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

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

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

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

### 3.1 DEVELOPING A TYPOLOGY

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

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

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

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

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

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

### 3.2 FIVE TYPES OF GUIDANCE

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

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

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

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

The purpose of discerning among these five different types of guidance is not to make a clear-cut distinction between guidance documents that contain interpretative elements and guidance documents that do not. In practice, the line between interpretation and application is hard to draw.<sup>6</sup> The attempt to distinguish different types of guidance in the first place serves analytical purposes: it enables tracing the use and effects of different guidance provisions in the national legal order in a more systematic and differentiated manner.

### 3.2.1 Interpretative guidance: providing interpretative rules

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

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

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

7 This first type of guidance falls into category of 'interpretative acts' that is defined by Senden as one category of administrative rule-making as opposed to decisional acts that make clear how the European Commission intends to use its implementing or discretionary powers. See Senden 2013, p. 60-61 and above section 2.1.3.

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

9 Lefèvre discerns among 'passive' and 'active' interpretation. The act of passive interpretation occurs when the Commission provides its own interpretation of EU law, whereas in the case of passive interpretation the European Commission limits itself to codifying an area of EU law. Lefèvre 2004, p. 812, 813. A similar distinction is made by Groenewegen between a broad and narrow interpretation of the law, see Groenewegen 2006, p. 7,8.

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

The character of interpretative guidelines of the European Commission may differ in the extent to which interpretative guidance is given. In some situations, an interpretative guidance provision prescribes what should be decided in a specific case. An example is the fifty trees rule laid down in the working document that was adopted by the DG AGRI services in 2005.<sup>11</sup> This document prescribes that as a general rule, parcels that contain more than fifty trees per hectare should be considered ineligible.<sup>12</sup> In other guidance documents, the interpretative guidance only lists factors or gives general guidance that should be taken into account by national authorities. For instance, in the area of free movement of persons, guidance is given as to whether an individual can be considered a genuine, sufficiently serious threat by providing factors that can be taken into account by national authorities.<sup>13</sup>

### 3.2.2 Implementing guidance: recommendations on implementing measures

When the objectives or provisions laid down in EU legislation are clear, guidance may still be given as to what instruments could be used in order to effectively implement the EU legislative requirements.<sup>14</sup> National authorities need to make choices on the form and content of implementing measures, and to this end often need to acquire knowledge as to the risks and pitfalls of specific decisions or instruments.<sup>15</sup> However, the options and the expected effects of the different modes or methods as to how to implement EU legislation may not be clear to the national authorities that are involved in the implementation of EU legislation.

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

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

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

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

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

14 Compare Nicolaidis 2012, p. 6.

15 Nicolaidis 2012, p. 7, 8.

menting guidance is an understanding of the European Commission as to the objectives and requirements laid down in the EU legislative act, and therefore the presence of some interpretative elements cannot be ruled out.

Examples of implementing guidance can be found in the area of EU agricultural subsidies concerning the implementation of the integrated administration and control system.<sup>16</sup> For instance, the 'guidance for on-the-spot checks and area measurement' spells out possible definitions that can be chosen on how to demarcate an agricultural parcel for the purpose of on-the-spot checks.<sup>17</sup> Provisions of implementing guidance also feature in the guidance documents related to the Habitats Directive. For instance the guidance document 'Managing Natura 2000' that accompanies the Habitats Directive, outlines the possible methodology that could be applied when conducting an 'appropriate assessment' in order to assess whether the plan or project will adversely affect the integrity of a Natura 2000 site.<sup>18</sup> In a similar way, the Managing Natura 2000 guidance document recommends that 'alternative solutions and mitigation measures' can be taken into account when examining the implications for the site.<sup>19</sup>

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

In addition to interpretative guidelines and recommendations on implementing measures, the guidance documents that are issued by the European Commission may also have an explanatory character. A guidance document has an explanatory character when it summarises legislative provisions or where it explains the rationale or logic behind the legislative provisions. The purpose of explanatory guidance is not to add further interpretative rules to the legislative act. Explanatory guidance seeks to capture or explain what is already in the law.<sup>20</sup>

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

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16 The integrated administration and controls system needs to be set up by the Member States in order to ensure that the EU direct payments legislation is implemented correctly. See chapter II of Regulation 1306/2013/EU.

