



Universiteit  
Leiden  
The Netherlands

## Guidance documents of the European Commission in the Dutch legal order

Dam, J.C.A. van

### Citation

Dam, J. C. A. van. (2020, February 11). *Guidance documents of the European Commission in the Dutch legal order*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/86926>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/86926>

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

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/86926> holds various files of this Leiden University dissertation.

**Author:** Dam, J.C.A. van

**Title:** Guidance documents of the European Commission in the Dutch legal order

**Issue Date:** 2020-02-11

Guidance documents of the European Commission  
in the Dutch legal order



# Guidance documents of the European Commission in the Dutch legal order

PROEFSCHRIFT

ter verkrijging van  
de graad van Doctor aan de Universiteit Leiden,  
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,  
volgens besluit van het College voor Promoties  
te verdedigen op dinsdag 11 februari 2020  
klokke 16.15 uur

*door*

Johanna Clara Adriana van Dam

geboren te Rotterdam

in 1987

Promotiecommissie: Prof. dr. T. Barkhuysen  
Prof. dr. W.J.M. Voermans  
Prof. dr. L.A.J. Senden (Universiteit Utrecht)  
Dr. O. Stefan (King's College London, UK)  
Prof. dr. H.C.H. Hofmann (University of Luxembourg,  
Luxembourg)

*No part of this publication may be reproduced, stored in a retrieval system, made available or communicated to the public, in any form or by any means, without the prior permission in writing of the publisher, unless this is expressly permitted by law.*

## 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



## Tables of Figures

Table 2-1 Legal principles, promises and ideal uses in light of legal principles	58
Table 3-1 Types of guidance	69
Table 5-1 Categories of direct payments guidance documents	116
Table 5-2 Groups of rulings that refer to direct payments guidance documents	137
Table 6-1 Number of rulings that refer to Habitat guidance documents	177
Table 7-1 Groups of rulings that refer to FMP guidance documents	216
Table 8-1 Use of guidance as an implementation aid: perspectives on bindingness	244
Table 8-2 Uses of guidance in implementing measures	245
Table 8-3 Uses of guidance by Dutch courts: degree of bindingness	246
Table 9-1 Two lenses to study the roles of guidance	264
Table 9-2 Better regulation principles for the issuing of guidance	279
Table 9-3 Types and EU expectations	280
Table 9-4 Guidelines for a principled use of guidance by national authorities	281
Table 9-5 A principled use of guidance by national courts	282
Annex Table 1 – Amending decisions to the Ministerial Regulation on direct payments	289
Annex Table 2 – Amending decisions to the policy rules on direct payments	289
Annex Table 3 – Number of explicit references in explanatory memoranda	291
Annex Table 4 – Provincial regulations and policy rules	292
Annex Table 5 – Amending decisions to the Aliens Act	294
Annex Table 6 – Amending decisions to the Aliens Circular	295
Annex Table 7 – Direct payments guidance documents and number of rulings	297
Annex Table 8 – Habitat guidance documents in the rulings of Dutch courts	302
Annex Table 9 – Groups of rulings that refer to the Species guidance document	303
Annex Table 10 – FMP guidance: Search terms and results	305
Annex Table 11 – FMP guidance documents: number of relevant rulings	305
Annex Table 12 – FMP guidance: Council of State and District Court of The Hague	305



