Guidance documents of the European Commission in the Dutch legal order

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4 Commission guidance in the Dutch legal order

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

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

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

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1 As follows from the principle of procedural autonomy. See for instance CJEU 21 September 1983, C-205-215/82, ECLI:EU:C:1983:233, par. 17 (*Deutsche Milchkontor GmbH*); CJEU 7 December 2010, C-439/08, ECLI:EU:C:2010:739, par. 63, 64 (*Vebic*). Schmidt-Aβmann refers to the Member States' 'autonomous administrative law'. Schmidt-Aßmann 2013, p.14.

2 Ruffert 2013b, p. 216, 218.

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

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

5 Hofmann et al. 2014, p. 12.

4.1 Characteristics of Dutch administrative law in an EU context

An 'open' legal system

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

European Union law has a special status compared to provisions laid down in international law. Articles 93 and 94 of the Dutch Constitution provide the direct applicability of self-executing provisions of international treaties and resolutions in the Dutch legal order. This 'moderate monist' system does not apply to EU law.[7] In the Netherlands, the Dutch judiciary recognises the primacy and autonomous character of EU law. Hence, the direct effect and primacy of Union law 'occurs' independently of the Dutch Constitution.[8] This was made clear by the Judicial Division of the Council of State in 1995. In the *Metten* ruling, the Council of State reasoned that the principle of primacy of EU law as developed by the Court of Justice also applies to provisions of EU law that do *not* have direct effect.[9] The Dutch highest civil court (*De Hoge Raad*) even ruled more explicitly, in the *Verplichte rusttijden* ruling of 2005, that provisions in EU regulations that have direct effect apply directly, not on the basis of Articles 93 and 94 of the Dutch Constitution, in the national legal order[10] In brief, the implementation of EU law in the Netherlands occurs in the context of an open, 'EU friendly' legal system.

The central role for (individual) administrative acts

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

6 Prechal et al. 2017, p. 75, 76; Van der Burg & Voermans 2015, p. 18, 30.
7 These Articles provide that 'self-executing provisions' of international treaties and resolutions become binding after they have binding published and have precedence over conflicting statutory regulations of Dutch law. See also Van den Brink et al. 2016, question I-3.
8 See Barkhuysen 2006, p. 8.
9 ABRvS 7 July 1995, ECLI:NL:RVS:1995:AN5284 *(Metten)*.
10 HR 2 November 2004, ECLI:NL:HR:2004:AR1797 (*Verplichte rusttijden)*.

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

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

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

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

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

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

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

15 Barkhuysen, Den Ouden & Schuurmans 2012.

16 Schuurmans 2015.

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

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

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

Europeanisation of Dutch administrative law

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

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

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

4.2 Dutch authorities and the implementation of EU law

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

20 See Van Keulen 2007.
21 Van den Brink & Den Ouden 2015.
22 Barkhuysen 2006, Barkhuysen 2006.
23 As is illustrated, for instance, by the contributions in Schueler & Widdershoven 2014.
24 I draw inspiration of Widdershoven 2014, p. 16 who considers national administrative law a 'vehicle' for the effective application of Union law.
25 See on the Europeanisation of administrative law in the Netherlands Schueler & Widdershoven 2014.

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

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

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

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

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

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

4.2.1 Adopting 'implementing legislation'

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

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

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

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

28 Nicolaides 2012, p. 6.
29 See CJEU 30 May 1991, C-361/88, ECLI:EU:C:1991:224, par. 30 (*Commission v Germany*).
30 Jans, Prechal & Widdershoven 2015, p. 11; Hofmann, Rowe & Türk 2011, p. 91.
31 CJEU 25 October 2012, C-592/11, ECLI:EU:C:2012:673, par. 36 (*Ketelä*). See also above section 2.5.7.
32 See Kral 2008;
33 *Cf.* Barkhuysen, Den Ouden & Schuurmans 2012, Verhoeven 2011, p. 9, 10., Voermans 2016, p. 345.
34 See Article 81 of the Dutch Constitution. See also Voermans 2016, p. 345.
35 See for a detailed overview of the hierarchy of norms in The Netherlands Voermans 2016, p. 347.
36 For instance COM(2009)313 final.

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

4.2.2 The Dutch policy rule

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

In this respect, the Netherlands is quite a peculiar and interesting case, as one type of non-legally binding instruments has been given a formal basis in the Dutch General Administrative Law Act.[39] This concerns the so-called policy rules that were introduced in the GALA in 1998.[40] Article 1:3 GALA defines the policy rule as: 'an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting legislative provisions in the exercise of a power of an administrative authority'.

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

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37 See section 6.5.1.
38 See Bröring & Geertjes 2013.
39 Compare Tollenaar 2012, par. 3.2.
40 Bröring 2012, p. 168.
41 Article 4:81(1) GALA; De Moor-Van Vugt & De Waard 2016, p. 372; Voermans 2016, p. 347.
42 Tollenaar 2012, par. 3.2. This follows from the requirement that a policy rule needs to be established by an order, which is 'a written decision of an administrative authority constituting a public law juridical act'. Article 1:3 GALA.
43 *Kamerstukken II*, 1993/94, 23700, 3, p. 107.
44 Tollenaar 2012, par. 4.2.