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

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

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

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

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

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

There may be different reasons for providing explanatory guidance to complement the legislative provisions that were adopted by the EU legislature. One of these reasons could be that the EU legal framework is characterised by a high level of complexity,<sup>23</sup> which is certainly the case for explanatory guidance documents issued in relation to the complex EU direct payments legal framework.<sup>24</sup> An example is the guidance on the purpose and content of on-the-spot checks<sup>25</sup> as well as the 'aid applications guidance' which explains the logic behind the issuing of 'pre-established information' for aid applications to be submitted by the beneficiaries.<sup>26</sup> The issuing of explanatory guidance documents by the European Commission may also be explained in view of the absence of explanatory memoranda to the EU legislative acts adopted at the European level.<sup>27</sup> One guidance document that seems to fill this gap is for instance the Natura 2000 guidance document, which at many places explains the logic behind Article 6 of the Habitats Directive.<sup>28</sup>

As mentioned above, explanatory guidance provides an explanation of the logic or the rationale behind legislative rules, but does not seek to add interpretative rules to the legislative text. Despite this codifying character of explanatory guidance, some interpretative elements, although hard to discern, might be present.<sup>29</sup> Indeed, even the explanation of legislative rules could reflect a normative view of the Commission services as to the interpretation of legislative provisions. Consequently, explanatory guidance may also guide implementing practices at the national level in a certain direction. However, this influence might be difficult to identify since it is likely that it is not readily visible in the implementing practices.<sup>30</sup>

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

23 Baratta 2014, p. 293-298.

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

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

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

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

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

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

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



### 3.2.4 Technical guidance: providing for technical modalities

More easily identifiable perhaps than explanatory guidance, is the provision of technical assistance to Member States. This type of guidance complements the EU legislative acts that require the adoption of technical measures. In several policy areas, EU legislative rules lay down technical standards that need to be achieved or outline several technical measures that can be adopted in order to comply with the legislative requirements.<sup>31</sup> It is then up to the national authorities to choose the technical modalities in order to comply with the EU legal standards.

Technical guidance is used to spell out the technical modalities or minimum standards that the Member States could apply in order to comply with the requirements laid down in legislation. Underlying this technical guidance, as with implementing guidance, is a view of what is necessary to achieve compliance with the requirements set out by the EU legislature. Technical guidance documents generally do not contain interpretative elements, although in practice the line between interpretation and technical rules may be hard to draw.<sup>32</sup>

The European Commission provides for technical assistance to the Member States in several policy areas. Guidance with a technical nature is issued for instance in relation to the Water Framework Directive<sup>33</sup> and in relation to the Industrial Emissions Directive.<sup>34</sup> Technical guidance also represents a considerable part of the guidance documents that are issued in the area of EU agricultural subsidies. Due to the technical character of the rules, it is not the DG AGRI Commission services but the Joint Research Centre that prepares the largest part of the technical guidance.<sup>35</sup> The Joint Research Centre, which is the Commission's scientific and knowledge service, also provides technical guidance documents in other policy areas.<sup>36</sup>

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

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

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

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

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

36 For instance, the JRC also provides for the BREF documents related to the Industrial Emissions Directive. Technical guidance documents may also be issued by agencies. For instance, the European Chemicals Agency issues guidance documents that facilitate the implementation of the REACH Regulation (Regulation 1907/2006/EC). See <https://echa.europa.eu/guidance-documents/guidance-on-reach> (last accessed at 29 April 2019).

### 3.2.5 The dissemination of good practices

The fifth type of guidance that can be discerned is that of facilitating an exchange of good practices and communicating the good practices to the Member States. These practices can, for instance, be presented during a workshop where officials from the Member States are present. Following the exchange of experiences, the good practices that were identified by the European Commission can be communicated to the Member States. These practices reflect appropriate ways or practices that are expected to lead to compliance with the requirements of EU legislation.<sup>37</sup> Similar to implementing guidance, the communication of good implementing practices increases the insights and knowledge of the Member States as to what implementing choices are available. In this way, informed decisions can be made as to what decision to make when implementing the EU legislative requirements.<sup>38</sup>

The exchange of good practices can be found, for instance, in the area of free movement of persons, in the Handbook addressing the fight against marriages of conveniences. This Handbook provides a toolkit to assist Member States in detecting whether a marriage is one of convenience.<sup>39</sup> The Handbook is issued by the European Commission though prepared in close cooperation with the Member States.<sup>40</sup> An overview of good practices can also be found in the guidance document on the Management of Natura 2000 sites in relation to the methodology that could be followed when developing the so-called 'management plans' mentioned in Article 6(1) of the Habitats Directive.<sup>41</sup> Recently, also in the area of EU agricultural subsidies, workshops have been organised in order to facilitate the exchange of good practices and to disseminate these good practices to the Member States.<sup>42</sup>

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

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

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

39 SWD(2014)284 final, 2014.

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

41 Managing Natura 2000 sites, p. 53.

42 An example is the workshop on the Active Farmer's provisions held on 27 October 2015, see <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=20934&no=3> (last accessed at 23 April 2019).

