalancing actor and 'guards' that national authorities do not use guidance as a binding rule. The Tribunal emphasises in several groups of rulings that the Commission's guidelines are not legally binding and that the minister should also act accordingly. This means, according to the Tribunal, that the minister has a responsibility to take account of the facts and circumstances if this is required by EU law, and that the use of the guidelines should be in line with the framework of EU direct payments legislation.⁵⁶

54 See above section 3.4.4.

55 See section 2.5.7.

56 This follows from the interpretative note rulings and the obvious error rulings discussed in section 5.6.1. See also section 8.3.1.

The non-legally binding character of FMP guidance documents is also explicitly recognised in rulings of the Council of State. In the 2011 rulings the Council of State considers that the guidelines 'have some significance', but also emphasises that the guidelines are not legally binding. In other rulings the Council of State recognises the complementary role of guidance in a more indirect manner. For instance, in the Overflying Natura 200 ruling the Council of State interprets the notion of 'project' in light of judicial guidance given by the Court of Justice. The Council of state thus acknowledges the primacy of the case law of the Court of Justice over Commission guidance.

Even though in several rulings Dutch courts emphasise and acknowledge the non-legally binding character of guidance documents, Dutch courts generally do not take a very critical stance towards the Commission's guidelines. From the analysis a picture emerges that, generally speaking, the courts are inclined to follow the Commission's guidelines. The rulings where the courts deviate from the guidelines (such as the breeding sites rulings⁵⁷ or the permanent grassland rulings⁵⁸) seem to be the exception rather than the rule.

Furthermore, the Courts also do not frequently refer questions on the interpretation or validity of guidance documents to the Court of Justice. This is remarkable as in certain cases where guidelines are used as an interpretation aid, it can be questioned whether the highest administrative courts should not have referred a question to the Court of Justice. For instance, does the Council of State take a too lenient approach by applying the Commission guidelines on persistent petty criminality?⁵⁹ Is the interpretation derived from Natura 2000 guidelines in the *Blankenburg* ruling on compensatory measures legality-proof?⁶⁰ Is the individualised approach as required by the Trade and Industry Appeals Tribunal on the basis of obvious error guidelines indeed in line with the interpretation of this concept as required by the Court of Justice?⁶¹

In other rulings, the question arises whether the Dutch courts should not have referred a question on the validity of guidance documents. This question arises in particular in cases where Commission guidelines are 'overruled'. The Court then in fact gives a sign as to the possible invalidity of Commission guidelines. An example are the fifty trees rulings in which the Tribunal in fact requires the minister to not apply the fifty trees rule as laid down in the guidelines of the European Commission. The opposite may also be the case, where a national court assumes the validity of Commission guidelines. Illustrative is the ruling of the District Court of The Hague on the protection of the otter. The Species guidelines are considered to be 'a

57 See section 6.6.2.

58 See section 5.6.4.

59 See section 7.6.2.

60 See section 6.6.1.

61 See section 5.6.1.

source of interpretation' and to be 'within the legal framework' of the Habitats Directive.⁶² These judicial practices raise questions from an EU legality perspective. Indeed, by assuming the validity or invalidity of Commission guidance documents, Dutch courts risk not acting in a legality-proof manner, as it is only the Court of Justice who can decide on the validity of Union acts.⁶³

The above observations lead to the conclusion that tension exists between the use of Commission guidelines as an interpretation aid and the 'interpretative monopoly' of the Court of Justice.⁶⁴ By using guidelines as an interpretation aid, national courts risk challenging the promise of non-bindingness, which in fact is also a promise of non-authoritativeness: the use of guidance must respect the prerogative of the Court of Justice to give the authoritative interpretation of EU law. This research shows that in practice, when using Commission guidelines as an interpretation aid, Dutch courts often take part in the exercise of the interpreting of EU law provisions.⁶⁵

8.6 CONCLUSION

The first part of this chapter discerned trends on the basis of the case studies that traces the issuing process of guidance documents and their subsequent roles in the implementing and judicial decision-making process. The analysis reveals a differentiated picture. Within the three policy areas, guidance documents are issued more or less frequently, follow different issuing processes, take different forms and include different types. Once received into the Dutch legal order, the guidance documents take on different roles as an implementation aid. These roles have been identified along the lines of the different types of guidance and different perspectives on their binding force. The analysis also provides insight into the important role of national courts in facilitating, or counterbalancing, the role of guidance documents in implementing practices.

The second part of this chapter analysed to what extent guidance documents are able to fulfil their promises in Dutch implementing practices. This part of the analysis, just as the first part, also shows a differentiated picture. The promises of consistency, predictability and transparency are fulfilled, in any case to a large extent, where guidelines are translated into national regulations, policy rules or adopted as a policy line when making

62 See section 6.6.2.

63 See section 2.2.2 and CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452, par. 9 (*Foto-Frost v Hauptzollamt Lübeck-Ost*).

64 See on the notion of shared judicial authority between the CJEU and national courts Van Harten 2014.

65 Jans, Prechal & Widdershoven 2015, p. 356 consider an 'open secret' that national courts do not refer all questions to the Court of Justice 'that qualify for a reference'.

individualised decisions. Yet, in several ways, the use of the guidelines risks being inconsistent (for instance due to a cherry picking approach), non-transparent (when the origin of the implementing practices remains mystified) or uncertain (due to the uncertain status of Commission guidelines). From a legality perspective, it is problematic when Commission guidelines are used as a substitute for EU legislative rules or as an aid to search for the limits of Union law.

National courts, again, play an important role when it comes to the ability of guidance documents to fulfil their promises in practice. In a direct or indirect manner, courts could promote the use of guidance in a way that is 'promises-proof'. The courts act as 'guardians of legal principles' for instance by requiring national authorities to substantiate a decision in light of Commission guidelines (thus enhancing transparency), by promoting consistency through a self-binding effect of the guidelines, or by counterbalancing the use of guidelines as though they were binding rules. In other ways, however, national courts do not take on their role as guardian. In judicial practices, guidelines are not always used in a consistent and transparent manner, their status remains largely uncertain and their use is not always 'legality-proof'.

To conclude, although guidelines can have strong, regulatory effect on implementing practices, their use or non-use in implementing as well as in judicial decision-making processes may raise concerns in light of legal principles that govern the implementation of EU law.

9.1 SUMMARY OF RESEARCH PROJECT

With the issuing of guidance documents the European Commission assists the Member States in the implementation of the EU legal framework at the national level. Whilst at the EU level the issuing of guidance documents has become part and parcel of the regulatory landscape, at the national level these non-legally binding documents find their way into national implementing processes as well as in judicial decision-making processes. Despite the growing importance of guidance documents, there is still much to be explored and discovered about their role and effects in the national legal order, as well as about their implications in light of the legal principles governing the implementation of EU law.

The research conducted in this book was guided by two aims. Firstly, this it was driven by the aim of providing insights into governance through guidance: the issuing of these documents at the EU level and their subsequent reception and role at the national level – in the Dutch legal order. The first part of this research provides insights into the roles of guidance documents at different stages of the implementation process, as well as in the role of guidance documents in judicial decision-making processes by national courts.

Secondly, this research was guided by the aim of identifying the implications of the use of guidance documents in light of the legal principles that govern the implementation of EU law. This aim is rooted in the view that despite their informal and non-binding character, the use of guidance documents should still, as much as possible, be in line with legal principles. The use of guidance documents in line with legal principles will enhance the legitimacy of guidance documents to serve as an ‘implementation tool’ in implementing practices and will contribute to the effectiveness of governance through guidance.

In order to provide insights into the process of governance through guidance, an in-depth analysis of the issuing and use of guidance documents was conducted in three different policy areas: the area of direct payments, the Habitats Directive and the Citizenship Directive. This empirical analysis set out at the EU level. The driving forces behind the issuing of guidance documents were identified, and different ‘types’ of guidance provisions were discerned in the various forms of guidance documents. It has been shown how the formulation of expectations at the EU level on the use of guidance documents by national authorities and courts, results in various forms of steering pressures to act guidance-proof. Subsequently the

analysis turned to the national level. It explored the roles of guidance documents in Dutch implementing and judicial decision-making processes using two lenses: 1) the different types of guidance and 2) the different perspectives on their binding character. These two lenses are presented below in Table 9-1.

Table 9-1 Two lenses to study the roles of guidance

Lens 1: different types of guidance

- 1) Guidelines in the form of interpretative rules (interpretative guidance);
 - 2) Guidelines that explain the logic behind or purpose of legislative provisions (explanatory guidance);
 - 3) Guidelines that provide for recommendations on the form of appropriate implementing measures and methods (implementing guidance);
 - 4) Guidelines that provide for recommendations on the form of technical measures (technical guidance) and;
 - 5) Guidelines that provide for good implementing practices developed in the Member States (the dissemination of good practices).

Lens 2: perspective on the binding character of guidance documents

- 1) The use of guidelines as binding rules or standards;
 - 2) The use of guidelines as a mandatory implementation aid (comply or explain);
 - 3) The use of guidelines as a voluntary implementation aid (cherry picking);
 - 4) No use/ignorance or irrelevance of guidelines.

The second part of this research conducted the analysis of the use of Commission guidance in light of legal principles governing the implementation of EU law. To this end, it explored the effects of the use of guidance documents in light of the promises outlined in the second chapter of this book (section 2.5). These promises are the ideal effects that could be triggered by the use of guidance documents as an implementation tool in order to positively interact with the legal principles of legal certainty, consistency, transparency and legality. It was argued that in order to fulfill these promises, guidelines should be used in a transparent, predictable, consistent manner whilst respecting their non-legally binding character.

The previous chapter identified general trends that can be derived from the case studies in the three policy areas, related to the issuing, role and implications of guidance documents of the European Commission. It found a differentiated picture, with differences in the issuing, form and character of guidance documents, different uses in the national legal order and different implications in light of the four legal principles mentioned above.

This concluding chapter synthesises the findings on the use of Commission guidelines by national authorities and national courts and their ability to exert the ideal effects, or promises, in practice and answers the research question raised in the introduction:

In what ways do authorities and courts in the Netherlands use guidance documents that are issued by the European Commission and what are the implications in light of legal principles governing the implementation of EU law?

Finally, this chapter addresses the final question of this research: what insights does the analysis of the issuing, use and implications of Commission guidance give that should be taken into account when considering the question whether and how to regulate the issuing and use of Commission guidance in the national legal order?

9.2 THE USE OF COMMISSION GUIDANCE BY NATIONAL AUTHORITIES: A GAP BETWEEN PROMISE AND PRACTICE?

Traces of different types of guidance have been found at different stages of the implementation process. This section explores how the use of different types of guidance relates to the four promises of predictability, transparency, consistency and non-bindingness. It discerns three different interactions: 1) the guidelines – through implementing practices – fulfil (some of) their promises in practice; 2) the use of the guidelines as an implementation aid puts the promises at risk; and 3) the guidelines are not used as an implementation aid and consequently do not fulfil their promises in practice. The first and second situation are not ‘mutually exclusive’. It is possible that the use of guidance as an implementation aid in one way contributes to one or more promises, whilst in other ways detracts from the same and/or other promises.

9.2.1 Promoting promises through national implementing practices

In which implementing practices does the use of Commission guidelines positively interact with (some of) the four promises? This is the case where Commission guidelines are used as an aid to draft Dutch implementing rules or where the guidelines are transposed into implementing rules. These may be legally binding rules, the typical Dutch policy rules or a fixed policy line. The guidelines then serve as an aid to clarify the criteria that are used when implementing EU law, and are able to contribute to a more transparent, consistent and predictable implementation of EU law.

The type of guidance that is mostly translated into national rules are the guidelines with an interpretative character. Traces of the use of Commission guidelines as an interpretative rulemaking aid have been found in the three policy areas. In the area of direct payments, interpretative guidelines are used to draft provisions in the Ministerial Regulation that operationalises the EU direct payments regulations as well as provisions in the policy rules that accompany this regulation. Traces of the interpretative guidelines related to the Citizenship Directive feature in the policy rules in the Aliens Circular, and also serve as a basis for policy lines employed by the Immigration and Naturalisation Service. In the area of the Habitats Directive, interpretative guidelines have been translated into guidelines in the explanatory memorandum to the Nature Protection Act.

Implementing guidance and technical guidance may have considerable influence on implementing practices, yet their legal relevance is highly internal: these types of guidance generally find their way into internal guidelines. Nonetheless, in an indirect manner, these types of guidance can also generate an external effect, for instance where they are used for the methodology to investigate marriages of convenience or for the measurement method that is used to measure agricultural parcels. In these cases, when it is made clear whether and how these implementing and technical guidelines are used in implementing practices, then these types of guidance could also contribute to a more transparent, consistent and predictable implementation of EU law. This, however, is more wishful thinking than reality.

Explanatory guidance is generally used as a silent aid to understand the purpose and logic of legislative provisions. Nevertheless, as the example of the explanatory memorandum to the Nature Protection Act shows, this type of guidance can also be used as an aid to clarify and explain the purpose and logic of EU legislative provisions. In this way, the explanatory guidance contributes to transparent implementing processes, at least at the legislative stage.

Commission guidance documents that disseminate good implementing practices leave few traces in Dutch implementing practices. In any case, concrete traces of the use of this type of guidance have not been found in the three policy areas. Two factors have been identified that can explain the absence of traces of good implementing practices. First, Dutch officials indicated that good practices are considered to have the least normative force as this type of guidance does not represent how EU legislative provisions *should* be implemented according to the Commission. Second, in the Netherlands, practices or methods to implement legally binding Union rules have often been put in place or developed prior to the issuing of good practices by the Commission. The dissemination of good practices then comes too late. In any case, due to the limited presence of this type of guidance in implementing practices, there is also little interaction between these good practices and the promises they could potentially fulfil.

9.2.2 Using Commission guidance whilst putting the promises at risk

The use of Commission guidelines may also, or even at the same time, negatively interact with the promises identified in the introduction of this research. The analysis revealed several risks related to the use of Commission guidelines that hamper the fulfilment of the four promises of guidance in practice. Risks arise most clearly when national authorities use the Commission's interpretative guidelines as interpretation aid, as this type of guidance affects the rights and obligations of EU citizens most directly through implementing measures.

Firstly, the use of interpretative Commission guidelines as a substitute for legally binding Union rules, could challenge the promise of non-

bindingness. This occurs, for instance, where interpretative guidelines are used as a basis for provisions in implementing legislation, policy rules and/or individualised decisions that detract from or go beyond provisions in EU directives or regulations. This risk has been observed most clearly in relation to interpretative direct payments guidelines that in practice take the role of *de facto* binding rules. The Commission guidelines are used, for instance, as a basis to draft binding provisions in the Dutch Ministerial Regulation on direct payments. This, moreover, might lead to 'binding interpretations of EU law' which is not permitted by the Court of Justice. Legality concerns also arise in relation to the interpretative FMP guidelines that risk being used to seek the limits of the EU legislative provisions in the Citizenship Directive.

Secondly, when used in an inconsistent manner, the use of Commission guidelines could also endanger the promise of guidelines to promote consistency in implementing practices. The promise of consistency is challenged, for instance, where the use of Commission guidelines is guided by a cherry picking approach whilst not being translated into binding rules or policy rules. This risk has manifested itself in relation to the FMP guidelines: the application of the interpretative and implementing guidelines related to the investigation of marriages of convenience is a concrete example. Another factor that may jeopardise the consistency effect, is where the Commission guidelines or the Commission's interpretation of guidelines is frequently changed. This is the case, in particular, with the direct payments guidelines that are generally strictly followed and 'instantly' translated into national rules or practices.

Thirdly, the promise of Commission guidelines to enhance predictability in implementing practices is hampered by the uncertain status of Commission guidelines. The use of Commission guidance in Dutch implementing practices is not governed by a clear approach as to their binding effect. Instead, as the analysis has revealed, their use is guided by different approaches reflecting different perspectives on their binding character. Direct payments guidelines tend to be used as *de facto* binding rules and implementing standards. The interpretative Habitat guidelines seem to be governed, predominantly, by a perspective of authoritativeness. In the area of free movement of persons, the guidelines are used as a voluntary interpretation aid and guided by a cherry picking approach. The uncertainty of the status of guidelines is problematic even where the guidelines are transposed into Dutch policy rules or legislation. Indeed, when these rules need to be interpreted or assessed, it must be clear what the status is of these guidelines and whether national authorities – to any extent – are bound to take these guidelines into account.

Finally, and closely related to the other promises is the promise of transparency: it must be clear whether and how guidelines are used in implementing practices. The analysis has shown, however, that the use of Commission guidelines in the implementation process is surrounded by secrecy rather than by transparency. This is due to the fact that the use

of the guidelines often remains invisible to the outside world. Generally speaking, the use of guidelines is not made explicit in the text of implementing legislation or policy rules, nor does the use of guidelines transpire from the explanatory notes to these rules, individualised decisions or other implementing practices. An exception is the explanatory memorandum to the Nature Protection Act that is explicit about the use of Commission guidelines to give further guidance on the interpretation of the Habitat provisions.

9.2.3 No role for Commission guidance: the promises left unfulfilled

The above section outlined the situations where Commission guidelines are used, or at least taken into account, when implementing EU legislative provisions. The analysis of the use of Commission guidelines also reveals that – in many situations – Commission guidelines may remain unused in the sense that the national authorities consider the guidelines not to have any relevance as an implementation tool. These cases are of course hard to find, as this requires insight into the content of Commission guidelines and corresponding implementing practices.

Nevertheless, some general remarks can be made about reasons why guidelines are not used as an implementation tool. First, the non-use of guidance may be the result of the fact that the guidelines do not provide guidance on the question concerned. Second, the Commission guidelines may not be given a role as an implementation aid in the situation where they are outdated due to more recent case law of the Court of Justice. Third, Commission guidelines may be considered superfluous where they only ‘repeat’ what is already stated in the law – this risk arises in particular for explanatory guidance. And, fourth, the officials involved in implementing practices may simply not know of the existence of the guidelines; a risk that arises for instance when Commission guidelines are numerous or when guidelines are difficult to find.

9.3 NATIONAL COURTS: BRIDGING THE GAPS BETWEEN PROMISES AND PRACTICE?

Traces of the use of guidance documents not only feature in implementing practices. Dutch courts also use the Commission guidelines as a judicial decision-making aid. The guidelines help national courts fulfil their role as guardians of the EU legal order, meaning that the courts need to ensure that EU legislative rules are implemented in line with the requirements and principles laid down in EU law. The question that arises is whether the way in which national courts use Commission guidelines contributes to the promises of these guidelines in implementing practices. Again, three different interactions can be discerned between the (non) use of guidelines by national courts and the promises of these guidelines.