# Contents

PREFACE	V
ACKNOWLEDGMENTS	VII
ABBREVIATIONS	IX
TABLES OF FIGURES	XI
CONTENTS	XIII
1 INTRODUCTION	1
1.1 Fifty trees	2
1.2 ‘Governance through guidance’	4
1.3 Challenging the rule of law?	7
1.4 Research dilemma and question	9
1.5 Design	11
1.5.1 Exploring the issuing and use of guidance at the EU level	11
1.5.2 Exploring the use of guidance in the Netherlands	13
1.5.3 Analysing the use of guidance in light of legal principles	15
1.6 Three policy areas	15
1.7 Methods	17
1.8 Outline	19
2 COMMISSION GUIDANCE AND ITS PROMISES	21
2.1 The phenomenon of guidance	21
2.1.1 Guidance and hard law	21
2.1.2 Guidance and soft law	23
2.1.3 A post-law function	25
2.2 The competence of the Commission to issue guidance documents	26
2.2.1 The Commission as guardian of the Treaties	26
2.2.2 Limits: no ‘new’ obligations	28
2.3 Functions of guidance in a shared and integrated legal order	30
2.3.1 What Does it Mean? Clarifying EU Legislation	31
2.3.2 United in too much diversity? Harmonising effects of guidance	31
2.3.3 Dialogic function of guidance documents	32
2.4 Informality: the key to success?	33
2.4.1 Features of informality	33
2.4.2 Advantages of informality	36
2.4.3 Risks of informality	38

2.5	Guidance, legal principles and promises	41
2.5.1	Legal principles: an EU perspective	42
2.5.2	Which legal principles?	43
2.5.3	From principles to promises	46
2.5.4	Promise 1: promoting certainty and predictability in the implementation of EU law	47
2.5.5	Promise 2: Promoting consistency in the implementation of EU law	49
2.5.6	Promise 3: Promoting transparency in the implementation of EU law	51
2.5.7	Promise 4: Respecting the rule of EU (hard) law	53
2.6	Conclusion	58
3	A TYPOLOGY OF GUIDANCE AND EU EXPECTATIONS	61
3.1	Developing a typology	61
3.2	Five types of guidance	62
3.2.1	Interpretative guidance: providing interpretative rules	63
3.2.2	Implementing guidance: recommendations on implementing measures	64
3.2.3	Explanatory guidance: explaining and providing an overview of legislation and jurisprudence	65
3.2.4	Technical guidance: providing for technical modalities	67
3.2.5	The dissemination of good practices	68
3.3	EU expectations on the use of guidance by national authorities	69
3.3.1	The <i>IJssel-Vliet</i> case law: binding legal effects on the Member States	70
3.3.2	Obligations in secondary legislation: comply or explain?	71
3.3.3	The use of guidance as a supervisory tool by the European Commission	74
3.4	EU Expectations on the use of guidance documents by national courts	77
3.4.1	The use of Commission guidance as an interpretation aid by the CJEU	78
3.4.2	The <i>Grimaldi</i> case law: guidance as a mandatory interpretation aid for national courts	80
3.4.3	The <i>IJssel-Vliet</i> case law: binding effects on national courts?	84
3.4.4	Preliminary questions and guidance documents	85
3.5	Conclusion	86
4	COMMISSION GUIDANCE IN THE DUTCH LEGAL ORDER	89
4.1	Characteristics of Dutch administrative law in an EU context	90
4.2	Dutch authorities and the implementation of EU law	92
4.2.1	Adopting 'implementing legislation'	94
4.2.2	The Dutch policy rule	95
4.2.3	Administrative decisions	96
4.2.4	Other implementing measures and practices	98

4.3	Dutch courts and the implementation of EU law	98
4.3.1	The competence of Dutch administrative and civil courts	99
4.3.2	The judicial organisation of administrative courts in the Netherlands	100
4.4	Perspectives on bindingness to analyse the use of Commission guidance	101
4.4.1	Developing perspectives on bindingness: a bottom-up approach	102
4.4.2	The use of Commission guidance by national authorities	104
4.4.3	The use of Commission guidance by national courts	105
4.5	Conclusion	106
5	DIRECT PAYMENTS GUIDANCE: LEGISLATION IN DISGUISE?	109
5.1	The EU direct payments legal framework	109
5.1.1	A complex legal framework	110
5.1.2	Shared management	111
5.1.3	Flexibility	112
5.2	Direct payments guidance documents	113
5.2.1	A scattered landscape	114
5.2.2	Types of guidance	117
5.3	EU expectations on the use of direct payments guidance documents	118
5.3.1	Expectations of the Commission: guidance as an audit tool	118
5.3.2	Expectations of the Court of Justice	121
5.3.3	Strong pressures to act guidance-proof	122
5.4	Implementing EU direct payments legislation in the Netherlands	123
5.4.1	The legal framework: the Ministerial Regulation and policy rules	123
5.4.2	Actors: the ministry and paying agency	123
5.4.3	The Dutch Trade and Industry Appeals Tribunal	124
5.5	The use of direct payments guidance by national authorities	124
5.5.1	Bringing the Ministerial Regulation in line with Commission guidance	125
5.5.2	A silent influence of Commission guidance in Dutch policy rules	129
5.5.3	Guidance as a standard for implementing and technical decisions	131
5.5.4	Individualised decisions: guidance as a 'binding instruction'?	133
5.5.5	Conclusion: direct payments guidance as binding rule or standard	135
5.6	The use of direct payments guidance by the Trade and Industry Appeals Tribunal	136
5.6.1	No use of guidance 'as if it were a binding rule'	138