Table 3-1 Types of guidance

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

3.3 EU EXPECTATIONS ON THE USE OF GUIDANCE BY NATIONAL AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52 Van Dam 2013, par. 2.2.2.

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

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

### 3.3.2 Obligations in secondary legislation: comply or explain?

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

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

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

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

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

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

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

58 Directive (EU) 2018/1972.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

national customs authorities shall take into account the Conclusions of the Customs Code Committee.<sup>69</sup>

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

78 Hofmann, Rowe & Türk 2011, p. 756.

79 See also Van Rijsbergen 2014, p. 124.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thus, the Court of Justice uses guidance documents as an interpretation aid, both in an implicit or explicit manner. This, however, does not mean that the Court of Justice *always* follows the guidance given by the European Commission. It has been argued that the Court of Justice uses guidance documents in so far as the Court considers the interpretation supportive to its own interpretation and line of reasoning.<sup>99</sup> This also means that the Court of Justice can just as well depart from the interpretative guidance proposed by the Commission.<sup>100</sup> This is shown by the ruling *SM*. In this case, the Court of Justice does not follow the Commission's interpretation that a child placed in legal guardianship of a Union citizen falls within the scope of the definition of 'direct descendent' as laid down in Article 2(2) (c) of Directive 2004/38.<sup>101</sup> The Court considers that the definition of this concept does not include the interpretation 'such as that which is apparent from point 2.1.2 of Communication COM(2009)313 final'.<sup>102</sup> Another example is the case *SF*, in which the Court makes explicitly clear that the Commission guidelines do not bind the Court.<sup>103</sup> In this case, the Court does not follow the interpretation proposed in the explanatory notes and a practical guide that were adopted by the Administrative Commission for the Coordination of Social Security Systems. The Court considers that 'even though those documents are useful tools for interpreting the regulation No 883/2004, they are not legally enforceable and cannot, therefore, bind the Court in the interpretation of that regulation.'<sup>104</sup>

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

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

96 Compare Senden 2004, pp. 372, 373.

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

98 Senden 2004, p. 372.

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

100 Luijendijk & Senden 2011, p. 328.

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

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

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

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

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

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

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

Later it becomes clear that for national courts the use of guidance documents, or in any case of recommendations of the European Commission, is not entirely voluntary. Important in this respect is the *Grimaldi* ruling handed down by the Court in 1989.<sup>108</sup> In the *Grimaldi* ruling the Court of Justice considers that a recommendation that is issued in the field of social policy cannot, despite its lack of binding force, be regarded as having no legal effects.<sup>109</sup> National courts are bound to take the recommendation into consideration. The Court considers:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

118 *Autoriteit Consument en Markt*.

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

The Dutch Tribunal, however, considers that a different model, the ‘Bulric plus model’ could be more appropriate in light of the facts of the case.<sup>120</sup> In a previous case, the Tribunal had already deviated from the Commission’s recommendation, considering the Bulric plus model the appropriate price regulation measure.<sup>121</sup> In *KPN v ACM* the Tribunal decides to refer a question to the Court of Justice on whether it is possible for the national court to deviate from the method proposed by the European Commission.<sup>122</sup> In light of the *Grimaldi* case law of the Court of Justice, the Dutch highest administrative court considers it uncertain what weight needs to be given to Commission Recommendation 2009/396.<sup>123</sup>

In its preliminary ruling, the Court of Justice first notes that a national court may depart from Recommendation 2009/396.<sup>124</sup> This follows from Article 4(1) of the Framework Directive which requires that an effective appeal mechanism needs to be put in place by the Member States. The Court then refers to the *Grimaldi* formula and recalls that it is settled case law that national courts are nevertheless bound to take recommendations into consideration.<sup>125</sup> The Court subsequently gives further guidelines on what this obligation entails for national courts in the context of reviewing the decisions of the national regulatory authority:

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

134 Compare Luijendijk & Senden 2011, p. 355.

135 See also Van Dam 2013, par. 2.2.2.

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

### 3.4.4 Preliminary questions and guidance documents

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

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

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

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

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

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136 Article 19 TEU.

137 Hartley 2014, p. 281, 282.

138 Van Harten 2014, p. 11 and 20.

139 Jacqu   2012, p. 693.

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

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

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

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

### 3.5 CONCLUSION

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

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

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

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

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

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

147 Eliantonio 2018, p. 513.

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

guidance documents can take different forms and shapes. Five types of guidance have been identified that seek to assist the Member States in the implementation process in different ways. The five types of guidance are: 1) interpretative guidance; 2) implementing guidance; 3) explanatory guidance; 4) technical guidance; and 5) the dissemination of good practices. The identification of these types of guidance mainly serves analytical purposes and can assist in tracing the use of guidance at the national level.

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