9.3.1 Guidelines as a judicial decision-making aid: promoting promises

The first interaction establishes a positive relationship between the use of guidance documents in judicial decision-making practices and the promises of guidance documents. This positive interaction can be discerned in three situations, namely by the use of guidance as an interpretation aid, by the use of guidance as an assessment standard for appropriate implementing practices and finally, by giving instructions to national authorities on how to use Commission guidelines.

Guidelines as a judicial interpretation aid

The analysis of the three policy areas has shown that interpretative guidelines in particular can come to be used as a judicial interpretation aid. Where national courts use these guidelines as an interpretation aid in an explicit, transparent and consistent way, the courts clarify that the guidelines serve as a criterion for the interpretation of EU law provisions.

Interpretative guidelines that have a highly detailed character are most apt to serve as a judicial interpretation and to leave traces in the text of the rulings. This is illustrated by the detailed interpretative guidelines laid down in the Species guidance document that frequently feature in rulings of the Council of State as well as in rulings of lower Dutch courts. In contrast, interpretative guidelines with a less detailed interpretative character or explanatory guidelines are less likely to leave explicit traces as a judicial interpretation aid. These guidelines are less apt to provide for concrete decision-making criteria. This is the case, for instance, for the guidelines laid down in the Managing Natura 2000 guidance document related to Article 6 of the Habitats Directive. This document has a highly explanatory nature and although it is used by national courts to understand the logic behind Article 6, it is seldom explicitly referred to in the rulings of Dutch courts. This does not mean that explanatory guidance never leaves visible traces in judicial decision-making practice. An example is the extensive references that are made to the explanatory guidelines to interpret the active farmer provision.

When used as an interpretation aid, Commission guidelines become embedded in the judicial interpretation of Union acts in light of which the lawfulness of implementing practices is assessed. Consequently, and indirectly, the use of guidance as a judicial interpretation aid might also resonate in implementing practices of national authorities. What is more, by using the guidelines as a judicial interpretation aid, the courts might encourage national authorities to take account of Commission guidelines when implementing EU law. In this way, the courts could promote a role for guidance in implementing practices, enabling the guidelines to contribute to more consistent, transparent and predictable implementing practices.

Guidance as an assessment standard for appropriate implementing practices

The above uses of Commission guidelines relate to interpretative and explanatory guidelines. The other types of guidance – implementing guidance, technical guidelines and good practices – could come to be used as an aid or standard to assess whether the national authority has followed an appropriate or acceptable methodology when implementing EU legislative provisions. The Judicial Division of the Council of State, for instance, uses Commission implementing guidelines as a standard to assess the lawfulness of the methodology when investigating marriages of convenience. The Trade and Industry Appeals Tribunal, in contrast, does not use implementing or technical guidelines as an assessment standard (at least no indications have been found of this). The JRC rulings of the Tribunal only give a glimpse of the dissemination of good practices. In these rulings, the Tribunal refers to guidance of the Joint Research Centre stating that a two-dimensional measurement method is used by other Member States, and uses this as a supportive argument for the conclusion that this two-dimensional measurement method is appropriate and that the contested decision can therefore be upheld.

When assessing the appropriateness of implementing practices, national courts have a different role: they do not give interpretative rules but assess whether the national authorities have followed a method that remains within the limits set by the EU legislative rules. By using the guidelines as an assessment aid or standard, the courts should make clear or confirm whether the guidelines provide for an appropriate method that could or should be followed in implementing practices. This, as with interpretative guidelines, promotes and clarifies the role of these guidelines in judicial practices and promotes a transparent, consistent and predictable use of these guidelines in implementing practices.

Giving instructions to national authorities

Furthermore, national courts promote the guidelines' promises in a more direct manner where they require national authorities to use guidelines in such a way that they exert their ideal effects in practice. This is the case where courts require national authorities to use the interpretative guidelines in a consistent manner (promise of consistency); where national authorities are required to substantiate how they use Commission's guidelines (promise of transparency); where courts clarify how national authorities could or should use guidelines as an interpretation aid (promise of predictability); or when the courts require national authorities to take account of and act in line with underlying legislative provisions (promise of non-bindingness).

Examples of such cases have been found in the analysis of the rulings that refer to the guidelines related to the Citizenship Directive. Firstly, the District Court of The Hague and the Council of State require national

authorities to substantiate decisions in light of the guidelines on persistent petty criminality, thus enhancing the promise of transparency. Secondly, these courts also promote a consistent use of the guidelines in implementing practices by recognising a certain self-binding effect of the FMP guidelines on the State Secretary. Thirdly the Council of State clarifies the 'legal status' of the Commission's guidelines, at least to a certain extent. The guidelines are considered to serve as an interpretation aid and to have 'some significance'. Yet, it remains uncertain whether this means that as a general rule, the guidelines have to be taken into account during implementing practices. Finally, the Trade and Industry Appeals Tribunal most clearly 'guards' that Commission's direct payment guidelines are used in a way that respects their non-legally binding character. The Tribunal requires the responsible minister to not use the guidelines as a binding instruction, and to stay within the legal limits provided by the EU legislative rules.

9.3.2 Guidelines in judicial practice: promises at risk

Dutch courts not only use guidelines in a way that is transparent, predictable, consistent and legality-proof. The analysis also reveals ways in which the use of Commission guidelines as a judicial decision-making aid detracts from the guidelines' promises.

The first risk is that Dutch courts do not always use Commission guidelines in a transparent manner. Various cases have been found where the courts are not transparent about the role the guidelines play or have played in the judicial decision-making process. Illustrative is the 'silent' use of the Managing Natura 2000 guidelines to the Habitats Directive. These guidelines are only in exceptional cases referred to in the text of the rulings of Dutch courts. Yet, in practice, the guidelines play an important but silent role as a judicial interpretation aid, as was indicated during interviews with officials and State Councillors of the Council of State. What is more, problems of transparency also, obviously, arise if Commission guidelines that have not been published are used as a decision-making aid. In this case, the guidelines provide for decision-making criteria of which their source however cannot be retraced.

The second risk that has been observed in the analysis of rulings of Dutch courts, is that Commission guidelines could be used in an inconsistent manner. Due to their non-legally binding character, courts are not 'bound' to take the guidelines into account, nor to explicitly refer to the guidelines. As a consequence, the risk arises that a specific guidance provision is used differently in cases that deal with similar questions. An example is provided by the divergent use of the Species guidelines in a civil case on the measures to be taken by the Dutch State for the protection of the Dutch otter. In first instance, the District Court of The Hague refers to the Species guidelines extensively in order to determine the scope of the obligation to set up a system of Species protection. In contrast, the ruling in appeal in the same case issued by the Court of Appeal of The Hague, does

not even mention the guidelines, nor does the ruling give the guidelines an explicit role as an interpretation aid.

Third, the rulings of Dutch courts analysed in the context of this research do not depict a clear status or role of Commission guidelines in implementing and judicial decision-making practices. Although the courts have given some indications as to the role of Commission guidelines, such as that the guidelines are not legally binding and that the guidelines have ‘some significance’, the courts first and foremost leave questions open. It remains unclear whether and to what extent the courts regard themselves bound by the guidelines of the European Commission. Furthermore, the courts also do not shed clear light on whether the guidelines are binding on national authorities. From interviews with Councillors of State it follows that in practice, the guidelines are considered to be an authoritative interpretation aid that in principle should be taken into account, and from which deviation is only possible when reasons are given for doing so. This ‘comply-or-explain’ approach applies, in their view, to both national authorities and courts. Nonetheless, whether this perspective is shared by other (lower) courts can be doubted. Instead, it is more likely that the use and perception of the binding force of Commission guidelines differs not only between courts but also between judges.

Last but not least, the use of Commission guidelines as a judicial decision-making aid also inevitably raises questions of legality – challenging the promise of non-bindingness of Commission guidelines. Formally, national courts only apply EU law provisions and the Court of Justice has the final say on the interpretation of EU law. In practice, national courts are also involved in the interpretation of EU law and Commission guidelines provide a helpful interpretation aid for that. This might, however, lead to an interpretation that is not evidently in line with the case law of the Court of Justice, or to an interpretation on a question that the Court has not yet clarified. What is more, the findings in this research indicate that in practice the use of Commission guidelines as an interpretation aid might be more appealing than making a reference to the Court of Justice.

9.3.3 No role for guidelines in judicial practice: increasing the gap

The above two sections outline uses of Commission guidelines where the promises are positively or negatively affected. There is, however, a third scenario. Indeed, in many rulings Commission guidelines are not given a role, or at least not explicitly, in the judicial decision-making process whilst the court adjudicates on a question for which guidance has been issued. These rulings are difficult to find. Indeed: even when guidelines are mentioned in the text of a ruling, the guidelines might still have played a role as a judicial decision-making aid. An example is the *Briels* ruling of the Judicial Division of the Council of State. In this ruling, the Council of State reflects on the possibility of including mitigation measures – a concept that has been introduced in Commission guidance documents. There is no

explicit role for Commission guidelines in this ruling. This, however, does not mean that the Managing Natura guidance documents have not been of any relevance as a judicial decision-making aid.

Obviously, when guidance documents are not given a visible role as judicial decision-making aid, the guidelines also do not fulfil a role in rendering the judicial decision-making process more transparent, consistent or predictable. Instead, it is more likely that no use, or a silent use of Commission guidelines raises even more questions on the status of the guidelines.

The possible reasons for national courts to disregard or ignore Commission guidelines are manifold. The courts might not be familiar with the relevant guidance documents or hesitant in giving a role to these non-binding documents in judicial practice. Furthermore, national courts might not have access to the relevant guidance documents. This is the case in the area of direct payments, where many Commission guidelines are made available only to national authorities, but not to the general public or national courts. Thirdly, guidelines could be given no role as a judicial decision-making aid where they have become outdated and are overruled by the case law of the Court of Justice (see for instance the *Overflying Natura 2000* ruling)¹ or where they have become overruled by case law of a national highest administrative court (as is the case in the rulings on breeding sites and resting places of certain bird species).²

9.4 THREE ANSWERS TO THE RESEARCH QUESTION

The above two sections present a synthesis of the findings on the relationship between the use of Commission guidelines in Dutch implementing and judicial practices and the promises of Commission guidance formulated in section 2.5. When combining the insights for national authorities and national courts, three different interactions can be discerned that each provide an answer to the central question in this research.

- 1) **A positive interaction** between guidelines and legal principles: National authorities and/or national courts use guidelines as an implementation aid or as a judicial decision-making in a way that serves the promises of these guidelines and where, consequently, there is a positive interaction with legal principles.
 - National authorities: Commission guidelines positively interact with their promises where the guidelines, indirectly or directly, find their way into national implementing rules or guidelines. These rules can take various forms, such as legally binding rules (e.g. a Ministerial Regulation), policy rules or even a line of conduct. In this

1 See section 6.6.1.

2 See section 6.6.2.

situation, Commission guidelines indirectly exert consistency, transparency and predictability through their effects in the national rule-making practices. The type of guidance that mostly finds its way into such rules are the Commission guidelines with an interpretative character.

- National courts: When assessing implementing practices, national courts contribute to the fulfilment of the promises of Commission guidelines in three ways: 1) by clarifying the role of guidelines when interpreting EU law provisions; 2) by clarifying the role of guidelines when assessing the appropriateness of implementing practices; and 3) by being clear and explicit about how national authorities are expected to use guidelines in a way that is in line with legal principles.
- 2) **A negative interaction** between guidelines and legal principles: national authorities and national courts use Commission guidelines as an implementation aid or as a judicial decision-making aid in a way that detracts from, rather than that contributes to, the fulfilment of guidance's promises, resulting in a negative interaction with legal principles. The negative interaction between the use of Commission guidance and its promises may occur in situations even where the guidelines have been laid down in national rulemaking practices. Thus, the positive and negative interaction of guidelines with legal principles is not mutually exclusive but may occur simultaneously.
- National authorities: The use of guidelines by national authorities negatively interacts with the promises of these guidelines in the situation where: 1) the use of the guidelines is silent or invisible or the content of the guidelines is inaccessible; 2) the guidelines are not used consistently; 3) the role and status of the guidelines remains uncertain; and 4) the use of the guidelines does not respect or goes beyond the underlying EU legislative provisions.
 - National courts: When guidelines come to be used in judicial decision-making practices, problems in light of legal principles may arise in the situation where: 1) the Courts use guidelines in an invisible manner or the content of the guidelines is inaccessible; 2) guidelines are used in an inconsistent manner; 3) courts remain silent about or do not clarify the status of guidance; and 4) the guidelines are used in a way that detracts from or goes beyond the underlying EU legislative provisions and/or the case law of the Court of Justice.
- 3) **No interaction** between guidelines and legal principles. The guidelines are not used in implementing practices and/or in judicial practices and, consequently, do not fulfil their promises in practice: there is no interaction with legal principles.
- National authorities: In implementing practices, Commission guidelines may be left unapplied for various reasons such as: 1) there is

not a good fit between the guidelines and national implementing practices; 2) the guidelines remain unnoticed (for instance due to limited resources and/or the high number of the guidelines); 3) the guidelines have become outdated or overruled by the case law of the EU Court of Justice or of a national court.

- National courts: The non-use of guidelines by national courts also has various, mostly similar reasons: 1) The guidelines could be inaccessible for national courts (guidelines may only be accessible for the national authorities); 2) the guidelines have remained unnoticed by the courts; 3) the guidelines have become outdated or overruled by case law of the Court of Justice or by the case law of national courts.

These three interactions each give a different answer to the research question. Together, the interactions show that at the national level, in implementing practices as well as in judicial practices, the use of Commission guidelines might give rise to problems in light of legal principles that govern the implementation of EU law. The ability of guidelines to fulfil their promises at the national level is not guaranteed: at the national level there is a risk that guidance documents will start taking on a life of their own.

The various uses and roles of guidance documents in the Dutch legal order that lead to different implications in light of legal principles, are the consequence of the unregulated character of the issuing and use of guidance documents which, in turn, is a consequence of informality. The use and role of guidance documents is governed and shaped by contextual factors, both at the EU level and at the national level. Whether and how guidance documents are used depends on factors such as the type of guidance, the steering pressures formulated at the EU level, the characteristics of the policy areas, the legal principles and administrative culture at the national level, and possibly the (legal) background of officials and judges who eventually decide whether or not to use the guidance documents.

9.5 THE LEGITIMACY OF GOVERNANCE THROUGH GUIDANCE AT RISK

This research has shed light on the consequences of the issuing of guidance documents in the Dutch legal order. As concluded above, it is found that in the three policy areas included in this research, guidance documents give rise to problems in light of legal principles that govern the implementation of EU law. The use of guidance documents is not governed by a coherent approach or common perspective on the role and status of guidance documents. This leads to an unpredictable and inconsistent use of guidance documents, as well as a lack of transparency – the use of guidance documents often remains invisible to the outside world. Last but not least, in practice guidance documents could take over the role of EU hard law where the documents serve as a basis for implementing decisions.

These findings show that the discourse and belief concerning the positive effects that guidance documents are considered to generate vis-à-vis legal principles may not meet reality. The various and unpredictable uses of guidelines at the national level jeopardise legal principles and affect the legitimacy of guidance documents as a governance tool. Indeed, as argued in this research, despite the informal and non-binding character of guidance documents it is of utmost importance that the use of guidance documents respects and even promotes legal principles in implementation processes. By jeopardising instead of serving legal principles the issuing and use of guidance documents challenges the rule of law that is so fundamental to the European Union legal order.

Despite these risks that the issuing of guidance documents entail, it is expected that in the coming years guidance documents will continue to play an important role in implementing practices as well as in judicial decision-making processes. The issuing of guidance documents is still on the rise, which is witnessed by new forms of guidance such as ‘implementation plans’ introduced in the better regulation guidelines.³ Moreover, in view of the importance the Commission attaches to ‘good implementation on the ground’,⁴ guidance documents are likely to remain a prominent compliance tool of the Commission services.

In light of the expected increasing importance of guidance documents, it is unlikely that the problems arising in the national legal order will ebb away. Instead, the problems and questions that surround the issuing and use of guidance are likely to become more pertinent in the coming years. Therefore, it is time to rethink governance through guidance and to envisage possibilities on how to regulate governance through guidance so that it is actually able to exert the effects that serve legal principles.

When thinking about the possibilities to regulate guidance, it needs to be kept in mind that measures that regulate the issuing and use of guidance documents, to a certain extent detract from the informal character of guidance documents. This might affect the effectiveness of governance through guidance. Indeed, the features of informality, as has been argued in this research, enable guidance documents to effectively address implementing problems and questions at the national level, thus promoting smooth and effective implementation processes. As stated in the introduction, the ideal situation to aim for is where there is room for informality whilst legal principles are respected. In reality, however, choices need to be made and the question is where the right balance can be found.

This ‘balance’ is currently tilted to one side: the issuing and use of guidance documents is governed by the logic of giving room to features of informality, flexibility and effectiveness. This leaves room for Commission guidelines to not play by the rules and principles imposed by the rule

3 SWD(2017)350 final, p. 35.

4 SWD(2017)350 final, p. 33.

of law. From the viewpoint taken in this research – namely that the use of guidance should respect legal principles governing the implementation of EU law – the problems that the Commission’s informal rules generate in the national legal order cannot be downplayed or denied. The findings point to the conclusion that a new balance must be found, that a more ‘principled approach’ to the issuing and use of guidance documents is needed. The next section outlines what routes could contribute to such a principled approach by bringing the use of guidance in line with legal principles.

9.6 TOWARDS A PRINCIPLED APPROACH: ‘GUIDANCE FOR GUIDANCE’?

9.6.1 Giving guidance a legal basis: too much formalisation?

The first possible route is to clarify the legal status of guidance documents in EU primary or secondary legislation. These legislative rules could also regulate the issuing process of guidance documents, prescribe what form guidance documents should take and provide for an obligation to publish Commission guidelines. The advantage of giving Commission guidance an explicit basis in EU law is that it would enhance transparency, clarity and certainty related to the issuing and use of Commission guidance documents for which the legal basis is provided. This could take away many of the problems related to uncertainty that are currently experienced at the national level.

The Dutch policy rules that have been given a basis in the Dutch GALA could serve as a source of inspiration.⁵ These policy rules, as stated in the GALA, should be published, and in principle followed by national authorities unless exceptional circumstances demand otherwise. However, the rules concerning these policy rules could not be ‘copy-pasted’ to the EU level. The Dutch policy rules are issued by national authorities in order to fulfil their own competences, whereas the Commission guidelines are addressed to national authorities in the Member States. When formalising Commission guidelines, account should be taken of the particularities of the system of shared administration.