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

Another regulatory phenomenon that features in the Dutch legal landscape shows more similarities with the Commission's guidelines that address national authorities. These are the so-called *richtsnoeren* or 'guidelines' that – contrary to the Dutch policy rules – do not have a legal basis in the Dutch GALA.[46] Like the Commission's guidance documents, the 'Dutch guidelines' are issued by a different authority than the authority that uses the guidelines to exercise its discretionary power.[47] One example is the guidelines that are issued by the Association of Netherlands Municipalities[48] that – not surprisingly – address the Dutch municipalities. Dutch guidelines, especially those with a highly technical character, have a certain binding effect on their addresses. The technical guidelines must, in principle, be followed and deviation is only permitted provided an explanation is given.[49]

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

4.2.3 Administrative decisions

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

45 See for instance Van den Brink & Van Dam 2014.
46 I compare Commission guidance and Dutch policy rules in Van Dam 2019, p. 535.
47 Bröring 1993.
48 Vereniging voor Nederlandse Gemeenten – *VNG*
49 Bröring 2012, p. 180-181. See for instance ABRvS 2 April 2014, ECLI:NL:RVS:2014:1173, par. 3.4.
50 See section
51 This is the third phase of the implementation process according to Jans, Prechal & Widdershoven 2015, p. 17.

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

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

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

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

52 Article 8.13 of the Dutch Aliens Decree 2000.
53 Jans, Prechal & Widdershoven 2015, p. 17, 18 refer to the enforcement of EU law as the fourth phase of the implementation process.
54 Article 4.8 paragraph 1 of the Dutch ministerial regulation which implements Regulation 13006/2013/EU.
55 Bröring 2019, p. 175.
56 Bröring 2012, p. 168.
57 Bröring & Geertjes 2013, p. 6.
58 Bröring & Geertjes 2013, p. 6.

4.2.4 Other implementing measures and practices

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

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

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

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

4.3 Dutch courts and the implementation of EU law

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

59 See Prechal 2009, p. 6.
60 Article 2.3. of the *Wet natuurbescherming*.
61 Article 74 of Regulation 1306/2013/EU.
62 Article 70 of Regulation 1306/2013/EU.

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

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

This section discusses the competence of Dutch administrative and civil courts to review implementing decisions and measures, and describes the judicial organisation of administrative courts in the Netherlands. It is, as we will see, the administrative courts[64] that play the main role in reviewing the implementing practices in the three policy areas selected for this research, and therefore the administrative judicial branch will take centre stage in this thesis.

4.3.1 The competence of Dutch administrative and civil courts

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

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

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

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

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

66 Article 8:3 GALA.

67 Stolk & Voermans 2016, p. 39.

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

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

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

4.3.2 The judicial organisation of administrative courts in the Netherlands

Throughout the twentieth century, the task to review administrative decisions was entrusted to several specialised administrative courts.[70] With the aim of providing a more uniform system of judicial review, the judicial organisation of administrative courts has been undergoing a reorganisation process since 1971.[71] This process, however, has not gone so far as to lead to one single highest administrative court. There are currently still three highest administrative courts in the Netherlands.[72]

Three highest administrative courts

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

69 See Article 7:1a GALA, which also provides for some other exceptions that allow to challenge a decision directly before an administrative court.
70 De Moor-Van Vugt & De Waard 2016, p. 389.
71 Stolk & Voermans 2016, p. 34-35.
72 Stolk & Voermans 2016, p. 46.

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

Which courts to study in this research?

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

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

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

4.4 Perspectives on bindingness to analyse the use of Commission guidance

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

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

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

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

4.4.1 Developing perspectives on bindingness: a bottom-up approach

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

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

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

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

75 See section 1.5.2.
76 Van den Brink 2012, p. 289 and p. 924, 925; Van den Brink 2016, p. 7. See also Van Dam 2013.
77 Van Rijsbergen 2018, p. 179, 180; See also Barkhuysen, Westendorp & Ramsanjhal 2017.
78 Luijendijk & Senden 2011, p. 341.
79 Georgieva 2016 and Georgieva 2015.

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

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

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

Two lenses to identify 'uses' of guidance

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

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

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

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

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

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

4.4.2 The use of Commission guidance by national authorities

Use of guidance as if it were a binding rule

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

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

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

Pick and choose: a voluntary implementation aid

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

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

No use or ignorance of guidance as an implementation aid

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

4.4.3 The use of Commission guidance by national courts

Use of guidance as a binding rule or assessment standard

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

Use of guidance as a mandatory judicial decision-making aid

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

85 See above section 3.4.2.

Use of guidance as a voluntary judicial decision-making aid

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

No use of guidance as a decision-making aid

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

4.5 Conclusion

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

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

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