5.6.2	Direct payments guidelines as an (authoritative) judicial interpretation aid	142
5.6.3	Beyond interpretation: what roles for other types of guidance?	144
5.6.4	Commission guidance overruled	147
5.6.5	Conclusion: the Tribunal as counterbalancing actor	148
5.7	Conclusion	149
6	HABITAT GUIDANCE: GOVERNED BY UNCERTAINTY	151
6.1	The Habitats Directive	152
6.1.1	Leaving room for manoeuvre to the Member States	152
6.1.2	The Commission as guardian of the Species	152
6.1.3	The Fitness check and focus on implementation on the ground	153
6.2	Habitat guidance documents	154
6.2.1	Natura 2000 guidance documents	154
6.2.2	Guidance on Species protection	157
6.3	EU expectations on the use of Habitat guidance documents	158
6.3.1	The Commission: a 'flexible approach'	158
6.3.2	The CJEU: few references to Habitat guidelines	159
6.3.3	Conclusion: addressing heterogeneity	161
6.4	The implementation of the Habitats Directive in the Netherlands	161
6.4.1	Previous legislative acts transposing the Habitats Directive	162
6.4.2	The 2017 Nature Protection Act: decentralised implementation	163
6.4.3	A layered system of judicial protection	164
6.4.4	Conclusion: a promising role for Habitat guidance documents	164
6.5	The use of Habitat guidance documents by national authorities	165
6.5.1	Translating guidance in the explanatory memorandum to the Nature Protection Act	165
6.5.2	Provincial regulations and policy rules: a limited role for Habitat guidance	167
6.5.3	Management plans and appropriate assessments: guidance for interpretation only?	168
6.5.4	Granting derogations and licences: guidance as (silent) interpretation aid	170
6.5.5	Different types of guidance, different perspectives?	172
6.6	The use of Habitat guidance documents by Dutch courts	176
6.6.1	MN2000 guidance: few references in the rulings of Dutch courts	177
6.6.2	Species guidelines as judicial interpretation aid	180
6.6.3	Beyond explicit references: do the rulings give a misleading picture?	186
6.7	Conclusion	188



7	FMP GUIDANCE DOCUMENTS: A PRACTICE OF CHERRY PICKING	191
7.1	The Citizenship Directive	192
7.1.1	Free movement of persons: touching on national immigration policies	192
7.1.2	The conditions and limitations governing the right to free movement	193
7.1.3	The Member States' conception of discretionary control	194
7.1.4	The Metock ruling and the request for Commission guidelines	195
7.1.5	The Commission's response	196
7.2	The FMP guidance documents	196
7.2.1	The 2009 Communication	196
7.2.2	The Handbook addressing alleged marriages of convenience	197
7.2.3	A request for further guidance and a spill-over effect to family reunification	199
7.3	EU expectations on the use of FMP guidance documents	200
7.3.1	Expectations of the European Commission	200
7.3.2	Silence of the Court of Justice	202
7.3.3	Conclusion: soft pressures to act guidance-proof	203
7.4	The implementation of the Citizenship Directive in the Netherlands	204
7.4.1	A restrictive immigration policy	204
7.4.2	A multi-layered legal framework	205
7.4.3	Actors: the Ministry and the Immigration and Naturalisation Service	206
7.4.4	The competent courts	206
7.5	The use of FMP guidance documents by national authorities	207
7.5.1	The Aliens Act and the Aliens Decree: a limited role for FMP guidance documents	207
7.5.2	Transposing FMP guidelines into Dutch policy rules	208
7.5.3	Implementing guidance and alleged marriages of convenience	211
7.5.4	The 2009 guidelines as an aid to justify individualised decisions	213
7.5.5	FMP guidelines in working instructions	214
7.5.6	Conclusion: a practice of 'cherry picking'	214
7.6	The use of FMP guidance documents by national courts	215
7.6.1	The 2011 rulings: setting the scene	216
7.6.2	The FMP guidelines as a judicial interpretation aid: settled case law	218
7.6.3	Reviewing the method of investigating marriages of convenience: beyond interpretation	222
7.6.4	A (self) binding effect? Courts as facilitating actor	223
7.7	Conclusion	227