Furthermore, it needs to be kept in mind that regulating the issuing process and defining the legal effects of Commission guidelines in law, detracts from the features of informality of guidance documents. This would mean that the guidelines lose some of their advantages related to the features of informality that not only make guidance documents a flexible implementation tool, but also an appealing and acceptable implementation tool for both the European Commission and the Member States. Therefore,

5 See for an overview of comparative law insights on soft administrative rule-making that could inspire regulatory action at the EU level for soft-rulemaking of the Commission Senden & Van den Brink 2012, p. 73-77.

giving Commission guidelines a legal basis in the Treaties risks contributing to an even more, in the words of Christiansen, Føllesdal and Piattoni, 'complex and cumbersome' EU regulatory system.⁶

Even with a legal basis for Commission guidelines, the need for room for informality remains. The Commission and the Member States might find other ways to issue informal rules and guidance that do not fall within the regulated category of guidance in the EU Treaties. Therefore, in my view, it seems appropriate to look for other, softer approaches to regulate the issuing and use of guidance documents. These regulatory measures could take the form of 'guidance for guidance' for the Commission services, national authorities as well as national courts.

9.6.2 The Commission: guidelines for guidance and managing EU expectations

The 'guidance for guidance' could, in the first place, encompass guidelines adopted by the Commission for the issuing and use of guidance documents by the various Directorate Generals.

A first step in the direction of 'guidelines for guidance' has already been taken. In 2017, the Commission included in the better regulation guidelines a toolbox on guidelines for the issuing of 'interpretative guidance documents' by the Commission services.⁷ Documents that give a 'legal interpretation of significant importance that result in new or modified policy developments' need to be endorsed by the College of Commissioners, take the form of a Communication or Notice and should be published in the C series of the Official Journal. Guidance documents that are part of the Commission's 'normal administrative operations' do not fall within the scope of this toolbox.⁸

With this toolbox, a first step towards a more formalised approach on the issuing of guidance is being taken. The toolbox creates a distinction between the more formal guidance documents in the form of a Communication or Notice and other guidance documents. This research has shown, however, that the most 'informal' forms of guidance, such as letters and notes, can create problems and questions in practice too. In order to address these problems, there is a need for guidelines that spell out principles for the adoption of all forms of guidance.

The better regulation toolbox could therefore be complemented with guidelines that promote the use of Commission guidelines in line with the promises formulated in this research. These guidelines could spell out some principles for the drafting and issuing of guidance documents in a way that promotes a transparent, consistent, predictable and legality-proof use of

6 Christiansen, Føllesdal & Piattoni 2003, p. 5. as also cited in the introduction of this book.

7 SWD(2017)350 final, p. 43.

8 Better Regulation Toolbox accompanying SWD(2017)350, p. 295/296.

the guidelines at the national level. Table 9-2 proposes some guidelines that could be included in the ‘guide for guidance’.

This research has also shown that the role that Commission guidelines play as a monitoring tool have consequences for the way in which guidelines are used and perceived at the national level. Therefore, the second part of the guide for guidance could manage expectations of the Member States by clarifying how the Commission services use the different types of guidelines when monitoring the implementation of EU law in the Member States. Table 9-3 proposes a template for clarifying the roles of guidance documents as a monitoring tool.

Table 9-2 Better regulation principles for the issuing of guidance

<i>Promise</i>	<i>Guidelines</i>
<i>Predictability</i>	Guidance documents are drafted in a clear, not too complex, manner and clarify what types of guidance are included in the guidance documents. It is clarified where the guidance documents only summarise or give an overview of EU legislative provisions (and thus takes the form of explanatory guidance).
<i>Consistency</i>	A frequent change or revision of the guidelines should be avoided as this could give rise to problems of consistency at the national level. The guidance given in the document is consistent with other guidance documents (it is to be avoided that guidance documents give contradictory information on the implementation of legislative provisions).
<i>Transparency</i>	The guidelines should be published and be accessible to national authorities, national courts as well as to EU citizens. In the case of a large number of guidance documents, a (thematic) classification of the documents could enhance their accessibility.
<i>EU legality-proof</i>	The introduction of the guidance document clarifies that the document is not legally binding and that the guidelines of the Commission do not replace the authoritative interpretation given by the EU Court of Justice. When drafting the guidelines account is taken of the underlying EU legislative provisions and relevant case law of the CJEU, so as to prevent legality questions and problems. The purpose and the role of Commission guidance should not go beyond clarifying the interpretation of legal provisions. Guidance documents cannot be used to impose new obligations on Member States that have not been provided for by the Treaty or by secondary legislation.

Table 9-3 Types and EU expectations

Type of guidance	The use of guidance documents in monitoring practices of the European Commission
Interpretative guidance	Serves as an interpretation aid when monitoring implementing practices as it represents the Commission’s view as to how EU law is to be interpreted, it is not used as a substitute for EU legislative rules.
Explanatory guidance	Serves as an explanatory aid when monitoring implementing practices as it represents the Commission’s view as to how EU law is to be explained.
Implementing guidance	Gives recommendations on how requirements in EU legislative provisions can be best achieved in practice. Member States can choose an alternative path, provided that the legislative requirements are met.
Technical guidance	Provides for the best technical modalities; whilst leaving it to the Member States whether to opt for these technical modalities or not.
Dissemination of good practices	Gives an overview of good practices developed in the Member States, whilst leaving to the Member States whether to choose for a good practice or not.

9.6.3 The Court of Justice: clarifying guidance’s legal status

As the highest EU Court, the Court of Justice provides the authoritative interpretation of guidance documents. As discussed in this research, in several rulings the Court elaborates on the legal effects of guidance documents for national authorities and national courts. Especially from a perspective of legal certainty, it is desirable that the Court of Justice further clarifies the status of guidance documents for national authorities and courts. The meaning and scope of the *Grimaldi* case law, in particular, could be further defined. What does the ‘formula’ mean that national courts are bound to take recommendations into consideration? Does the *Grimaldi* case law only encompass recommendations, or also other forms of guidance documents?

In brief, the Court of Justice could provide the national authorities and national courts with further judicial guidance on the use of Commission guidance documents. At the same time, however, it needs to be kept in mind that the Court of Justice is not the EU legislature. The Court of Justice has to respect the room for discretion of the Member States and must act within the limits set by the EU legislation.

9.6.4 National authorities: taking a principled approach

The main actors that give shape to the role of guidance documents in practice are the national authorities. In order to promote a principled use of guidance documents by national authorities (both legislative and administrative authorities), a ‘guide for guidance’ could outline principles and rules to be taken into account. Table 9-4 provides an overview of rules that could be included in this guide for guidance.

Table 9-4 Guidelines for a principled use of guidance by national authorities

<i>Promise</i>	<i>Guidelines</i>
<i>Predictability</i>	The guidelines of the European Commission are used in a predictable manner. The transposition of Commission guidelines into national implementing legislation, policy rules or other guidelines contributes to a predictable implementation of EU law. The role of guidelines in implementation processes is clarified. E.g. the guidelines could be used following the practice of ‘comply-or-explain’.
<i>Consistency</i>	The guidelines of the European Commission are used in a consistent manner in individual cases. The transposition of Commission guidelines into national implementing legislation, policy rules or other guidelines contributes to a consistent implementation of EU law. Frequent changes of national legislation, policy rules or guidelines as a consequence of changes of Commission guidelines should be avoided.
<i>Transparency</i>	The guidelines of the European Commission are used in a transparent manner. This transparency requirement entails being explicit about the role that guidelines play in: – Legislative practices: Include explicit references in the text of the legislative rule or in the explanatory memorandum when guidelines are taken into account for drafting implementing legislation (formal legislation as well as delegated legislation or decentralised legislation). – Policy rules and other guidelines: Include explicit references in the text of the policy rule/guidelines or in explanatory notes when guidelines are taken into account for drafting the policy rules/guidelines. – Individualised decisions: Include explicit references in the text of the individualised decision when the guidelines are taken into account in the decision-making process, and /or explain a deviation from Commission guidelines. The webpage of the competent authority publishes the guidelines of the Commission or includes a link to the website where the guidelines are published. (If the guidelines are not published this affects the transparency of the implementation process).
<i>EU Legality-proof</i>	The guidelines of the Commission are used in a way that is in line with underlying EU legislative provisions as well as the case law of the CJEU. The guidelines of the Commission are not to be followed blindly; the implementation of Union law is the responsibility of the Member States (Article 291 TFEU). Account should be taken of the rules laid down in secondary legislation as well as judgments of the Court of Justice that prescribe how national authorities should use guidelines of the European Commission. Guidelines of the European Commission cannot be used to adopt legislative provisions that give a binding interpretation of EU law.

9.6.5 National courts as guardians of legal principles

This research shows that Dutch courts play an important role in shaping the role of guidance documents in implementation processes. Within the limits of their competences, national courts should take their regulatory role seriously. A 'guide to a principled use of Commission guidance by national courts' could spell out guidelines to be taken into account by national courts when using guidance documents of the European Commission. Table 9-5 gives guidelines for such a principled use of guidance documents by national courts.

Table 9-5 A principled use of guidance by national courts

<i>Promise</i>	<i>Guidelines</i>
<i>Predictability</i>	National courts use Commission guidance in a predictable manner as an aid for the interpretation and application of EU legislative provisions. The courts clarify the approach or perspective as to the (binding) legal effects of guidance documents in line with the case law of the CJEU. The courts make clear whether national authorities are expected to take account of Commission guidelines in regulatory and or decision-making practices. When uncertainty arises as to the legal status of Commission guidelines, courts refer questions to the CJEU. Nonetheless, even within the 'boundaries' of the judicial guidance given by the CJEU, national courts still play an important role in clarifying the status of guidelines in proceedings before national courts.
<i>Consistency</i>	National courts use Commission guidance in a consistent manner for the interpretation and application of EU legislative provisions. The courts ensure that national authorities use guidelines consistently, recognising a self-binding effect of the guidelines on the national authorities through general principles of law (e.g. legitimate expectations, equality, legal certainty).
<i>Transparency</i>	National courts use guidance in a transparent manner. The courts are more transparent about the role guidelines play in judicial decision-making processes and are explicit about a deviation from the guidelines. Within the limits of their competences, national courts assess whether national authorities have used guidance documents in a sufficiently transparent manner.
<i>EU legality proof</i>	National courts use guidance documents as an aid, not a substitute, to interpret and apply the EU legislative rules. The courts take a (positive) critical approach towards Commission guidelines and refer questions to the Court of Justice on the interpretation of EU legislative provisions. The courts ensure that the guidelines are not used by national authorities as though they were binding rules or lead to decisions that go beyond the requirements laid down in EU law.

9.6.6 Further research

The above sections outline various routes to bring the use of guidance documents at the national level in line with legal principles that govern the implementation of EU law. These routes and recommendations are based on the findings in this research which explored the use of guidance documents in three policy areas and in one Member State. These findings show that the use of guidance documents in Dutch implementing and judicial decision-making practices gives rise to problems in light of legal principles governing the implementation of EU law.

The findings in this research not only reveal the problematic consequences that the abundance of guidance documents may have; it also points out that further research on the role and effects of guidance documents is needed. The question arises, firstly, whether a similar 'varied' use of guidance documents can be observed in other Member States, and whether in those Member States similar risks arise in light of legal principles. Secondly, this research explored the use of 'unregulated guidance' in the sense that it studied guidance documents that were issued 'spontaneously' by the European Commission. For those guidance documents, EU secondary legislation does not provide a specific obligation for the Commission to adopt guidance documents and/or for national authorities to take the Commission's documents into account. It would be interesting to explore the role and consequences of guidance documents that in contrast to the documents studied in this research, have a basis in secondary legislation. What is the role of those 'regulated' guidance documents in national implementing practices? Thirdly, guidelines are issued not only by the Commission services but also by agencies of the European Commission, such as the guidelines issued by the European Securities and Markets Authority. These guidelines may also come to play an important role in implementing practices,⁹ and should therefore also be taken into account when further exploring how to regulate the issuing and use of guidance documents.

Furthermore, not only could research be conducted on other forms of guidance and on the use of guidance in other Member States, the scope of the research could also be expanded. Indeed, the issuing of guidance documents fits in a broader trend in which the European Commission more actively assists the competent authorities in implementing Union law. This assistance is provided not only through written guidance documents but also in the form of other practices. The better regulation toolbox outlines a number of 'support actions', such as the organisation of bilateral or multilateral meetings with Member States, training for national officials and the setting up of networks to exchange information on implementing practices.¹⁰ This development raises the question whether and how these forms of 'unwritten guidance' affect the implementation of Union law.

9 See Van Rijsbergen 2018, p. 154-181.

10 SWD(2017)350 final, p. 281.

Do they contribute to an effective and 'principled' implementation of Union law?

In brief, in the coming years informality is likely to continue to play an important role in the system of shared administration. The need to explore the role and implications of informality is increasingly topical, whilst the question remains where the right balance between informality and legality can be found.

Annex

The main aim of this research is to explore the use of guidance documents by authorities and courts in the Netherlands, and to assess the implications in light of legal principles. In order to be able to identify the use of guidance documents at the different stages of the implementation process, an empirical approach is taken. The following sections provide a more detailed account of the study that was conducted to search for traces of the use of Commission guidance documents in the three policy areas included in this research.

Section 1.1 elaborates on the empirical approach taken in this study and on how various obstacles and challenges were addressed. Section 1.2 provides an insight into the search for explicit references in implementing legislation and policy rules. Section 1.3 outlines the search for explicit references of guidance documents in rulings of Dutch courts. Section 1.4 provides an overview of the formal interviews that were conducted and that provided additional insights into the use of guidance documents in the Dutch legal order.

1.1 TAKING AN EMPIRICAL APPROACH

By merely studying the text of guidance documents, their roles and effects in implementing practices does not become visible. Therefore, in order to be able to shed light on the role of guidance documents, insights into the actual effects of the recourse to Commission guidance is needed. Taking an empirical approach to study the role and implications of guidance documents, this research goes beyond studying law in the books.¹ In doing so, it takes an external perspective to the law – or in this case to guidance – by studying how guidance finds its way into implementing and judicial practices.² This research assumes that context matters in relation to how guidance documents are issued, used and perceived. So it is interested in the dynamics that shape the issuing and use of guidance.³

One important consequence of studying ‘guidance-in-action’ is that the collection of empirical data requires using different empirical research

1 Thus studying law-in-action, see Seron & Silbey 2004, p. 33, 35.

2 See for an explanation of (and encouragement) to think outside the legal box: Van der Woude 2016.

3 Van der Woude 2016.

methods that go beyond the classic research methods used in the field of law. This study draws not only on literature and case law research, but also on document analysis and formal and informal interviews with officials, judges and experts. The research methods that have been used to conduct the empirical research were introduced in section 1.7 of this thesis.

In order to be able to identify the use of guidance documents at different stages of the implementation process, a two-step approach was followed. First, a search for explicit references to guidance documents was conducted in implementing documents as well as in rulings of Dutch courts. Traces of guidance documents are considered explicit when they refer directly to a particular guidance document. Subsequently, a qualitative, textual analysis was conducted to study these explicit references in more depth in order to find out what role these documents actually play in implementation processes. This in-depth analysis also included a search for traces of guidance documents in the form of 'linguistic similarities'.⁴ In that case the traces in the implementing document or ruling only resemble the text or wording used in guidance documents, but do not explicitly refer to a guidance document. The insights gained from the search for traces of the use of guidance documents in implementing documents and rulings were supplemented with information acquired through interviews.

The aim of this research is not to give an exhaustive overview or account of the use of guidance documents by national authorities and national courts. This is not needed in light of the aim of this research which is to provide insights into the various roles guidance documents take in implementation processes. In order to be able to identify these roles that guidance documents take, as well as possible factors that influence these rules, it suffices to discern general trends or patterns that indicate how guidance documents are used. Besides, giving an exhaustive overview of the use of guidance documents in Dutch implementing and judicial processes is fairly impossible for two reasons. First, the use of guidance documents is often merely practice and thus highly 'invisible' to the outside world. Second, the issuing and use of guidance documents is subject to continuous change. The Commission revises guidance documents and/or issues new guidance documents. On the other hand, the implementing measures and practices of national authorities are also not static objects and are often subject to revision and change.

1.2 THE SEARCH FOR EXPLICIT REFERENCES IN IMPLEMENTING LEGISLATION AND POLICY RULES

The search for traces of the use of Commission guidance documents in Dutch implementing practices sets out with a study of various implementing documents that could possibly provide information on the use of guidance

4 Compare Sadl 2015.

documents. The search for explicit references or traces of guidance documents was confined to the study of documents that are published and accessible to the author. For instance, individualised decisions in the three policy areas (*beschikkingen*) are not published and therefore could not be studied. Similarly, internal framework documents that transpose Commission guidance documents (e.g. in the area of direct payments) could not be consulted. The documents that have been studied can be divided into three groups:

- Legislation and policy rules: A search for traces of the use of guidance was conducted in the text of legislative acts implementing the EU legislative instruments involved in this study. This study includes primary and secondary legislation, as well as, in the case of the Habitats Directive, rulemaking practices of the Dutch provinces (Dutch provincial regulations and policy rules).
- Explanatory memoranda or notes: traces of the use of guidance were also searched for in the text of explanatory memoranda or notes to the proposals for implementing regulations or policy rules or amendments to these regulations and policy rules.
- Other governmental documents or policy documents: these documents were studied where, via other sources, it became clear that these documents could provide information on the use of Commission guidelines.

When studying these implementing documents, I followed the two-step approach outlined above. First, I read through the documents whilst searching for explicit references to Commission guidance documents. Subsequently, I conducted an in-depth analysis of the use of Commission guidelines by conducting a textual analysis of these documents in which references were found.

The next sections concentrate on the most important implementing documents that provided information on the use of guidance documents: implementing legislation and policy rules as well as explanatory memoranda and related notes.

1.2.1 Direct payments

The search for explicit references was conducted in relation to the Ministerial Regulation⁵ and policy rules⁶ that implement the EU direct payments legal framework adopted after the 2013 reform. This means that previous Ministerial Regulations and policy rules that operationalised former EU direct payments schemes, have not been included in this search. The reason for not including these previous acts in the search for explicit references is:

5 Uitvoeringsregeling rechtstreekse betalingen GLB.

6 Beleidsregel uitvoeringsregeling rechtstreekse betalingen GLB.

1) this is not strictly necessary for the purpose of this research (which is to provide some general insights into the role direct payments guidance documents play in present-day implementing practices); and 2) the search for explicit references appeared to be time-consuming and also for this reason has been limited to studying the Regulation and policy rules currently into force.

The search for explicit references was conducted in three steps. The first step consists of a search for explicit references to direct payments guidance documents in the text of the Ministerial Regulation and the related policy rules. This search did not reveal explicit references to direct payments guidance documents.

