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Guidance documents of the European Commission in the Dutch legal order

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2 Commission guidance and its promises

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]

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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]

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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 a-typical 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.

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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:C1990:348 (*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.

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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]

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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.* Nicolaides 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, flexibility[57] or discretion[58] to the Member States in the implementation of EU law. For instance, EU legislative rules could provide for a certain margin of appreciation[59] 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]

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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]

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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 the 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 be 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 guidelineshowever, 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 law[93] 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]

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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 equality[184] 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 precise[186] 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]

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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 & Ortlep 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 Luijendijk 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 Luijendijk & 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 illusionary 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 illusionary 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'	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.