8	TRENDS AND ANALYSIS IN LIGHT OF THE PROMISES	229
8.1	Guidance as an informal regulatory tool: united in diversity	229
8.1.1	The frequency, form, issuing process and types of guidance	230
8.1.2	Driving forces and pressures to act guidance-proof	231
8.2	Roles of guidance as implementation aid	232
8.2.1	Perspectives on bindingness	233
8.2.2	Guidance as an aid to interpret provisions of EU law	234
8.2.3	Guidance as an aid to understand and explain EU law provisions	235
8.2.4	Guidance as an aid to take decisions on implementing measures	236
8.2.5	Guidance as an aid to take decisions on the form of technical measures	236
8.2.6	Guidance as an aid to develop good implementing practices	237
8.3	National courts as facilitating or counterbalancing actors	238
8.3.1	National courts as a counterbalancing actor	238
8.3.2	National courts as a facilitating actor	240
8.4	Guidance as an implementation tool: the promises fulfilled?	247
8.4.1	Enhancing (un)certainty in the implementation of EU legislation?	247
8.4.2	Promoting (in)consistency in the implementation of EU law?	248
8.4.3	Giving rise to problems of transparency in the implementation of EU law?	250
8.4.4	Challenging the promise of non-bindingness: legality at risk?	251
8.5	National courts: promoting the promises of guidance?	254
8.5.1	Clarifying or mystifying the status of Commission guidelines?	254
8.5.2	Promoting an (in)consistent use of Commission guidelines?	255
8.5.3	Promoting (a lack of) transparency through Commission guidelines?	257
8.5.4	Promoting a legality-proof use of guidance or challenging the promise of non-bindingness?	259
8.6	Conclusion	261
9	CONCLUSION	263
9.1	Summary of research project	263
9.2	The use of Commission guidance by national authorities: a gap between promise and practice?	265
9.2.1	Promoting promises through national implementing practices	265

9.2.2 Using Commission guidance whilst putting the promises at risk	266
9.2.3 No role for Commission guidance: the promises left unfulfilled	268
9.3 National courts: bridging the gaps between promises and practice?	268
9.3.1 Guidelines as a judicial decision-making aid: promoting promises	269
9.3.2 Guidelines in judicial practice: promises at risk	271
9.3.3 No role for guidelines in judicial practice: increasing the gap	272
9.4 Three answers to the research question	273
9.5 The legitimacy of governance through guidance at risk	275
9.6 Towards a principled approach: 'Guidance for Guidance'?	277
9.6.1 Giving guidance a legal basis: too much formalisation?	277
9.6.2 The Commission: guidelines for guidance and managing EU expectations	278
9.6.3 The Court of Justice: clarifying guidance's legal status	280
9.6.4 National authorities: taking a principled approach	280
9.6.5 National courts as guardians of legal principles	282
9.6.6 Further research	283
ANNEX	285
SAMENVATTING (DUTCH SUMMARY)	313
BIBLIOGRAPHY	327
CASES	343
CURRICULUM VITAE	349
PREVIOUSLY PUBLISHED WORK	351