The second step consists of a search for traces in the form of linguistic similarities to the text of direct payments guidance documents. When reading through the text of the Ministerial Regulation and the policy rules, I identified three linguistic similarities. First, Article 1.1 on the definition of light tillage, and second, Article 2.14 on the allowance of light tillage on sensitive permanent grassland, both reflect guidelines laid down in document DS/EGDP/2015/02/FINAL (the permanent grassland guidance).⁷ A third linguistic similarity can be found in Article 2.17(6) which provides that a five metres bufferzone is allowed for landscape features, as is provided for in the EFA layer guidance.⁸

These linguistic similarities were identified by scanning through the text of the Ministerial Regulation and policy rules. The linguistic similarities were identified by the author on the basis of her knowledge of the text of direct payments guidance documents. In this respect, it should be noted that these three linguistic similarities may not provide the full picture since the text of the Ministerial Regulation and the policy rules may include more of such textual similarities with Commission guidance documents. In view of the large number of direct payments guidance documents it is difficult, if not impossible, to identify all such possible linguistic similarities.

The third step consists of a search for explicit references to direct payments guidance documents in amending decisions to the Ministerial Regulation and the policy rules. This search was conducted using search terms from which I expected that they could possibly reveal traces to direct payments guidance documents. The following search terms were used: *guidance, richtsnoeren, werkdocument, Europese Commissie, brief, richtsnoer*. The amending decisions included in this search and the results of this search are presented in 'Annex Table 1' and 'Annex Table 2'.

7 *Stcrt.* 2016, 16496, p. 4.

8 *Stcrt.* 2015, 46132, p. 7.

Annex Table 1 – Amending decisions to the Ministerial Regulation on direct payments

Amending decisions to the Ministerial Regulation⁹ included in the search:¹⁰

Stcrt. 2015, 8489; *Stcrt.* 2015, 16150; *Stcrt.* 2015, 46132; *Stcrt.* 2016, 16496, *Stcrt.* 2016, 34648; *Stcrt.* 2016, 55791; *Stcrt.* 2016, 68986; *Stcrt.* 2016, 13791, *Stcrt.* 2017, 55331; *Stcrt.* 2017, 70783; *Stcrt.* 2018, 10737; *Stcrt.* 2018, 16840.

Results:

- 1) Three explicit references to a guidance document of the European Commission. These references were found in the amendments *Stcrt.* 2016, 16496 and *Stcrt.* 2016, 13791 to the Ministerial Regulation. The references refer to document DS/EGDP/2015/02/FINAL (the permanent grassland guidance) and to a ‘working document of the European Commission’.
- 2) The search also revealed five implicit references. In these cases, the amending decisions do not refer to a specific guidance document. The amending decisions more generally refer to the ‘opinion’, ‘the view’, ‘the interpretation’ or ‘requirements’ of the European Commission. These references were found with the search term ‘Europeese Commissie’.

Annex Table 2 – Amending decisions to the policy rules on direct payments

Amending decisions to the policy rules¹¹ included in the search:¹²

Stcrt. 2015, 19605, *Stcrt.* 2015, 46127, *Stcrt.* 2016, 23378, *Stcrt.* 2017, 13798; *Stcrt.* 2018, 10752.

Results:

One explicit reference to a guidance document of the European Commission was found in amending decision *Stcrt.* 2015, 19605, which refers to a ‘working document on missing ear tags in the context of cross compliance’.

1.2.2 The Habitats Directive

The search for traces of Habitat guidance documents set out with a search for explicit references in relation to the Nature Protection Act that entered into force in 2017. This formal legislative act currently transposes the Habitats Directive. The two previous legislative acts that transposed the Habitats Directive, the Natura Protection Act 1998 and the Flora and Fauna Act, have also been included in the search for explicit references. I expected that including these former legislative acts could give insight into whether the ‘new’ Nature Protection Act refers more often or less often to the Habitat guidance documents than its predecessors. The search for explicit references also includes regulations and policy rules adopted by the Dutch provinces. Indeed, with the entering into force of the new Nature Protection Act, the Dutch provinces play a prominent role in the implementation process.

9 Uitvoeringsregeling rechtstreekse betalingen GLB.

10 These are amending decisions to the Minister Regulation displayed at www.overheid.nl. Last search at 14 July 2018.

11 Beleidsregel uitvoeringsregeling rechtstreekse betalingen GLB.

12 These are the amending decisions to the Minister Regulation displayed at www.overheid.nl. Last search at 14 July 2018.

This section first describes the process and findings of the search for explicit references in relation to the Nature Protection Act, the Nature Protection Act 1998 and the Flora and Fauna Act. Subsequently, it describes the process and findings of the search for explicit references in the provincial regulations and policy rules.

The Nature Protection Act, the Nature Protection Act 1998 and the Flora and Fauna Act

The search for explicit references in relation the Nature Protection Act adopted in 2017, the Nature Protection Act 1998 and the Flora and Fauna Act was conducted in three steps. First, it was examined whether the text of the Nature Protection Act refers to the text in Habitat guidance documents. This is not the case: no explicit references were found. The absence of references can be explained in light of the fact that this act aims to directly transpose the provisions in the Habitats Directive.

The second step searched for explicit references in the explanatory memorandum to the Nature Protection Act that entered into force in 2017. When reading through the explanatory memorandum to this Act, I came across the words *guidance document*, *leidraad* and *richtsnoer*, and noted that these words are used to refer to the Managing Natura 2000 guidance document and to the Species guidance document.

The third step looked at explanatory memoranda to the previous legislative acts. To this end, I selected: 1) the explanatory memorandum to the Flora and Fauna Act; and 2) the explanatory memorandum to the amending act of 2005 to the Nature Protection Act of 1998. The reason for including the amending act of 2005 and not the explanatory memorandum to the initial version of the Nature Protection Act, is that this amending act transposed the Natura 2000 regime into the Nature Protection Act 1998.

An overview of the number of references to the Habitat guidance documents in the explanatory memoranda is presented in Annex Table 3 below. As this table, references to the Habitat guidance documents feature in the explanatory memorandum to the Nature Protection Act 2017 and in the explanatory note to the amending act of 2005 to the Nature Protection Act 1998. The absence of explicit references to Commission guidelines in the explanatory memorandum to the Flora and Fauna Act can be explained in light of the fact that the legislative proposal was adopted some years before the Commission issued the Species guidance document in 2007.

Annex Table 3 – Number of explicit references in explanatory memoranda

Guidance document	Explanatory memoranda to Flora and Fauna act ¹³	Explanatory memorandum to Nature Protection Act (1998) ¹⁴	Explanatory memorandum to Nature Protection Act (2017) ¹⁵
Species guidance document	-	-	21
Managing Natura 2000 guidance document	-	10	27

Provincial regulations and policy rules

As mentioned above, the search for explicit references to Habitat guidance documents also includes the provincial regulations and policy rules that were adopted in order to implement the Nature Protection Act of 2017. The first step of this research exercise was to find the provincial policy rules and regulations. To this end, I searched the database of the website www.overheid.nl as well as the websites of the individual provinces. The Provincial regulations (*verordeningen*) and policy rules (*beleidsregels*) that were included in this research are presented in Annex Table 4.

The second step was to search for explicit references to the Habitat guidance documents in the selected provincial regulations and policy rules. This search set out with the four search terms with which the explicit references in the legislative acts and the explanatory memoranda were identified: *guidance*, *leidraad*, *richtsnoer*, *handleiding*. To these key words I added the words ‘*Europese Commissie*’ (European Commission), and for the Dutch title of the MN2000 guidance document ‘*Beheer van Natura 2000-gebieden*’.

The search using these search terms in provincial regulations and policy rules revealed one reference to the Species guidance document in the explanatory note to the policy rules of Province Noord-Holland.¹⁶ The explanatory note to the policy rule refers to the Species guidance document in relation to the concept of serious damage (Article 16(1)(b) of the Habitats Directive).

13 *Kamerstukken II*, 1992/93, 23147, 3; *Kamerstukken II*, 1995/96, 23147, 7.

14 *Kamerstukken II*, 2001/02, 28171, 3.

15 *Kamerstukken II*, 2011/12, 33348, 3.

16 Beleidsregel natuurbescherming Noord-Holland, 6 September 2016, PB. 2016, 103, p. 15.

Annex Table 4 – Provincial regulations and policy rules

Drenthe	Beleidsregels Wet natuurbescherming provincie Drenthe 23 december 2016, PB. 2016, 6940.
Flevoland	Verordening uitvoering Wet natuurbescherming Flevoland 1 november 2016 PB. 2016, 5854.
Fryslân	Verordening Wet natuurbescherming Fryslân 2017, 7 december 2016, PB. 2016, 6515; Beleidsregel wet natuurbescherming Fryslân 2018, PB. 2018,5518.
Gelderland	Wijziging Omgevingsverordening Gelderland vanwege vaststelling Natuurparagraaf 2 februari 2017, PB. 435.
Groningen	Verordening natuurbescherming provincie Groningen 27 december 2016, PB. 2016, 6952.
Limburg	Omgevingsverordening Limburg 2015 29 maart 2017, PB. 2017, 1365; Wijzigingsverordening Hoofdstuk 3 Natuur van de Omgevingsverordening Limburg 2015 30 december 2016, PB. 2016, 6983.
Noord-Brabant	Verordening natuurbescherming Noord-Brabant 23 december 2016, PB. 6933; Beleidsregel natuurbescherming Noord-Brabant 28 december 2016, PB. 2016, 7021.
Noord-Holland	Verordening Natura 2000 gebieden Noord-Holland, 3 oktober 2016, PB. 2016, 106; Verordening vrijstellingen soorten Noord-Holland, 3 oktober 2016, PB. 2016, 109; Beleidsregel natuurbescherming Noord-Holland, 6 september 2016, PB. 2016, 103.
Overijssel	Vaststelling hoofdstuk 7 Omgevingsverordening Overijssel 2009, 30 december 2016. PB. 2016, 7082; Vaststelling beleidsregel natuur Overijssel 2017, 30 december 2016, PB. 2016, 7018.
Utrecht	Verordening Natuur en Landschap provincie Utrecht 2017 30 december 2016, PB. 2016, 7054; Beleidsregels natuur en landschap provincie Utrecht 2017 30 december 2017, PB. 2016, 7058.
Zeeland	Zeeland: Verordening Wet natuurbescherming Zeeland 2017 9 november 2016, PB. 2016, 5992.
Zuid-Holland	Verordening uitvoering Wet natuurbescherming Zuid-Holland 20 december 2016, PB. 2016, 6788; Beleidsregel uitvoering Wet natuurbescherming Zuid-Holland 20 december 2016, PB. 2016, 6787.

1.2.3 The Citizenship Directive

The European Commission issued two guidance documents that complement the Citizenship Directive:

The 2009 Communication

- Communication from the 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).¹⁷

The Handbook addressing marriages of convenience

- Communication from the Commission to the European Parliament and the Council. Helping national authorities fight abuses of the right to free movement. 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 (COM(2014)604 final).¹⁸
- Commission Staff Working Document. 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).¹⁹

Search terms

On the basis of the titles of the FMP guidance documents, I formulated search terms that could guide the analysis for explicit references in legislation, policy rules, explanatory notes and in the case law of Dutch courts. I used search terms that could reasonably be expected to be used in order to refer to one of the FMP guidance documents. Since both the 2009 Communication and the Communication announcing the Handbook have been translated into Dutch, I included both English and Dutch terms in the list (see below).

- *Europese Commissie*
- *Handboek*
- *Mededeling*
- *Richtsnoeren*
- *Communication*
- *Guidance*
- *Handbook*

17 This document is accessible at the eur-lex website in 22 languages (Dutch included).

18 This document is accessible at the eur-lex website in 23 languages (Dutch included).

19 This document is accessible at the eur-lex website only in the English language.

Legislative acts transposing the Citizenship Directive

The search for explicit references in the legislative acts transposing the Citizenship Directive focuses on the Aliens Act, the main act governing immigration policy in the Netherlands, and the Aliens Decree, the delegated legislative act (*AmvB*) that transposes the provisions of the Citizenship Directive. In order to find possible references to the guidance documents in the text of the legislative acts I first read through the text of the acts transposing the Citizenship Directive. Secondly, I searched for explicit references in the explanatory memoranda to the amending acts that transposed the Citizenship provisions into these acts.²⁰

Both the Aliens Act and the Aliens Decree contain no explicit references to the FMP guidance documents; nor can explicit references be found in the explanatory notes to the amending acts that brought the Aliens Act as well as the Aliens Decree in line with the Citizenship Directive.²¹ The absence of traces of the Habitat guidance documents in the amending acts can be explained in light of the fact that the amendments were adopted in 2006, thus three years before the first FMP guidance documents were issued. Subsequent amendments to the articles of the Aliens Decree that transpose the Citizenship Directive²² include one explicit reference to the Handbook addressing marriages of convenience. The reference is included in the amending act *Stb.* 2016, 86.²³

Annex Table 5 – Amending decisions to the Aliens Act

Amending decisions to the Aliens Act included in the search:

Stb. 2010, 307; *Stb.* 2011, 652; *Stb.* 2012, 159; *Stb.* 2013, 181; *Stb.* 2014, 268; *Stb.* 2016, 86.

Results:

One explicit reference to Handbook addressing marriages of convenience (*Stb.* 2016, 86).

The Aliens Circular and explanatory notes

The Aliens Act and the Aliens Decree are complemented by the Aliens Circular that lays down policy rules for the Immigration and Naturalisation Service. Section B10 of the Circular provides for policy rules to Articles 8.7 until 8.25 of the Aliens Decree that transpose the Citizenship Directive. The text of section B10 of the Aliens Circular does not contain explicit references to the FMP guidance documents. Nevertheless, two linguistic similarities

²⁰ Using the list of search terms included above.

²¹ *Kamerstukken II*, 2005/06, 30493, 3 and *Stb.* 2006, p. 215.

²² Articles 8.7 until 8.25 the Aliens Decree. I did not examine amendments to the Aliens Act, since this act only lays down the basic rule that Community subjects shall be issued a residence card.

²³ *Stb.* 2016, 86, p. 27. The explanatory note cites the definition given on p. 8 of the Handbook.

were identified when reading through the text of the policy rules: the Aliens Circular adopts the same definition as the guidelines for abuse and also follows the guidance on the concept of persistent petty criminality.

The policy rules in section B10 were included in the Aliens Circular in January 2009.²⁴ The first FMP guidance document COM(2009)313 was issued a few months later, in July 2009, which explains why the amending decision of the Dutch State Secretary that introduces the policy rules in section B10 does not refer to any FMP guidelines. The search for traces of FMP guidelines therefore only includes amending decisions to the Aliens Circular that were taken later than July 2009.

The search for explicit references in amending decisions revealed two explicit references to the 2009 Communication COM(2009)313.²⁵ The first reference features in the amending decision of 9 April 2013 and refers to the interpretative rule laid down in the 2009 Communication that persistent petty criminality may represent a threat to public policy.²⁶ The second reference features in the amending decision of 23 December 2011 and refers to the 2009 Communication in relation to the concept of a durable relationship.²⁷

Annex Table 6 – Amending decisions to the Aliens Circular

Amending decisions to the Aliens Act included in the search:

Stcrt. 2013, 8389; *Stcrt.* 2013, 27834; *Stcrt.* 2014, 8761; *Stcrt.* 2014, 35433; *Stcrt.* 2016, 33962; *Stcrt.* 2017, 17943; *Stcrt.* 2017, 36329; *Stcrt.* 2017, 53847.

Results:

One explicit reference to Handbook addressing marriages of convenience (*Stb.* 2016, 86).

1.3 THE SEARCH FOR EXPLICIT REFERENCES IN THE RULINGS OF DUTCH COURTS

An important part of the empirical research involves a case law analysis of rulings of the CJEU and of rulings of Dutch courts. The main focus is on the analysis of the rulings of Dutch courts, as the central research question asks in what ways national courts use guidance documents of the European Commission. The analysis of rulings of Dutch courts followed the same two-step approach outlined above. First, a search for explicit references to Commission guidance documents in the rulings of Dutch courts was conducted in the three policy areas. Second, a textual analysis was conducted of the rulings that were found with explicit references. In some cases, this search was complemented with additional case law research for other rulings. This complementary research explored whether the rulings

²⁴ *Stcrt.* 2009, 19.

²⁵ The search was conducted at <http://wetten.overheid.nl>.

²⁶ *Stcrt.* 2013, 8389, p. 120.

²⁷ *Stcrt.* 2011, 23324, p. 24.

that refer to guidance documents were copied in later rulings without explicitly referring to these guidance documents.

The analysis in this section concentrates on the first stage of the case law research: it describes the search for explicit references to Commission guidance documents in the rulings of Dutch courts. This search for explicit references was conducted in the database accessible at www.rechtspraak.nl.

The results of this search for explicit references does not give, nor does it aspire to give, an exhaustive overview of all rulings that refer to Commission guidance documents.²⁸ In the first place, it might be possible that the search terms that are used do not reveal all rulings that explicitly refer to Commission guidance documents. Secondly, the database of www.rechtspraak.nl does not include all rulings that are handed down by Dutch courts. For instance, in principle all rulings of the Dutch Supreme Court, the Judicial Division of the Council of State and the Dutch Trade and Industry Appeals Tribunal are published, in so far as these rulings are not manifestly unfounded, manifestly inadmissible and/or concluded with a standard formula.²⁹

1.3.1 Direct payments

In the area of direct payments, the Dutch Trade and Industry Appeals Tribunal is the competent court in first and only instance. Therefore, the search for rulings that refer to direct payments guidelines of the Commission was confined to rulings of this Court. In order to be able to find 'relevant rulings' I used the search terms that in an earlier study conducted by the author of this research³⁰ revealed rulings of the Tribunal that refer to direct payments guidelines. I complemented these search terms with other search terms which I expected could reveal relevant rulings or that were derived from rulings that were brought to my attention by experts and scholars in the field of EU subsidies. This resulted in the following list of search terms with which the rulings included in this research were found:³¹

- Werkdocument + steun;
- Oriëntatiedocument + steun;
- Interpretatienota + steun;
- Joint Research Centre;
- Joint Research Center;³²
- Guidance + steun;
- Observations.

²⁸ As also mentioned above in section 1.1 of the Annex.

²⁹ See *Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl*, accessible at <https://www.rechtspraak.nl/Uitspraken/Paginas/Selectiecriteria.aspx>.

³⁰ Van Dam 2013, section 3.2.1.

³¹ Last search was conducted at on 12 June 2019.

³² 'Center' and 'Centre' appear to be used as terminology in the rulings – therefore both search terms have been included.

