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

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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 governance<sup>1</sup> has become increasingly important in addressing the many challenges the EU faces.<sup>2</sup> It is in the informal sphere that sometimes solutions can be found for problems that cannot be solved by law.<sup>3</sup> 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.<sup>4</sup> 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.’<sup>5</sup>

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.<sup>6</sup> Without such guidance documents Member States would be ‘stumbling in the dark in their attempts to fulfil the demands of European law’.<sup>7</sup>

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

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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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

### *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?

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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.<sup>11</sup>

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’)<sup>12</sup>. Guidance documents are also referred to as ‘unilateral rulemaking’ (in the sense that it is issued unilaterally by the Commission), as ‘informal rulemaking’<sup>13</sup> 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.

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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.<sup>14</sup> Soft law, in the words of Stefan, is 'booming in many policy fields'.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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'.<sup>19</sup>

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

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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'.<sup>20</sup>

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,<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> Commission officials even consider 'guidelines' amongst the most effective compliance instruments,<sup>24</sup> and also in legal literature guidance documents are often associated with effective implementation of EU law.<sup>25</sup> With the aim of 'good implementation' of Union law in the Member States high on the 'better regulation agenda',<sup>26</sup> 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.<sup>27</sup>

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',<sup>28</sup> enabling EU regulatory policies to achieve results in practice and to further the EU integration process.<sup>29</sup> 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.<sup>30</sup> In view of the assumed problem-solving character, guidance documents are associated with the notion of output

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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.<sup>31</sup> It is the output, the effects that guidance documents achieve in practice that is an important parameter for their success as a governance tool.<sup>32</sup>

### 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.<sup>33</sup> 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.<sup>34</sup> These legal principles also have to be observed by the Member States when implementing the binding Union rules at the national level.<sup>35</sup>

The proliferation of guidance documents has encountered fierce criticism, both in legal literature as well as in practice,<sup>36</sup> 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.<sup>37</sup> Input legitimacy requires, as stated by Scharpf, that those affected by a decision have in some way been involved in the adoption process.<sup>38</sup> 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

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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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup> Another risk is the lack of transparency that often surrounds the issuing<sup>44</sup> and, possibly, also the use of guidance documents.<sup>45</sup> 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.<sup>46</sup>

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'.<sup>47</sup> 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.<sup>48</sup> 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

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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'.<sup>49</sup> 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,<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> In practice,

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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 conducted<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.

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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.<sup>57</sup> 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.<sup>58</sup>

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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’.<sup>59</sup> 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.<sup>60</sup>

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.

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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.<sup>61</sup> 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.

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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).<sup>62</sup> 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:

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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.<sup>63</sup> 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.<sup>64</sup>

### 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'<sup>65</sup> 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.<sup>66</sup>

### 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

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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.<sup>67</sup> 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,<sup>68</sup> 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’.<sup>69</sup>

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.<sup>70</sup> 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’.<sup>71</sup> 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.

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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.<sup>72</sup> 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.<sup>73</sup>

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](http://www.rechtspraak.nl), and is described in section 1.3 of the Annex.

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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](http://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.