The rulings found refer to different direct payments guidance documents. Annex Table 7 provides an overview of the different direct payments guidance documents and the number of rulings that refer to the document.³³

Annex Table 7 – Direct payments guidance documents and number of rulings

Name of group	Guidance document	No. of rulings
Obvious error rulings	Working document VI/7103/98 Rev2-NL + Working document AGR 49533/2002	182
Fifty trees rulings	Working document 60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) No 796/2004	4
Interpretative note rulings	Interpretative notes no. 51 and 26	12
WikiCAP rulings	Information on the WikiCAP website of the Joint Research Centre on the measurement method	5
Permanent grassland rulings	Information on the WikiCAP website of the Joint Research Centre on permanent grasslands	10
Active farmer rulings	Active farmer guidance. Guidance document on the implementation of Article 9 of regulation (EU) No 1307/2013, DSCG/2014/29.	2
Observations on notifications rulings	Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) No 639/2014 (DS-CDP-2015-04-rev1).	3
LPIS guidance rulings	Guidance document on the Land Parcel Identification System (LPIS) under Articles 5, 9 and 10 of Commission Delegated Regulation (EU) No 640, DSCG/2014/33.	2
Administrative penalties rulings	Guidance for implementation of Article 19a of Regulation (EU) 640/2014 on the simplification of administrative penalties for certain direct payments schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016.	1
Total		221

³³ I draw inspiration from the presentation of rulings by Stefan 2013, p. 275.

Rulings that refer to Working document VI/7103/98 Rev2-NL + Working document AGR 49533/2002 (obvious error rulings)

CBb 21 March 2001, ECLI:NL:CBB:2001:AB0861; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1293; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1294; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1295; CBb 10 July 2001, ECLI:NL:CBB:2001:AB1500; CBb 6 June 2001, ECLI:NL:CBB:2001:AB2130; CBb 6 June 2001, ECLI:NL:CBB:2001:AB2131; CBb 4 July 2001, ECLI:NL:CBB:2001:AB2524; CBb 8 August 2001, ECLI:NL:CBB:2001:AC0156; CBb 8 August 2001, ECLI:NL:CBB:2001:AB4352; CBb 8 August 2001, ECLI:NL:CBB:2001:AC0124; CBb 22 August 2001, ECLI:NL:CBB:2001:AD1265; CBb 26 September 2001, ECLI:NL:CBB:2001:AD3894; CBb 3 October 2001, ECLI:NL:CBB:2001:AD4701; CBb 3 October 2001, ECLI:NL:CBB:2001:AD4706; CBb 18 October 2001, ECLI:NL:CBB:2001:AD4769; CBb 7 November 2001, ECLI:NL:CBB:2001:AD5555; CBb 7 November 2001, ECLI:NL:CBB:2001:AD5562; CBb 2 January 2002, ECLI:NL:CBB:2002:AD9108; CBb 6 February 2002, ECLI:NL:CBB:2002:AD9673; CBb 16 January 2002, ECLI:NL:CBB:2002:AD9058; CBb 2 April 2002, ECLI:NL:CBB:2002:AE1883; CBb 3 May 2002, ECLI:NL:CBB:2002:AE3415; CBb 28 June 2002, ECLI:NL:CBB:2002:AE7069; CBb 1 November 2002, ECLI:NL:CBB:2002:AF1177; CBb 12 March 2003, ECLI:NL:CBB:2003:AF6804; CBb 25 April 2003, ECLI:NL:CBB:2003:AF9584; CBb 11 July 2003, ECLI:NL:CBB:2003:AI0376; CBb 21 November 2003, ECLI:NL:CBB:2003:AO1041; CBb 4 May 2004, ECLI:NL:CBB:2004:AO9947; CBb 12 May 2004, ECLI:NL:CBB:2004:AP1017; CBb 4 June 2004, ECLI:NL:CBB:2004:AP1564; CBb 9 June 2004, ECLI:NL:CBB:2004:AP1571; 18 August 2004, ECLI:NL:CBB:2004:AR2140; CBb 20 August 2004, ECLI:NL:CBB:2004:AR1629; CBb 12 December 2004, ECLI:NL:CBB:2004:AR8438; CBb 11 March 2005, ECLI:NL:CBB:2005:AT2696; CBb 30 March 2005, ECLI:NL:CBB:2005:AT3912; CBb 13 April 2005 ECLI:NL:CBB:2005:AT4981; CBb 1 June 2005, ECLI:NL:CBB:2005:AT7331; CBb 24 June 2005, ECLI:NL:CBB:2005:AT8903; CBb 7 October 2005, ECLI:NL:CBB:2005:AU4648; CBb 18 November 2005, ECLI:NL:CBB:2005:AU7332; CBb 9 December 2005, ECLI:NL:CBB:2005:AU9318; CBb 15 February 2006, ECLI:NL:CBB:2006:AV2917; CBb 8 March 2006, ECLI:NL:CBB:2006:AV5870; CBb 29 March 2006, ECLI:NL:CBB:2006:AX8790; CBb 5 April 2006, ECLI:NL:CBB:2006:AW3632; CBb 7 June 2006, ECLI:NL:CBB:2006:AX8376; CBb 21 July 2006, ECLI:NL:CBB:2006:AY6959; CBb 6 September 2006, ECLI:NL:CBB:2006:AY9330; CBb 29 November 2006, ECLI:NL:CBB:2006:AZ5764; CBb 12 February 2007, ECLI:NL:CBB:2007:AZ9934; CBb 12 February 2007, ECLI:NL:CBB:2007:AZ9936; CBb 12 March 2007, ECLI:NL:CBB:2007:BA0974; 14 March 2007, ECLI:NL:CBB:2007:BA1557; CBb 5 June 2007, ECLI:NL:CBB:2007:BA7356; CBb 6 June 2007, ECLI:NL:CBB:2007:BA7361; CBb 6 June 2007, ECLI:NL:CBB:2007:BA7166; CBb 3 July 2007, ECLI:NL:CBB:2007:BB0115; CBb 4 July 2007, ECLI:NL:CBB:2007:BB0098; CBb 10 July 2007, ECLI:NL:CBB:2007:BB0105; CBb 5 September 2007, ECLI:NL:CBB:2007:BB3575; CBb 26 September 2007, ECLI:NL:CBB:2007:BB6157; CBb 3 October 2007, ECLI:NL:CBB:2007:BB5669; CBb 17 October 2007, ECLI:NL:CBB:2007:BB6209; CBb 29 October 2007, ECLI:NL:CBB:2007:BB7143; CBb 29 October 2007, ECLI:NL:CBB:2007:BB7142;

CBb 31 October 2007, ECLI:NL:CBB:2007:BB7147; CBb 31 October 2007, ECLI:NL:CBB:2007:BB7148; CBb 1 November 2007, ECLI:NL:CBB:2007:BB7205; CBb 14 November 2007, ECLI:NL:CBB:2007:BB8854; CBb 21 November 2007, ECLI:NL:CBB:2007:BB9727; CBb 11 December 2007, ECLI:NL:CBB:2007:BC1348; CBb 11 December 2007, ECLI:NL:CBB:2007:BC1358; CBb 20 February 2008, ECLI:NL:CBB:2008:BC6219; CBb 21 February 2008, ECLI:NL:CBB:2008:BC8230; CBb 19 March 2008, ECLI:NL:CBB:2008:BC8201; CBb 2 April 2008, ECLI:NL:CBB:2008:BC9985; CBb 16 April 2008, ECLI:NL:CBB:2008:BD0258; CBb 8 December 2008, ECLI:NL:CBB:2008:BG7022; CBb 18 February 2009, ECLI:NL:CBB:2009:BH4683; CBb 26 March 2009, ECLI:NL:CBB:2009:BI1003; CBb 28 May 2009, ECLI:NL:CBB:2009:BI9211; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9418; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9420; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9441; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9445; CBb 15 October 2009, ECLI:NL:CBB:2009:BK2049; CBb 20 November 2009, ECLI:NL:CBB:2009:BK5141; CBb 2 December 2009, ECLI:NL:CBB:2009:BK5978; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7268; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7270; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7271; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7274; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7275; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6809; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6813; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6819; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6817; CBb 14 December 2009, ECLI:NL:CBB:2009:BK7266; CBb 14 December 2009, ECLI:NL:CBB:2009:BK7267; CBb 16 December 2009, ECLI:NL:CBB:2009:BL4501; CBb 13 January 2010, ECLI:NL:CBB:2010:BM1569; CBb 25 January 2010, ECLI:NL:CBB:2010:BM1597; CBb 25 January 2010, ECLI:NL:CBB:2010:BM1599; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1827; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1825; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1829; CBb 4 March 2010, ECLI:NL:CBB:2010:BM2459; CBb 10 March 2010, ECLI:NL:CBB:2010:BM2454; CBb 10 March 2010, ECLI:NL:CBB:2010:BM2461; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2451; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2705; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2728; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2729; CBb 28 March 2010, ECLI:NL:CBB:2010:BM3397; CBb 03 May 2010, ECLI:NL:CBB:2010:BM3419; CBb 19 May 2010, ECLI:NL:CBB:2010:BM6074; CBb 9 June 2010, ECLI:NL:CBB:2010:BM8566; CBb 9 June 2010, ECLI:NL:CBB:2010:BM8567; CBb 23 June 2010, ECLI:NL:CBB:2010:BN0427; CBb 24 June 2010, ECLI:NL:CBB:2010:BN0409; CBb 25 June 2010, ECLI:NL:CBB:2010:BN0306; CBb 25 June 2010, ECLI:NL:CBB:2010:BN0323; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0990; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0992; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0995; CBb 30 June 2010, ECLI:NL:CBB:2010:BN1001; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0914; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0915; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0918; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0919; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0921; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0923; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4361; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4362; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4372; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4373; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4375;

CBb 8 July 2010, ECLI:NL:CBB:2010:BN4376; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4381; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4385; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4975; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4980; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4981; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4896; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4897; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4899; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4993; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4996; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4998; CBb 28 July 2010, ECLI:NL:CBB:2010:BN5008; CBb 28 July 2010, ECLI:NL:CBB:2010:BN5010; CBb 29 September 2010, ECLI:NL:CBB:2010:BO1049; CBb 6 October 2010, ECLI:NL:CBB:2010:BO1697; CBb 26 October 2010, ECLI:NL:CBB:2010:BO2413; CBb 10 November 2010, ECLI:NL:CBB:2010:BP0447; CBb 10 November 2010, ECLI:NL:CBB:2010:BO5302; CBb 8 December 2010, ECLI:NL:CBB:2010:BO7419; CBb 7 January 2011, ECLI:NL:CBB:2011:BP2677; CBb 17 February 2011, ECLI:NL:RBZLY:2011:BP7612; CBb 29 June 2011, ECLI:NL:CBB:2011:BU3161; CBb 16 December 2011, ECLI:NL:CBB:2011:BV1020; CBb 15 February 2012, ECLI:NL:CBB:2012:BV7086; CBb 15 February 2012, ECLI:NL:CBB:2012:BV8371; CBb 18 July 2012, ECLI:NL:CBB:2012:BX5079; CBb 5 September 2012, ECLI:NL:CBB:2012:BX7333; CBb 1 February 2013, ECLI:NL:CBB:2013:BZ4272; CBb 20 December 2013, ECLI:NL:CBB:2013:295; CBb 21 May 2014, ECLI:NL:CBB:2014:202; CBb 8 March 2017, ECLI:NL:CBB:2017:83; CBb 9 November 2017, ECLI:NL:CBB:2017:371; CBb 25 January 2018, ECLI:NL:CBB:2018:42; CBb 10 April 2018, ECLI:NL:CBB:2018:137; CBb 24 April 2018, ECLI:NL:CBB:2018:129; CBb 8 May 2018, ECLI:NL:CBB:2018:314; CBb 8 May 2018, ECLI:NL:CBB:2018:323; CBb 5 June 2018, ECLI:NL:CBB:2018:265; CBb 17 July 2018, ECLI:NL:CBB:2018:360; CBb 17 July 2018, ECLI:NL:CBB:2018:379; CBb 4 December 2018, ECLI:NL:CBB:2018:640.

Rulings that refer to Working document 60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) No 796/2004 (fifty trees rulings)

CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249; CBb 16 September 2013, ECLI:NL:CBB:2013:152.

Rulings that refer to Interpretative notes no. 51 and 26 (interpretative note rulings)

CBb 21 March 2003, ECLI:NL:CBB:2003:AF6914; CBb 13 October 2006, ECLI:NL:CBB:2006:AZ0218; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3568; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3571; CBb 6 December 2006, ECLI:NL:CBB:2006:AZ4328; CBb 14 December 2006, ECLI:NL:CBB:2006:AZ5816; CBb 20 December 2006, ECLI:NL:CBB:2006:AZ5867; CBb 26 June 2007, ECLI:NL:CBB:2007:BA8565; CBb 22 December 2006, ECLI:NL:CBB:2006:AZ5865; CBb 12 April 2007, ECLI:NL:CBB:2007:BA4862; CBb 26 June 2007, ECLI:NL:CBB:2007:BA8574; CBb 3 July 2007, ECLI:NL:CBB:2007:BB0115.

Rulings that refer to Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) No 639/2014 DS-CDP-2015-04-rev1 (Observations on notifications rulings)

CBb 11 July 2017, ECLI:NL:CBB:2017:212; CBb 9 October 2017, ECLI:NL:CBB:2017:316; CBb 25 January 2018, ECLI:NL:CBB:2018:41.

Active farmer guidance. Guidance document on the implementation of Article 9 of regulation (EU) No 1307/2013, DSCG/2014/29 (active farmer rulings)

CBb 21 June 2017, ECLI:NL:CBB:2017:239; CBb 21 June 2017, ECLI:NL:CBB:2017:241.

Rulings that refer to Information on the WikiCAP website of the Joint Research Centre on the measurement method (WikiCAP rulings)

CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876; CBb, 11 January 2013, ECLI:NL:CBB:2013:BZ3408; CBb 26 November 2014, ECLI:NL:CBB:2014:440; CBb 17 December 2014, ECLI:NL:CBB:2014:478; CBb 5 March 2018, ECLI:NL:CBB:2018:90.

Rulings that refer to Information on the WikiCAP website of the Joint Research Centre on grasslands on airports (Permanent grassland rulings)

CBb 2 October 2013, ECLI:NL:CBB:2013:189; CBb 2 October 2013, ECLI:NL:CBB:2013:190; CBb 2 October 2013, ECLI:NL:CBB:2013:191; CBb 24 October 2013, ECLI:NL:CBB:2013:213; CBb 5 November 2013, ECLI:NL:CBB:2013:222; CBb 28 November 2013, ECLI:NL:CBB:2013:266; CBb 12 December 2013, ECLI:NL:CBB:2013:282; CBb 12 December 2013, ECLI:NL:CBB:2013:283; CBb 6 December 2013, ECLI:NL:CBB:2013:300; CBb 28 January 2014, ECLI:NL:CBB:2014:32.

Guidance document on the Land Parcel Identification System (LPIS) under Article 5, 9 and 10 of Commission Delegated Regulation (EU) No 640, DSCG/2014/33 (LPIS guidance rulings)

CBb 4 June 2019, ECLI:NL:CBB:2019:227; CBb 23 April 2019, ECLI:NL:CBB:2019:161.

Guidance for implementation of Article 19a of Regulation (EU) 640/204 on the simplification of administrative penalties for certain direct payments schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016 (Ruling on administrative penalties).

CBb 17 July 2018, ECLI:NL:CBB:2018:358.

1.3.2 The Habitats Directive

The search for references to Habitat guidance documents in the rulings of Dutch courts was conducted – as for the other policy areas – at www.rechtspraak.nl. In order to be able to find relevant rulings, the search set out by making a list of possible search terms that could reveal the rulings that refer to Habitat guidance documents.

Guidance documents related to the Habitats Directive often have the name ‘guidance’ in the title. Therefore, I used the search terms ‘guidance + *Habitatrichtlijn*’. I also used search terms that appeared ‘successful’ in the search for explicit references in the explanatory memoranda to the legislative acts, namely the terms *richtsnoer* and the term *leidraad*. Finally, an additional search was conducted by typing in the titles of the two core Habitat guidance documents: the Species guidance document and the Management Natura 2000 guidance documents.³⁴

The search for references to guidance documents related to the Habitats Directive in rulings of Dutch courts resulted in 31 rulings.³⁵ An overview of the guidance documents, the number of rulings and the search terms is included in Annex Table 8.

Annex Table 8 – Habitat guidance documents in the rulings of Dutch courts

Name of guidance document	No. of rulings (31)	Found with search terms
Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC	6	‘Beheer van “Natura 2000”-gebieden’
Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC	20	‘Guidance document + habitat’ ‘Richtsnoeren + Habitatrichtlijn’ ‘Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC’
Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC	4	“Richtsnoeren + habitatrichtlijn
EU Guidance on wind energy development in accordance with the EU nature legislation	1	‘Guidance + habitat’

34 For the document on the Management Nature 2000 guidance document I used search terms that reflect both the English title and the Dutch title, as I was told during interviews with judges that rulings might refer to the Dutch title and therefore I added this additional search.

35 Last search conducted at 10 June 2019.

After the search for explicit references, the question arose how to find possible patterns in these rulings with regard to the use of the Habitat guidance documents in judicial decision- making practices. To this end, I categorised the rulings along the lines of the substantive topics that the rulings deal with. For the questions that concerned the application of Article 6 of the Habitats Directive this appeared to be difficult. Except for two rulings that concern the question on the assessment of satisfactory alternatives, the rulings each deal with different legal questions. For the rulings related to the interpretation and application of the Species protection regime, the exercise was more successful. Among the rulings that relate to the Species protection regime different ‘groups of rulings’ can be identified. These groups of rulings are presented below in Annex Table 9.

Annex Table 9 – Groups of rulings that refer to the Species guidance document

Foraging area rulings: ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464; Rb. Leeuwarden 17 December 2012, ECLI:NL:RBL EE:2012:BY6864; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024; Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748.
Breeding site rulings: ABRvS 25 February 2009, ECLI:NL:RVS:2009:BH3985; Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561.
Rulings on scope of the obligation to set up a system of species protection Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593.
Incidental killing ruling: ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215.
Rulings related to the concept of disturbance: Rb. Maastricht 1 February 2011, ECLI:NL:RBMAA:2011:BP2657; Hof Arnhem 29 November 2011, ECLI:NL:GHARN:2011:BU6242; Hof Arnhem 29 May 2012, ECLI:NL:GHARN:2012:BW7281.

The criminal rulings related to the concept of disturbance do not fall within the scope of this research, since in these rulings the courts do not assess the practices of a public authority. Instead, private parties are accused of having disturbed breeding sites or resting places. Therefore, these rulings were not included in the analysis.

In the other four groups of rulings, the courts assess implementing practices of the Minister or the provinces. Therefore, these rulings are included in the analysis that aims to explore in what ways the Habitat guidance documents are used in judicial decision-making practices. When conducting the analysis, I also searched for rulings in which the use of guidance resonates or is reflected, but which do not explicitly refer to Habitat guidance documents.

Rulings that refer to the guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (the Species guidance document)

Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; Rb. Maastricht 1 February 2011, ECLI:NL:RBMAA:2011:BP2657; Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951; Rb. Leeuwarden 17 December 2012, ECLI:NL:RBLEE:2012:BY6864; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503; Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593; Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748; Hof Arnhem 29 November 2011, ECLI:NL:GHARN:2011:BU6242; Hof Arnhem 29 May 2012, ECLI:NL:GHARN:2012:BW7281; Hof 's Hertogenbosch 3 May 2013, ECLI:NL:GHSHE:2012:4855; ABRvS 17 January 2007, ECLI:NL:RVS:2007:AZ6380; ABRvS 25 February 2009, ECLI:NL:RVS:2009:BH3985; ABRvS 19 January 2010, ECLI:NL:RVS:2010:BL0689; ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8041; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561; ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464; ABRvS 5 February 2014, ECLI:NL:RVS:2014:281; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024.

Rulings that refer to the document Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (Managing Natura 2000 guidance document)

Rb. Haarlem 28 November 2003, ECLI:NL:RBHAA:2003:AN9193; Rb. Alkmaar 20 November 2007, ECLI:NL:RBLK:2007:BB9271; Rb. Den Haag 3 October 2012, ECLI:NL:RBSCR:2012:BX8921. ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5684; ABRvS 19 June 2013, ECLI:NL:RVS:2013:CA3652; ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380.

Rulings that refer to the guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

ABRvS 13 May 2009, ECLI:NL:RVS:2009:BI3701; ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504; ABRvS 18 February 2015, ECLI:NL:RVS:2015:438; ABRvS 18 July 2018, ECLI:NL:RVS:2018:2454.

Ruling that refers to the EU guidance on wind energy development in accordance with the EU nature legislation

ABRvS 4 May 2016, ECLI:NL:RVS:2016:1227.

1.3.3 The Citizenship Directive

The search for rulings that refer to the FMP guidance documents was conducted using the search terms listed above in section 1.2.3.³⁶ This search resulted in a total number of 91 cases that explicitly refer to the 2009 Communication or the Handbook addressing marriages of convenience.³⁷ The large majority of the rulings refers to the 2009 Communication of the European Commission. Three rulings also refer to the Handbook addressing marriages of convenience. The competent courts reviewing administrative decisions on free movement of persons are the District Court of The Hague (in first instance) and the Council of State (the highest administrative court).

Annex Table 10 – FMP guidance: Search terms and results

Search terms	No. of relevant rulings
COM(2009)313	67
Richtsnoeren + 2004/38	86
Guidance + 2004/38	0
Handbook + 2004/38	0
Handboek + 2004/38	3
Total no. relevant rulings	91

Annex Table 11 – FMP guidance documents: number of relevant rulings

Guidance document	No. of relevant rulings
Communication 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.	88
Handbook 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.	3

Annex Table 12 – FMP guidance: Council of State and District Court of The Hague

Court	No. of relevant rulings
Council of State	28
District Court of The Hague	63

36 *Europese Commissie; Handboek; Mededeling; Richtsnoeren; Communication; Guidance; Handbook.*

37 Last search was conducted on 7 June 2019.

Within the rulings found with the search for explicit references, different groups of rulings can be discerned along the lines of the legal question or issue for which the rulings refer to the Commission guidelines. An overview of the different groups of the rulings is given below.

References that relate to the concept of a durable relationship (par 2.1.1 of COM(2009)313)

Rb. Den Haag 19 August 2010, ECLI:NL:RBSGR:2010:BN6033; Rb. Den Haag 26 January 2011, ECLI:NL:RBSGR:2011:BP3126; Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627; Rb. Den Haag 11 February 2015, ECLI:RBDHA:2015:1506; 28 May 2015, ECLI:RBDHA:2015:7317; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7323; Rb. Den Haag 15 March 2019, ECLI:NL:RBDHA:2019:3720; ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678.

References that relate to the concept of sufficient resources (par. 2.3.1. of COM(2009)313)

Rb. Den Haag 17 February 2012, ECLI:NL:RBSGR:2012:BV7441; Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638; Rb. Den Haag 14 June 2016, ECLI:RBDHA:2016:6623; Rb. Den Haag 22 December 2016, ECLI:RBDHA:2016:17144; Rb. Den Haag 6 November 2017, ECLI:NL:RBDHA:2017:16273; ABRvS 3 September 2013, ECLI:NL:RVS:2013:1068; ABRvS 13 June 2016, ECLI:NL:RVS:2016:1628; ABRvS 13 June 2016, ECLI:NL:RVS:2016:1629.

References that relate to the concept of genuine, present and sufficient serious threat (par. 3.2 of COM(2009)313))

Rb. Den Haag 13 January 2011, ECLI:NL:RBSGR:2011:BP2584; Rb. Den Haag 21 March 2011, ECLI:NL:RBSGR:2011:BP8895; Rb. Den Haag 14 April 2011, ECLI:NL:RBSGR:2011:BQ1518; Rb. Den Haag 26 October 2011, ECLI:NL:RBSGR:2011:BU7257; Rb. Den Haag 9 December 2011, ECLI:NL:RBSGR:2011:BU8209; Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV3857; Rb. Den Haag 12 March 2012, ECLI:NL:RBSGR:2012:BV8686; Rb. Den Haag 15 February 2013, ECLI:NL:RBDHA:2013:CA1559; Rb. Den Haag 13 March 2013; ECLI:NL:RBDHA:2013:BZ6327; Rb. Den Haag 13 May 2013, ECLI:NL:RBDHA:2013:CA1251; Rb. Den Haag 24 January 2014, ECLI:NL:RBDHA:2014:8681; Rb. Den Haag 10 March 2015 ECLI:RBDHA:2015:8845; Rb. Den Haag 11 June 2015, ECLI:RBDHA:2015:11329; Rb. Den Haag 22 July 2015, ECLI:RBDHA:2015:8846; Rb. Den Haag 15 September 2015, ECLI:RBDHA:2015:11330; Rb. Den Haag 9 June 2016, ECLI:RBDHA:2016:6389; Rb. Den Haag 26 July 2017, ECLI:RBDHA:2017:8909; ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584; ABRvS 18 June 2013, ECLI:NL:RVS:2013:62; ABRvS 5 September 2013, ECLI:NL:RVS:2013:1054; ABRvS 14 November 2017,

ECLI:NL:RVS:2017:3163; ABRvS 19 January 2018, ECLI:NL:RVS:2018:186; ABRvS 6 June 2018, ECLI:NL:RVS:2018:1738; ABRvS 6 June 2018, ECLI:NL:RVS:2018:1739.

References that relate to the definition/investigation of a marriage of convenience (par. 4.2 of COM(2009)313)

Rb. Den Haag 21 October 2010, ECLI:NL:RBSGR:2010:BO2122; Rb. Den Haag 27 January 2011, ECLI:NL:RBSGR:2011:BQ2080; Rb. Den Haag 18 October 2011, ECLI:NL:RBSGR:2011:BT8866; Rb. Den Haag 29 November 2011, ECLI:NL:RBSGR:2011:BU6799; Rb. Den Haag 25 July 2012, ECLI:NL:RBSGR:2012:BX4356; Rb. Den Haag 23 August 2013, ECLI:NL:RBDHA:2013:11310; Rb. Den Haag 27 February 2014, ECLI:NL:RBDHA:2014:4388; Rb. Den Haag 4 March 2014, ECLI:NL:RBDHA:2014:7818; Rb. Den Haag 27 June 2014, ECLI:NL:RBDHA:2014:8014; Rb. Den Haag 6 July 2016, ECLI:RBDHA:2016:10835; Rb. Den Haag 4 November 2016, ECLI:RBDHA:2016:17104; Rb. Den Haag 20 April 2017, ECLI:RBDHA:2017:5849; Rb. Den Haag 14 August 2017, ECLI:RBDHA:2017:9297; Rb. Den Haag 31 October 2017, ECLI:NL:RBDHA:2017:15061; Rb. Den Haag 4 December 2017, ECLI:NL:RBDHA:2017:16277; Rb. Den Haag 21 December 2017, ECLI:NL:RBDHA:2017:16326; Rb. Den Haag 31 May 2018, ECLI:NL:RBDHA:2018:6487; Rb. Den Haag 18 September 2018, ECLI:NL:RBAMS:2018:6575; Rb. Den Haag 30 October 2018, ECLI:NL:RBDHA:2018:14317. ABRvS 6 June 2012, ECLI:NL:RVS:2012:BW7878; ABRvS 28 June 2012, ECLI:NL:RVS:2012:BX0615; ABRvS 31 May 2013, ECLI:NL:RVS:2013:CA2009; ABRvS 14 July 2016, ECLI:NL:RVS:2016:2069; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120; ABRvS 25 July 2017, ECLI:NL:RVS:2017:2031; ABRvS 19 October 2017, ECLI:NL:RVS:2017:2847; ABRvS 22 November 2017, ECLI:NL:RVS:2017:3233.

References that relate to the concepts of fraud and abuse other than marriages of convenience (par. 4 of COM(2009)313)

Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326; Rb. Den Haag 10 June 2015, ECLI:RBDHA:2015:8481; Rb. Den Haag 9 August 2016, ECLI:RBDHA:2016:10837; Rb. Den Haag 9 January 2019, ECLI:NL:RBDHA:2019:155; ABRvS 5 October 2012, ECLI:NL:RVS:2012:BX9567; ABRvS 17 December 2012, ECLI:NL:RVS:2012:BY7401; ABRvS 11 November 2016, ECLI:NL:RVS:2016:3081; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2492; ABRvS 31 January 2018, ECLI:NL:RVS:2018:360.

References to other questions not belonging to one of the above groups (COM(2009)313)

Rb. Den Haag 25 August 2011, ECLI:NL:RBSGR:2011:BU3879; Rb. Den Haag 21 December 2011, ECLI:NL:RBSGR:2011:BW4757; Rb. Den Haag 14 September

2012,

ECLI:NL:RBSGR:2012:BX9061; Rb. Den Haag 12 March 2015, ECLI:RBDHA:2015:2686; Rb. Den Haag 17 June 2016, ECLI:RBDHA:2016:8327
12 Rb. Den Haag March 2015, ECLI:RBDHA:2015:2686; Rb. Den Haag 23 December 2016, ECLI:RBDHA:2016:16920; ABRvS 5 October 2012, ECLI:NL:RVS:2012:BX9530; ABRvS 16 June 2015, ECLI:NL:RVS:2015:2008.

**Rulings that refer to the Handbook addressing marriages of convenience
SWD(2014)284 final**

Rb. Amsterdam 18 September 2018, ECLI:NL:RBAMS:2018:6575; Rb. Rotterdam 20 March 2017, ECLI:NL:RBROT:2017:2070; Rb. Den Haag 14 August 2017, ECLI:NL:RBDHA:2017:9297.

1.4 INTERVIEWS

1.4.1 European Commission

Interview 1 – Commission official A

Interview with official A, Directorate General Agriculture and Rural Development, European Commission, 16 December 2015, Brussels.

Interview 2 – Commission official A

Interview with official A, Directorate General Agriculture and Rural Development, European Commission, 20 July 2018, (telephone interview).

1.4.2 Dutch ministries and agencies

Interview 3 – National officials A and B

Interview with officials A and B, Ministry of Economic Affairs, 26 April 2016, The Hague.

Interview 4 – National officials A and C

Interview with officials A and C, Ministry of Economic Affairs (RVO), 11 October 2018, Deventer.

Interview 5 – National official D

Interview with official D, senior official at the Ministry of Economic Affairs, Directorate Legislation and Legal Affairs, The Hague, 23 September 2015.

Interview 6 – National official D

Interview with official D, senior official at the Ministry of Economic Affairs, Directorate Legislation and Legal Affairs, telephone interview, 9 June 2017.

Interview 7 – National officials E, F, G

Interview with officials E, F and G, IND, Ministry of Justice and Security, Rijswijk, 11 December 2014.

Interview 8 – National officials H and I

Interview with officials H and I, Ministry of Justice and Security, Den Haag, 28 November 2014.

Interview 9 – National official H

Interview with official H Senior Policy Officer at the Ministry of Security and Justice, 20 July 2018 (telephone interview).

Interview 10 – National official F

Interview with official F, Senior Policy Officer at the Ministry of Security and Justice, 27 August 2018, The Hague.

1.4.3 Dutch Provinces

Interview 11- National official J

Interview with official J of Province A, Policy Advisor (Nature), telephone interview, 21 June 2017.

Interview 12 – National official K

Interview with official K of Province B, Legal Advisor (Nature Protection Act; Birds and Habitats Directive), telephone interview, 29 August 2017.

Interview 13 – National official L

Interview with official L of Province C, Senior Legal Official (Green legislation), telephone interview, 24 August 2017.

Interview 14 – National official M

Interview with official M of Province D, Senior Legal Policy Advisor (Green legislation), answer to interview questions in writing/via email, 8 August 2017 and telephone interview on Friday 24 October 2017.

Interview 15 – National official N

Interview with official N of Province E, Senior Legal Policy Advisor, answer to interview questions via email, August 2017.

Interview 16 – National official O

Interview with official O of Province F, telephone interview, 6 September 2017.

Interview 17 – National official P

Interview with official P of Province G, Legal Officer (Physical Environment), telephone interview on 15 September 2017.

Interview 18 – National official Q

Interview with official Q of Province H, Legal Officer (Licensing, Monitoring and Enforcement), telephone interview on 3 November 2017.

Interview 19 – National official R

Interview with official R of Province I, Legal Advisor (Nature and Environment), telephone interview on 6 November 2017.

Interview 20 – National official S

Interview with official S of Province I, Legal Officer, telephone interview on 7 November 2017.

Interview 21 – National official T

Interview with official T of Province J, Legal Advisor, telephone interview on 14 November 2017.

1.4.4 Interviews with lawyers

Interview 22 – Lawyer A

Interview with lawyer A at Dutch law office, telephone interview on 16 July 2015 (not recorded).

Interview 23 – B and C

Interview with lawyers B and C, lawyers at Dutch law office, The Hague, 16 September 2015 (not recorded).

1.4.5 Judicial Division of the Council of State

Interview 24 – Official A at Council of State

Interview with senior official A at the Judicial Division of the Council of State, The Hague, 17 October 2014.

Interview 25 – Official B at Council of State

Interview with senior official B at the Judicial Division of the Council of State, The Hague, 13 July 2015.

Interview 26 – State Councillors C and D

Interview with State Councillor C and State Councillor D at the Judicial Division of the Council of State, The Hague, 17 September 2015.

Interview 27 – State Councillor E

Interview with former State Councillor E of the Council of State, Amsterdam, 4 August 2015 (not recorded).

Interview 28 – State Councillor C

Interview with State Councillor C at the Judicial Division of the Council of State, The Hague, 2 October 2018.

Samenvatting (Dutch Summary)

Guidance documenten van de Europese Commissie in de Nederlandse rechtsorde

I. INLEIDING

De Europese Unie stuurt niet alleen door middel van het recht, dat is neergelegd in verdragen, verordeningen en richtlijnen, maar ook door middel van informele, niet-bindende regels. Niet-bindende regels kunnen de vorm aannemen van guidance documenten waarmee de Europese Commissie de lidstaten bijstaat in de implementatie van de harde Unierechtelijke regels. Guidance documenten verschijnen in vele verschillende vormen, zoals werkdocumenten, richtsnoeren, notities, handboeken, 'vraag en antwoord documenten' en brieven.

In het licht van het groeiend aantal guidance documenten is het niet verwonderlijk dat deze documenten ook verschijnen in de nationale rechtsorde. Guidance documenten kunnen worden gebruikt als 'implementatiehulpmiddel' door nationale autoriteiten. Ook in de rechtspraak van nationale rechters zijn guidance documenten terug te vinden. De documenten vervullen dan een rol als hulpmiddel om Unierechtelijke bepalingen uit te leggen en toe te passen, en om de nationale implementatiepraktijk te toetsen.

Guidance documenten, veelal aangeduid onder de noemer van soft law, zijn een veel gebruikt 'compliance' instrument van de Commissie, en worden geacht bij te dragen aan een correcte en uniforme implementatie van het Unierecht. De aannahme van guidance documenten wordt daarnaast gedreven door de 'wens' om bij te dragen aan rechtszekerheid, transparantie en consistentie in het implementatieproces. Daar tegenover staat dat guidance documenten niet worden aangenomen volgens een in de Verdragen neergelegde procedure, en zodoende beschikken over geen, of weinig democratische (input) legitimiteit. Dat maakt de guidance documenten een kwetsbaar en veel bekritiseerd sturingsinstrument dat spanningen oproept in het licht van de voor de EU zo fundamentele *rule of law*.

Gedurende de laatste jaren is er een toenemende aandacht in de juridische literatuur voor de effecten van guidance documenten op het nationale niveau – en dan met name in de nationale rechtspraak. Desalniettemin zijn inzichten in de toepassing en effecten van guidance documenten in ieder geval in Nederland voorsnog beperkt. Dit onderzoek beoogt de rol van guidance documenten in het Nederlandse implementatieproces (zowel de wetgevings- als bestuurspraktijk) en in de rechtspraak in kaart te brengen en de implicaties in het licht van rechtsbeginselen te duiden. De hoofdvraag luidt als volgt:

Op welke wijze gaan de Nederlandse autoriteiten en de Nederlandse rechter om met guidance documenten van de Europese Commissie en wat zijn daarvan de implicaties in het licht van rechtsbeginselen die bij de implementatie van het Unierecht in acht dienen te worden genomen?

De opzet van het onderzoek bestaat uit drie delen. In het eerste deel (hoofdstuk 1-4) wordt het fenomeen guidance geïntroduceerd en het analytisch kader geformuleerd. Ook wordt de Europese en Nederlandse context geschetst in het licht waarvan de toepassing van guidance zal worden geanalyseerd. Vervolgens wordt in het tweede deel (hoofdstuk 5-7) onderzocht hoe de Nederlandse wetgever, bestuursorganen en rechter omgaan met guidance documenten van de Europese Commissie op drie rechtsterreinen: Europese landbouwsubsidies (directe betalingen), de Habitatrichtlijn 92/43/EEG en De Burgerschapsrichtlijn 2004/38/EC. Het derde deel analyseert de bevinden in het licht van vier rechtsbeginselen (hoofdstuk 8) en beantwoordt tot slot de onderzoeksvraag (hoofdstuk 9).

II. GUIDANCE DOCUMENTEN EN VIER 'PROMISES'

In de literatuur worden guidance documenten zoals gezegd veelal onder het concept 'soft law' geschaard vanwege de mogelijkheid dat deze documenten praktische en juridische effecten kunnen generen. In dit onderzoek wordt de term guidance gebruikt, om twee redenen. Ten eerste is het concept guidance breder dan het concept 'soft law' omdat het bij soft law gaat om regels die beogen gedrag te sturen. Guidance documenten hebben daarentegen dikwijls een informatief en hoog technisch karakter, zonder dat normatieve regels worden gegeven voor nationale autoriteiten. In de tweede plaats wordt de term guidance gehanteerd in de praktijk, zowel binnen de Commissie als in de Nederlandse bestuurspraktijk. Onder het fenomeen guidance wordt in dit onderzoek verstaan schriftelijke documenten waarin de Europese Commissie de lidstaten bijstaat in de implementatie van het Unierecht.

In het systeem van 'shared administration' waarbij het grootste deel van het Unierecht wordt uitgevoerd door de lidstaten in nauwe samenwerking met de Commissie, spelen guidance documenten een belangrijke rol. Guidance documenten worden geacht de effectieve implementatie van het Unierecht te bevorderen. De documenten geven duidelijkheid over de betekenis van Unierechtelijke bepalingen, zorgen voor een uniforme implementatie van het Unierecht en bevorderen een dialoog tussen de Europese Commissie en nationale autoriteiten. Om deze functies te kunnen vervullen, speelt het informele karakter van guidance een belangrijke rol: het geeft guidance documenten souplesse en flexibiliteit, waardoor snel op implementatieproblemen en veranderde omstandigheden en inzichten kan worden ingespeeld.

Dit onderzoek richt zich, zoals gezegd, op de relatie tussen de rol van guidance documenten en Unierechtelijke rechtsbeginselen die bij de

implementatie van het Unierecht in acht dienen te worden genomen. Om die relatie te kunnen onderzoeken, formuleert hoofdstuk 2 vier 'promises', of ideale effecten, van guidance documenten in het licht van vier rechtsbeginselen waarvan wordt verwacht dat zij door de toepassing van guidance documenten worden 'geraakt': rechtszekerheid, gelijkheid- en consistentie, transparantie en legaliteit. De 'promises' schetsen de effecten die guidance documenten dienen te genereren om positief met rechtsbeginselen te kunnen interacteren. De vier promises van guidance documenten zijn:

- 1) De toepassing van guidance bevordert een voorspelbare implementatie van het Unierecht (rechtszekerheidsbeginsel).
- 2) De toepassing van guidance bevordert een consistente implementatie van het Unierecht (het gelijkheids- en consistentiebeginsel).
- 3) De toepassing van guidance bevordert een transparante implementatie van het Unierecht (het transparantiebeginsel).
- 4) De toepassing van guidance respecteert de bindende Unierechtelijke normen (het legaliteitsbeginsel).

In het licht van deze vier promises zal de toepassing van guidance documenten in de Nederlandse bestuurs- en rechtspraktijk in hoofdstuk 8 worden geanalyseerd.

III. TYPES GUIDANCE EN EUROPESE VERWACHTINGEN

Hiervoor is besproken dat het fenomeen guidance ziet op niet juridisch bindende documenten die de lidstaten bijstaan in de implementatie van het Unierecht. Hoofdstuk 3 laat zien dat binnen deze groep vijf verschillende types guidance kunnen worden onderscheiden, namelijk:

- 1) Interpretatieve richtsnoeren die aangeven As we have seen in section 2.2.2, guidance documents are not issued following a legislative procedure spelled out in the Treaties and lack legally binding force. Consequently, through the issuing of guidance documents the Commission cannot create new, binding obligations on the Member States.¹ hoe een Unierechtelijke hard law bepaling volgens de Commissie dient te worden uitgelegd (interpretatieve guidance).
- 2) Richtsnoeren die uitleg geven aan onderliggende Unierechtelijke hard law bepalingen zonder interpretatieve elementen toe te voegen (uitleggende guidance).
- 3) Aanbevelingen ten aanzien van geschikte implementatiemethode(n) (implementatieve guidance).

1 See for instance CJEU 20 March 1997, C-57/95, ECLI:EU:C:1997:164 (*France v Commission*) and CJEU 16 June 1993, C-325/91, ECLI:EU:C:1993:245 (*France v Commission*). See also Scott 2011, p. 340.

- 4) Passende technieken om te kunnen voldoen aan technische standaarden en vereisten neergelegd in Unierechtelijke hard law (technische guidance).
- 5) Goede praktijken ontwikkeld in de lidstaten om bepalingen van Unierecht te implementeren (guidance in de vorm van 'good practices').

Vervolgens onderzoekt hoofdstuk 3 in hoeverre en op welke wijzen op EU-niveau verwachtingen worden geformuleerd voor de wijze waarop nationale autoriteiten en rechters guidance documenten zouden moeten toepassen. Die verwachtingen vloeien in de eerste plaats voort uit de rechtspraak van het Hof van Justitie. Zo heeft het Hof van Justitie in de *IJssel-Vliet* rechtspraak bepaald dat richtsnoeren op het terrein van het staatssteunrecht een bindende werking kunnen hebben voor nationale autoriteiten op grond van de samenwerkingsplicht neergelegd in artikel 108 VWEU en aanvaarding door de desbetreffende lidstaat. Een zo vergaande bindende werking is echter nog niet erkend op andere terreinen. Het uitgangspunt blijft dus dat guidance documenten geen bindende werking hebben voor nationale autoriteiten. Dit wordt anders wanneer in secundaire wetgeving wordt neergelegd dat nationale autoriteiten rekening dienen te houden met guidance documenten. In dat geval, zo blijkt uit het *ACM vs KPN* arrest, ontstaat een 'comply-or-explain' verplichting voor nationale autoriteiten. Dit proefschrift beperkt zich tot een studie naar de toepassing van 'ongereguleerde guidance': guidance zonder expliciete basis in secundaire Uniewetgeving.

Voor de nationale rechter is de *Grimaldi* rechtspraak van het Hof van Justitie nog steeds leidend. In het in 1989 gewezen *Grimaldi* arrest heeft het Hof van Justitie bepaald dat de nationale rechter gehouden is om rekening te houden met aanbevelingen van de Europese Commissie. In de literatuur wordt deze 'formule' vertaald als een inspanningsverplichting voor de nationale rechter om rekening te houden met guidance documenten. In het *ACM vs KPN* arrest heeft het Hof van Justitie de *Grimaldi* formule verder aangescherpt. In die zaak overweegt het Hof van Justitie dat de nationale rechter slechts op specifieke gronden kan afwijken van een aanbeveling behorende bij de Kaderrichtlijn telecomcommunicatie. Deze overweging dient echter te worden gelezen in het licht van de specifieke juridische context. Het gaat namelijk om een aanbeveling die is aangenomen op basis van artikel 19 van de Kaderrichtlijn telecomcommunicatie en waarmee de nationale regelgevende instanties, volgens datzelfde artikel, zoveel mogelijk rekening dienen te houden. Het is echter niet uit te sluiten dat een vergelijkbare strikte invulling van guidance documenten zal worden aangenomen op andere, vergelijkbare rechtsterreinen.

Uit het bovenstaande volgt dat guidance documenten in meerdere of mindere mate een juridisch bindende werking kunnen verkrijgen voor nationale autoriteiten alsmede voor de nationale rechter. Daar komt nog bij dat guidance documenten door de Commissie ook als toezichtsinstrument kunnen worden gebruikt in het kader van haar werkzaamheden als 'guardian of the Treaties'. Guidance documenten kunnen bijvoorbeeld een

rol spelen bij beslissingen tot het openen van infractieprocedures of bij het opleggen van financiële correcties (zoals op het terrein van Europese subsidies). Het gebruik van guidance als monitoring instrument kan in de praktijk zorgen voor een feitelijk bindende werking van guidance documenten voor nationale autoriteiten.

IV. DE NEDERLANDSE CONTEXT EN VIER PERSPECTIEVEN

Hoofdstuk 4 bespreekt de karakteristieken van het Nederlandse bestuursrecht, alsmede de instrumenten die worden gebruikt om het Unierecht te implementeren en schetst in hoofdlijnen het systeem van de rechterlijke organisatie. Dit hoofdstuk formuleert ook vier perspectieven op het bindende karakter van guidance. De perspectieven kunnen worden weergegeven als:

- 1) De toepassing van guidance als ware het een bindende regel of standaard;
- 2) De toepassing van guidance als verplicht implementatiehulpmiddel waar alleen gemotiveerd vanaf kan worden geweken;
- 3) De toepassing van guidance als vrijwillig implementatiehulpmiddel;
- 4) Geen toepassing geven aan/het buiten beschouwing laten van guidance.

De perspectieven zijn geformuleerd na een verkennend onderzoek naar de wijze waarop met guidance wordt omgegaan in de Nederlandse bestuurs- en rechtspraktijk. Samen met de vijf types guidance vormen de perspectieven de twee assen van het analytisch kader in het licht waarvan verschillende rollen van guidance kunnen worden onderscheiden.

V. GUIDANCE IN DE IMPLEMENTATIEPRAKTIJK: EEN GEVARIEERD BEELD

Hoofdstuk 5,6 en 7 staan in het teken van het empirische onderzoek naar de rol van guidance documenten in de Nederlandse rechtsorde. Hieronder worden, in grote lijnen, de bevindingen van dit onderzoek naar de rol van guidance documenten in het implementatie proces op de drie geselecteerde terreinen besproken.

Een bindende werking?

De empirische analyse laat een gevarieerd beeld zien in de mate waarin guidance als een bindend implementatiehulpmiddel wordt ervaren en toegepast. De mate van 'bindende werking' van guidance documenten verschilt per beleidsterrein en ook, zoals in de volgende subparagraaf zal blijken, per type guidance.

De documenten hebben de meest vergaande bindende kracht op het terrein van directe betalingen. De vele guidance documenten bij de landbouwverordeningen worden in de regel strikt gevolgd. Uit interviews met

ambtenaren bij het ministerie en de RVO alsmede uit de rechtspraak van het CBb blijkt dat de documenten in het implementatie proces worden ervaren en toegepast 'als ware het wetgeving'; afwijking van guidance documenten brengt immers het risico van een financiële correctie met zich mee. Daarnaast spelen ook het streven naar rechtszekerheid, consistentie alsmede 'controleerbaarheid' een rol bij het strikt volgen van de richtsnoeren van de Commissie.

Het onderzoek naar de twee guidance documenten bij de Burgerchapsrichtlijn 2004/38/EG laat een ander beeld zien. Op dit terrein wordt de toepassing van guidance documenten gekenmerkt door een nationale praktijk van 'cherry picking'. Dit betekent dat guidance documenten in het algemeen door de IND worden gebruikt als implementatiehulpmiddel voor zover zulks in lijn is met het, doorgaans restrictieve, implementatiebeleid. De guidance documenten nemen aldus de vorm aan van 'vrijwillig implementatiehulpmiddel'.

Een perspectief op de bindende werking van guidance documenten bij de Habitatrichtlijn is minder gemakkelijk te ontwaren. In Nederland is de Habitatrichtlijn geïmplementeerd in de Wet Natuurbescherming 2017 die, grotendeels, wordt uitgevoerd op het niveau van de provincies. Expliciete sporen van guidance documenten zijn slechts te vinden in de memorie van toelichting bij de Natuurbeschermingswet, terwijl op het niveau van de provincies de Habitat guidance documenten vooral een 'onzichtbare' rol spelen als interpretatiehulpmiddel. Op basis van interviews met ambtenaren bij het Ministerie en met provincieambtenaren ontstaat het algemene beeld dat guidance documenten als gezaghebbend interpretatiehulpmiddel worden beschouwd waar niet zomaar vanaf kan worden gegaan.

De types guidance

In de tweede plaats laat de analyse zien dat in het licht van de types guidance verschillende rollen van guidance als implementatiehulpmiddel kunnen worden onderscheiden.

Het type guidance dat het meest zichtbaar sporen achterlaat in de implementatiepraktijk zijn de interpretatieve richtsnoeren. Op het terrein van landbouwsubsidies worden de interpretatieve guidance documenten omgezet in de Uitvoeringsregeling rechtstreekse betalingen en in de daarbij behorende beleidsregels, of ze worden als bindend voorschrift gehanteerd bij het nemen van beschikkingen. Voorts laten de Nederlandse beleidsregels neergelegd in de Vreemdelingencirculaire sporen zien van interpretatieve richtsnoeren gerelateerd aan de Burgerchapsrichtlijn. En tot slot, interpretatieve richtsnoeren behorend bij de Habitatrichtlijn zijn te vinden in de reeds genoemde memorie van toelichting behorend bij de Natuurbeschermingswet en worden gebruikt om 'guidance' te geven voor de uitleg van de Natuurbeschermingswet op provinciaal niveau.

Het tweede type van 'uitleggende guidance', dat uitleg geeft aan of een overzicht geeft van Unierechtelijke hard law bepalingen, laat minder duidelijke

lijk sporen achter in de implementatiepraktijk. Dat heeft ermee te maken dat dit type guidance minder ‘concrete’ handvatten geeft voor de interpretatie van Unierechtelijke bepalingen. Toch zijn enkele sporen van dit type guidance geïdentificeerd, bijvoorbeeld in de toelichting op beleidsregels behorend bij de Uitvoeringsregeling rechtstreekse betalingen, als ook in de werkinstructies van de IND. Ondanks het feit dat dit type guidance een minder tastbaar effect heeft op implementatie-instrumenten en praktijken, kunnen de uitleggende richtsnoeren echter, op een meer abstract niveau, sturing geven aan de wijze waarop Unierechtelijke bepalingen worden uitgelegd en toegepast.

Het derde type ‘implementatieve guidance’ dat aanbevelingen geeft ten aanzien van de geschikte implementatiemethoden kan een grote sturende kracht hebben op de implementatiepraktijk. Dat laat het onderzoek naar de toepassing van deze documenten op het terrein van de landbouwsubsidies zien. De vele implementatieve guidance documenten zijn leidend voor de inrichting van het beheer- en controlesysteem, dat door de lidstaten moet worden opgezet. Maar ook in het implementatieproces van de Burger-schapsrichtlijn spelen de implementatieve richtsnoeren een rol: aan de hand van de richtsnoeren uit COM(2009)313 zijn ‘pilots’ ontwikkeld om schijnhu-welijken te kunnen detecteren en te onderzoeken.

Ook de technische guidance documenten kunnen een belangrijke rol spelen als – in dit geval – technisch implementatiehulpmiddel. Dat wordt duidelijk, wederom, uit de analyse op het terrein van de directe betalingen. De vele technische richtsnoeren worden gebruikt als standaard voor het inrichten van het beheers- en controlesysteem, zoals bijvoorbeeld het land-bouwpercelen- en identificatiesysteem. De technische richtsnoeren worden veelal vertaald naar interne kaderdocumenten van de RVO.

Resteert dan nog het type guidance dat een overzicht geeft van ‘good practices’ die zijn ontwikkeld in de lidstaten. Alhoewel dit type guidance veel voorkomt op alle drie de rechtsterreinen, wordt dit type guidance niet snel aangewend als implementatiehulpmiddel op het nationale niveau. De voornaamste verklaring hiervoor lijkt te zijn dat de goede praktijken van andere lidstaten niet weergeven wat *volgens de Commissie* de meest geschikte implementatiemethode is of wat de juiste interpretatie is van Unierechte-lijke bepalingen. Er gaat derhalve een minder sterk bindende werking uit van dit type guidance dan van de andere types guidance: zelfs op het terrein van directe betalingen werd dit door de geïnterviewde ambtenaren benadrukt.

VI. GUIDANCE EN DE NEDERLANDSE BESTUURSRECHTSPRAAK

Naast de nationale wetgever en het bestuur speelt ook de nationale rechter een belangrijke rol bij de doorwerking van het Unierecht. De nationale rechter ziet erop toe dat het Unierecht door de nationale autoriteiten op de juiste wijze wordt geïnterpreteerd en toegepast, en kan daarbij gebruik maken van guidance documenten van de Europese Commissie. Dat bete-

kent ook dat de nationale rechter een rol kan spelen in het ‘verhelderen’ en ‘reguleren’ van de toepassing van guidance documenten als implementatiehulpmiddel. Deze paragraaf beziet welke rol guidance documenten spelen in de rechtspraak op de drie geselecteerde rechtsterreinen.

Types guidance: interpretatieve guidance domineert

Zoals hierboven geschetst dient de nationale rechter volgens de *Grimaldi* rechtspraak ‘aanbevelingen’ in aanmerking te nemen bij het beslechten van geschillen. Het onderzoek naar de rechterlijke uitspraken op de drie geselecteerde rechtsterreinen heeft geen uitspraken opgeleverd waarin naar de *Grimaldi* rechtspraak wordt gewezen. Dit betekent echter niet dat Nederlandse bestuursrechters niet naar interpretatieve richtsnoeren verwijzen. Integendeel, de rechters tonen zich weinig terughoudend als het gaat om het hanteren van guidance documenten als interpretatiehulpmiddel. Zo verwijzen de Afdeling en de lagere rechters regelmatig naar het Species guidance document behorend de Habitatrichtlijn alsmede naar de richtsnoeren neergelegd in document COM(2009)313 behorend bij de Burgerschapsrichtlijn. Op het terrein van de directe betalingen spelen interpretatieve richtsnoeren een zichtbare rol in de rechtspraak van het CBb, met als meest geciteerd het werkdocument over het begrip ‘kennelijke fout’.

Toch zijn de interpretatieve richtsnoeren niet de enige types guidance die een rol kunnen spelen in het rechterlijke besluitvormingsproces. De rechtspraak laat ook zien dat guidance met aanbevelingen ten aanzien van de geschikte implementatiemethode als toetsingsmaatstaf wordt gehanteerd. Aan dit type guidance wordt gerefereerd in zaken over vermeende schijnhuwelijken. De Afdeling toetst de implementatiepraktijk in het licht van de richtsnoeren waarin aanbevelingen worden gedaan ten aanzien van de geschikte onderzoeksmethode om schijnhuwelijken te identificeren. Het is echter opmerkelijk dat dit type guidance geen (zichtbare) rol speelt in de rechtspraak van het CBb op het terrein van de rechtstreekse betalingen. Juist op dit terrein worden immers veel guidance documenten aangenomen die aanbevelingen geven ten aanzien van passende implementatiemethoden en technieken.

Welke rol is er voor de twee andere types guidance: de uitleggende guidance en de guidance in vorm van ‘goede praktijken’? Om met de laatste te beginnen: slechts in enkele uitspraken wordt door het CBb verwezen naar ‘goede praktijken’ van andere lidstaten zoals gecommuniceerd door de het Joint Research Centre van de Commissie. In die uitspraken overweegt het CBb dat het feit dat ook andere lidstaten gebruik maken van een driedimensionale meetmethode, voor de keuze van het Nederlandse betaalorgaan pleit om hetzelfde te doen. Voorts blijkt uit een aantal uitspraken dat uitleggende guidance een rol kan spelen bij het nemen van beslissingen om de context en doel van een Unierechtelijke betalingen vast te stellen.

Een gezaghebbend interpretatiehulpmiddel?

Het bovenstaande laat zien dat vooral de interpretatieve richtsnoeren een zichtbare rol vervullen als rechterlijk interpretatie hulpmiddel. De volgende vraag is dan in hoeverre de rechters aan guidance documenten een bindende werking toekennen.

In veel, zelfs een meerderheid, van de uitspraken verwijzen de Nederlandse bestuursrechters naar guidance documenten van de Commissie zonder in te gaan op de juridische status van deze documenten.

In een aantal uitspraken is de rechter echter meer expliciet over de rol van guidance documenten. Het meest expliciet is de Afdeling in uitspraken waarin wordt verwezen naar de richtsnoeren gerelateerd aan de Burgerschapsrichtlijn. Volgens de Afdeling bieden de richtsnoeren COM(2009)313 een handvat voor de interpretatie van de bepalingen van Richtlijn 2004/38, en kan aan guidance documenten derhalve niet 'elke werking worden onzegd'. Door de Afdeling wordt vervolgens vrij consistent naar de rol van de richtsnoeren als 'interpretatiehandvat' gerefereerd.

Het CBb kiest een, vooralsnog uitzonderlijk, expliciete benadering in de recente 'kennelijke fout zaken'. Het CBb maakt duidelijk dat het dit document in aanmerking neemt omdat het afkomstig is van een 'gezaghebbende instantie' (namelijk de Commissie), alsmede vanwege het feit dat de Minister het document hanteert bij de beoordeling of sprake is van een kennelijke fout.

Voorts maakt het CBb in verschillende uitspraken duidelijk dat het de toepassing van richtsnoeren als 'beleidsuitgangspunt' door de Minister accepteert. Echter, uit die uitspraken blijkt ook dat het CBb niet accepteert dat de Minister de richtsnoeren van de Commissie hanteert 'als een dwingend voorschrift'. Daarmee miskent de Minister volgens het CBb het niet-bindende karakter, zo volgt uit de 'vijftig bomen zaken'. Het CBb verlangt van de Minister dat hij een afweging maakt in het licht van de omstandigheden van het geval indien dat wordt vereist door de onderliggende Unierechtelijke bepalingen.

Alhoewel aldus een (voorzichtige) trend lijkt te ontstaan waarbij de toepassing meer wordt gemotiveerd, laat de rechtspraak toch vooral nog vragen open ten aanzien van de status van guidance documenten. Bijvoorbeeld: hanteert de rechter de documenten als een verplicht of juist vrijwillig interpretatiehulpmiddel? Neemt de rechter hierbij de *Grimaldi* rechtspraak van het Hof van Justitie als uitgangspunt? Acht de rechter het mogelijk om van (bepaalde types) guidance af te wijken, en zo ja dient dit te worden gemotiveerd? En, hanteert de rechter eenzelfde maatstaf voor de Nederlandse bestuursorganen?

Uit interviews met staatsraden bij de Raad van State volgt dat guidance documenten van de Europese Commissie als een gezaghebbend interpretatiehulpmiddel worden beschouwd. Dat betekent dat de guidance documenten, zowel door de rechter als door het bestuur, in beginsel dienen te worden gevolgd bij de interpretatie van het Unierecht. Afwijking is moge-

lijk, mits onderbouwd: een 'pas-toe-of-leg-uit' verplichting dus. De vraag is echter of dit perspectief wordt gedeeld door de andere (hoogste en lagere) bestuursrechters. Uit (informele) interviews met andere Nederlandse rechters reist het beeld dat inderdaad verschillend naar de bindende werking van guidance documenten wordt gekeken.

VII. ANALYSE IN HET LICHT VAN DE VIER 'PROMISES'

Na de rol van guidance documenten in de implementatiepraktijk en de rechtspraak te hebben onderzocht, kunnen de bevindingen worden geanalyseerd in het licht van de vier 'promises' van guidance in het licht van de vier rechtsbeginselen (zie hoofdstuk 8). De vraag is dan: in hoeverre dragen guidance documenten bij aan een voorspelbare, consistente en transparante implementatie van het Unierecht en worden daarbij de grenzen van het harde Unierecht in acht genomen en gerespecteerd?

De implementatiepraktijk: de promises onvervuld

De analyse van de toepassing van guidance documenten in de implementatiepraktijk laat, enerzijds, praktijken zien waarmee de vier promises van guidance documenten worden gediend. Dit is het geval in de situatie waarin de, met name interpretatieve, richtsnoeren van de Commissie worden gebruikt bij het opstellen van beleidsregels en zelfs bij het opstellen gedelegeerde regelgeving (namelijk de Ministeriële regeling op het terrein van directe betalingen). Via deze nationale regels kunnen guidance documenten bijdragen aan het vergroten van voorspelbaarheid, transparantie en consistentie in de implementatie van het Unierecht.

Anderzijds getuigt de analyse ook van het bestaan van 'guidance praktijken' die aan het vervullen van de vier promises in de weg staan.

In de eerste plaats wordt een voorspelbaarheidseffect van guidance documenten belemmerd door de onzekerheid ten aanzien van de status en bindende werking van guidance documenten in de implementatiepraktijk. Het is onduidelijk in hoeverre door bestuursorganen een bindende werking aan guidance documenten wordt toegekend en derhalve welke rol guidance documenten spelen als implementatiehulpmiddel. Dit is ook een probleem indien guidance documenten worden gebruikt voor het opstellen van beleidsregels of regelgeving. Indien deze regels, of de besluiten gebaseerd daarop worden aangevochten is het van belang te weten wat de status van deze regels is en of op die regels een beroep kan worden gedaan.

De toepassing van guidance documenten is, in de tweede plaats, veelal onzichtbaar voor de buitenwereld, waardoor guidance documenten ook niet de beoogde 'transparantie-effecten' genereren. De analyse laat zien dat de wetgever en bestuursorganen in veel gevallen niet verwijzen naar guidance documenten. Het is vaak onduidelijk dat artikelen in de Ministeriële regeling over rechtstreekse betalingen zijn gebaseerd op guidance documenten, dat beleidsregels voortvloeien uit Commissierichtsnoeren

of dat individuele beslissingen zijn gebaseerd op richtsnoeren van de Commissie. Daarnaast wordt een transparante toepassing van guidance documenten ook niet bevorderd doordat guidance documenten, zo is bijvoorbeeld het geval op het terrein van rechtstreekse betalingen, alleen toegankelijk zijn voor de nationale autoriteiten maar niet openbaar zijn gemaakt voor justitiabelen.

In de derde plaats zorgen de richtsnoeren van de Commissie ook niet altijd voor een consistente implementatie van het Unierecht. Dit risico doet zich met name voor wanneer de toepassing van guidance documenten wordt beheerst door een ‘cherry picking’ approach, en de richtsnoeren niet zijn omgezet in een Nederlandse beleidsregel. Het gevaar bestaat dan dat richtsnoeren van de Commissie in het ene geval wel worden toegepast, en in het andere geval niet – zoals de toepassing van de richtsnoeren ten aanzien van schijnhuwelijken laat zien. Daarnaast kan ook een frequente herziening van Commissie richtsnoeren leiden tot een veelvuldig wijzigende implementatiepraktijk, en dus aan een consistente toepassing het Unierecht in de weg staan.

In de vierde plaats laat de empirische analyse zien dat ondanks het niet-bindende karakter, guidance documenten in de praktijk een basis kunnen vormen voor beslissingen die niet zijn terug te voeren op een onderliggende Unierechtelijke hard law bepaling. Dit risico is het meest zichtbaar op het terrein van Europese subsidies waar guidance documenten worden toegepast als ware het bindende regels; maar ook wanneer guidance documenten worden gehanteerd om implementatiepraktijken te rechtvaardigen of onderbouwen waarbij de grenzen van de Unierechtelijke hard law bepalingen worden ‘opgezocht’. Dit risico doet zich voor bijvoorbeeld op het terrein van vrij verkeer van personen waar het Unierecht in de regel ‘restrictief’ wordt geïmplementeerd.

Aldus kan worden geconcludeerd dat om verschillende redenen de guidance documenten in de implementatiepraktijk niet de gewenste effecten kunnen vervullen. Het niet bindende, zo flexibele karakter, dat guidance documenten een aantrekkelijk sturingsmiddel maakt, zorgt ervoor dat guidance documenten in de praktijk niet altijd consistent, transparant, voorspelbaarheid en ‘Unierecht-proof’ worden toegepast. In veel opzichten blijven de beloftes van guidance documenten onvervuld.

De rechtspraak: een promises-proof toepassing van guidance?

Bovenstaande conclusie ziet op de toepassing van guidance documenten als implementatiehulpmiddel door de Nederlandse wetgever en bestuursorganen. Hoe zit het u met de Nederlandse rechter? Bevordert de rechter een toepassing van guidance in lijn met de promises of juist niet?

Ook de rechtspraak laat een genuanceerd beeld zien. Aan de ene kant, kunnen verschillende ‘praktijken’ worden ontwaard die ertoe bijdragen dat guidance documenten de gewenste effecten, in ieder geval deels, kunnen vervullen.

In de eerste plaats laat de analyse zien dat de toepassing van guidance documenten als interpretatiehulpmiddel of beoordelingsmaatstaf kan bijdragen aan een transparante, voorzienbare en consistente toepassing van Unierecht door de rechter. Dit is met name het geval wanneer guidance documenten 'steevast' door de rechter wordt aangehaald om een bepaalde bepaling van Unierecht uit te leggen of toe te passen. Een voorbeeld zijn de reeds genoemde 'obvious error' uitspraken van het CBb, waarin het CBb al bijna twintig jaar lang consistent naar het guidance document van de Commissie verwijst.

In de tweede plaats geeft de analyse van de rechtspraak ook voorbeelden van uitspraken waarin de rechter instructies geeft aan het bestuur om 'promises-proof' met guidance documenten om te gaan. Zo verlangt de Afdeling van de minister en de IND om de richtsnoeren in Mededeling COM(2009)313 bij de motivering van een besluit in acht te nemen. Ook lijkt de Afdeling ten aanzien van diezelfde richtsnoeren een zelf-bindende werking voor het bestuur te erkennen. De Afdeling overweegt bijvoorbeeld de richtsnoeren als interpretatiehulpmiddel dienen, des te meer vanwege het feit dat de minister ook zelf regelmatig naar de richtsnoeren in COM(2009)313 verwijst.

Aan de andere kant, is de toepassing van guidance documenten nog niet volledig 'promises-proof'. De rechtspraak laat ook praktijken zien die juist eraan in de weg staan dat guidance documenten de gewenste effecten genereren.

In de eerste plaats is een helder perspectief ten aanzien van de status en bindende werking van guidance documenten niet in de rechtspraak te ontwaren. Zoals hierboven reeds geconcludeerd laat de rechtspraak vooral vragen open ten aanzien van de bindende werking van guidance documenten. Zo blijft onduidelijk of guidance documenten worden beschouwd als verplicht of vrijwillig interpretatiehulp-middel en of de Nederlandse rechter zichzelf in enige mate aan guidance documenten gebonden acht.

In de tweede plaats blinkt de toepassing van guidance documenten door de Nederlandse rechter ook niet uit als het gaat om 'transparantie'. Uit de rechterlijke uitspraken wordt immers niet altijd duidelijk of en in hoeverre guidance documenten een rol hebben gespeeld in de redenering van de rechter. Illustratief is de 'onzichtbaarheid' van het Managing Natura 2000 guidance document in rechterlijke uitspraken, terwijl dit document in de praktijk veel wordt geraadpleegd en gebruikt – zo werd duidelijk in interviews met bestuursrechters.

Ten derde komt ook de consistente toepassing van guidance documenten in gevaar doordat er geen eenduidig perspectief is ten aanzien van de bindende werking van guidance documenten. Zo laten de 'otter-uitspraken' op het terrein van de Habitatrichtlijn zien dat in één zaak het Species guidance document in eerste instantie uitvoering wordt aangehaald door de rechtbank, maar in hoger beroep door het gerechtshof volledig wordt genegeerd. Kortom, ook vanuit transparantie-oogpunt valt er nog veel te winnen.

Tot slot is de vraag of de rechter het niet-bindende karakter van guidance documenten respecteert, en guidance zo gebruikt dat het in lijn is met de onderliggende Unierechtelijke hard law bepalingen. Uit verschillende uitspraken blijkt dat de Nederlandse bestuursrechters het gebruik van guidance documenten als ware het een bindende regelgeving niet accepteren. Dit volgt het meest expliciet uit de rechtspraak van het CBB, zoals de vijftig bomen zaken illustreren. Aldus kan worden geconcludeerd dat de niet-bindende werking van guidance inderdaad expliciet wordt erkend. De analyse laat echter ook zien dat de rechter guidance regelmatig als interpretatiehulpmiddel hanteert, en slechts zelden (expliciet) van richtsnoeren van de Commissie afwijkt. Een al te gemakkelijk 'volgen' van guidance documenten kan ervoor zorgen dat in de praktijk de richtsnoeren van de Commissie, en niet de rechtspraak van het Hof leidend zijn bij de interpretatie van Unierechtelijke hard law. Bovendien zijn op de drie terreinen geen uitspraken gevonden waarin de rechter een vraag stelt aan het Hof van Justitie over de interpretatie en/of geldigheid van guidance documenten van de Commissie.

VIII. CONCLUSIE

Volgens Hofmann, Rowe en Türk '[w]ere the Commission not to provide such guidance, many Member States would, frankly, be stumbling in the dark in their attempts to fulfill the demands of European law'.²

In de praktijk vervullen guidance documenten hun rol als implementatiehulpmiddel op uiteenlopende wijzen, zo wordt duidelijk uit de analyse in dit onderzoek. Zo worden guidance documenten als *de facto* bindend voorschrift gehanteerd; spelen zij een rol als gezaghebbend interpretatiehulpmiddel waar – onder motivering – van af kan worden geweken of staat de toepassing van guidance in het teken van een 'cherry picking' benadering. De Nederlandse bestuursrechter hanteert de guidance documenten voornamelijk als interpretatiehulpmiddel, maar laat vooral ook vragen open ten aanzien van de bindende werking van guidance documenten voor Nederlandse bestuursorganen en voor de rechter zelf.

De onvoorspelbare en vaak onzichtbare wijze waarop met guidance documenten wordt omgegaan in de praktijk, roept spanningen op in het licht van beginselen die bij de implementatie van het Unierecht in acht dienen te worden genomen. De bevindingen van dit onderzoek laten zien dat de toepassing van guidance documenten kan leiden tot rechtsonzekerheid, inconsistentie, een gebrek aan transparantie en dat zij zelfs de rol van het Unierecht kunnen overnemen.

Voor de legitimiteit van het EU-bestuur en van het nationale bestuur is echter van groot belang dat met guidance documenten wordt omgegaan op een wijze die (zoveel mogelijk) in lijn is met rechtsbeginselen. Immers,

2 Hofmann, Rowe & Türk 2011, p. 570.

het feit dat guidance documenten worden gekarakteriseerd door een sterk informeel karakter, betekent niet dat de toepassing van guidance niet door rechtsbeginselen wordt genormeerd. Integendeel, indien guidance documenten in de nationale rechtsorde tot juridische vragen en problemen leiden, staat daarmee de legitimiteit van guidance als sturingsmiddel onder druk.

Dit betekent dat verder moet worden nagedacht over de vraag hoe de aanname en toepassing van guidance documenten op Europees niveau en in de Nederlandse rechtsorde te reguleren of stroomlijnen.

Daarbij lijkt wellicht de meest voor de hand liggende oplossing om guidance documenten een expliciete basis te geven in de EU-Verdragen om de aanname daarvan te regelen en de status daarvan te verduidelijken. Echter, zo een maatregel zou ook afbreuk doen aan het informele karakter van guidance documenten en de bindende werking van die richtsnoeren kunnen versterken. Daarmee zou de vrijheid van de lidstaten in de implementatie van het Unierecht en de flexibiliteit van guidance onnodig worden beperkt.

De oplossing kan derhalve beter worden gevonden in de vorm van zachte regels, een soort 'guidance voor guidance' dus, die de Commissie, wetgever, bestuur en rechter begeleiden bij de toepassing van guidance documenten en uitnodigen – zoveel mogelijk – om te gaan met guidance documenten op een transparante, consistente en voorspelbare wijze. Daarnaast kunnen de zachte regels herinneren aan de verantwoordelijkheid van de lidstaten voor de implementatie van het Unierecht, zodat bij de aanname en toepassing van guidance documenten de ruimte en flexibiliteit die door het Unierecht wordt geboden wordt benut, maar ook de grenzen die door het Unierecht worden gesteld, in acht worden genomen.

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This thesis contains and/or builds on the following previously published work by the author:

- J.C.A. Van Dam, 'De doorwerking van Europese administratieve soft law: in strijd met Nederlandse legaliteit?', *Netherlands Administrative Law Library*, 2013.
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- MI-316 R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019
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- MI-318 R.J.W. van Eijk, *Web Privacy Measurement in Real-Time Bidding Systems. A Graph-Based Approach to RTB system classification*, Amsterdam: Ipskamp Printing 2018, ISBN 978 94 028 1323 4
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- MI-320 Y. Tan, *The Rome Statute as Evidence of Customary International Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019
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- MI-323 I. Antonaki, *Privatisations and golden shares. Bridging the gap between the State and the market in the area of free movement of capital in the EU*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019
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- MI-325 L.B. Esser, *De strafbaarstelling van mensenhandel ontrafeld. Een analyse en heroriëntatie in het licht van rechtsbelangen* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 697 6
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With the issuing of guidance documents the European Commission assists the Member States in the implementation of Union law. This thesis seeks to unravel the process of governance through guidance by tracing its role and legal implications in the Dutch legal order.

The first part explores the use of guidance documents by Dutch authorities and courts. Along the lines of five types of guidance and four perspectives on their binding force, different roles of guidance are discerned. National courts act as counterbalancing or facilitating actors by reinforcing or downplaying the role of guidance documents in implementation processes.

The second part assesses the implications in the light of legal principles. To this end, it formulates four 'promises', or ideal effects, that outline how the use of guidance documents could contribute to a predictable, consistent and transparent implementation process, whilst respecting the rule of EU hard law. The analysis finds that, in practice, these 'promises of guidance' are not always fulfilled: a gap between promise and practice exists.

The findings thus show how the issuing and use of guidance risks to challenge the rule of law that is so fundamental to the EU legal order. This thesis therefore invites to rethink governance through guidance.

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