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Guidance documents of the European Commission in the Dutch legal order

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This first case study explores the role of the various guidance documents in relation to the implementation of direct payments regulations that provide rules for the granting of EU agricultural subsidies to farmers in the European Union. The case study consists of two parts.

The first part of this chapter discusses the Commission's and Member States' competences in the legal context of 'shared administration' (section 5.1), and provides insights into the various guidance documents that are issued in addition to the already complex EU legal framework (section 5.2). These guidance documents, as we will see, are issued with the aim of preventing financial corrections and are used by the Commission as an audit tool. This 'EU context', as will be shown, results in the exertion of strong pressures on the Member States to comply with the Commission's guidelines (section 5.3).

The second part of this chapter sets out by describing the main contours of the implementation process of the EU direct payments legislation in the Netherlands (section 5.4). It subsequently explores the use of guidance documents in the implementing practices of the Dutch Ministry of Economic Affairs as well as the Dutch paying agency (section 5.5). The general trend is that throughout the different stages of the implementation process, direct payments guidance documents tend to be strictly followed. This is the case not only for the 'interpretative guidelines' but also for the guidelines that provide for implementing practices and measures, as well as for the technical guidance documents. Direct payments guidance documents are used as if they were binding rules or standards, taking the role of 'legislation in disguise'.

However, as will be shown, the highest administrative court – the Trade and Industry Appeals Tribunal – takes a more critical stance towards the use of direct payments guidance documents as an implementation aid (section 5.6). Dutch authorities thus act between strong steering pressures to act 'guidance-proof' on the one hand, and the instruction not to use guidance as a binding rule given by the Dutch highest administrative court on the other hand (section 5.7).

5.1 THE EU DIRECT PAYMENTS LEGAL FRAMEWORK

Granting direct payments is the key support mechanism for farmers within the Common Agricultural Policy. It is one of the most highly Europeanised

policy areas, and has its roots in the early years of the EU integration process. The objectives of the Common Agricultural Policy were set out in the EEC Treaty signed in 1957 and have remained the same ever since.¹ The CAP aims at an increase in food and agricultural production, to ensure a fair standard of living for the agricultural community, to stabilise markets and to assure the availability of food supplies for consumers at reasonable prices.

In 1962, the European Agriculture Guidance and Guarantee Fund (EAGGF) was set up through which the Common Agricultural Policy was financed jointly by the Member States.² In 2007, the EAGGF was replaced by two separate funds each reflecting one pillar of the CAP.³ The direct payments are financed by the first pillar, the European Agricultural Guarantee Fund. The European Agricultural Fund for Rural Development constitutes the second pillar and provides financial support for the rural development programmes of the Member States.

Although the percentage of the EU budget reserved for agricultural subsidies has decreased over the years, it still represents an important share (38%) of the current EU budget. The direct payments constitute the key support mechanism under the CAP: 72% of the budget allocated for the CAP is reserved for direct payments. For the years 2014-2020, the direct payments aid accounted for over 40 billion euros per year.⁴

5.1.1 A complex legal framework

Over the last decades, EU agricultural policy has been subject to many reforms that have shaped the direct payments legal framework. The current legislative framework is the result of the reform that took place in 2013. The regulations that govern the direct payments consist of two basic acts, two delegated acts and two implementing acts:

Basic regulation 1306/2013⁵

Basic regulation 1307/2013⁶

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- 1 Article 39 of the Treaty establishing the European Economic Community and Article 39 TFEU.
 - 2 Regulation (EEC) 25/1962 of 20 April 1962 on the financing of the common agricultural policy.
 - 3 Council Regulation (EC) 1290/2005 of 21 June 2005 on the financing of the common agricultural policy.
 - 4 CAP explained. Direct Payments for Farmers 2015-2020 (May 2017) available at https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/direct-payments-schemes_en.pdf (last accessed 29 September 2019).
 - 5 Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy.
 - 6 Regulation (EU) 1307/2013 of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy.

- Commission delegated regulation 639/2014⁷
- Commission delegated regulation 640/2014⁸
- Commission implementing regulation 641/2014⁹
- Commission implementing regulation 809/2014¹⁰

Although the reform of 2013 aims at simplification of the direct payments rules, after the 2013 reform the legislative framework governing the direct payments still provides for a complex legal framework that must be implemented by the Member States.¹¹ One of the reasons for the increased complexity of the legal framework, is that the reform reinforced the integration of greening requirements in the first pillar by making 30% of the direct payments conditional on fulfilling greening requirements.¹² The reform further aimed at more ‘targeted support’ by introducing subsidies for young farmers as well as several optional schemes.¹³ Better targeting also implies additional eligibility criteria. The introduction of optional schemes and new eligibility criteria required detailed and different rules on controls and control methods.

5.1.2 Shared management

Characteristic for the direct payments financed from the first pillar is that the subsidies are implemented in the context of shared management.¹⁴ In this system of shared management, the responsibilities of the Commission and the Member States are intertwined. Whilst the Member States are responsible for the implementation of the direct payments regulations, the Commission monitors and controls the Member States’ implementing practices.

The controlling and supervisory powers of the Commission can be traced back to the fact that the Commission is responsible for the implementation of the EU budget. Article 317(1) TFEU provides that the Commission implements the EU budget in cooperation with the Member States under its own responsibility. As ‘guardian of the EU budget’, the Commission audits the implementation of the direct payments legislation by the Member

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- 7 Commission delegated regulation 639/2014 of 11 March 2014 supplementing Regulation (EU) 1307/2013 and amending Annex X to that Regulation.
 - 8 Commission delegated regulation (EU) 640/2014 of 11 March 2014 supplementing Regulation 1306/2013.
 - 9 Commission implementing regulation (EU) 641/2014 of 16 June 2014 laying down rules for the application of Regulation 1307/2013.
 - 10 Commission implementing regulation 809/2014 of 17 July 2014 laying down rules for the application of Regulation 1306/2013 of the European Parliament and the Council with regard to the integrated administration and control system, rural development measures and cross compliance.
 - 11 See Kranenborg 2016, 117.
 - 12 Article 47 of Regulation (EU) 1307/2013; Kranenborg 2016, p. 115.
 - 13 CAP explained. Direct Payments for Farmers 2015-2020 (May 2017).
 - 14 Article 4 of Regulation 1306/2013.

States. Where the Commission finds that direct payments have not been granted in accordance with Union law, the Commission is empowered to impose financial corrections and to recover the amounts that have been unduly paid from the Member States.¹⁵ Although the Commission bears ultimate responsibility for the EU budget, the Commission is dependent on the Member States' administrations when it comes to the correct implementation of the budget.¹⁶

It is the obligation of the Member States to take 'all measures necessary to ensure effective protection of the financial interests of the European Union'.¹⁷ This means that the Member States shall designate paying agencies that are entrusted with the task of carrying out the payments (the direct payments) to the farmers (the beneficiaries). These paying agencies also need to verify and control whether direct payments are correctly and duly spent and to this end carries out administrative checks as well as on-the-spot checks.¹⁸ When irregularities are found, the Member States are required to take corrective measures that can take the form of the reduction or withdrawal of aid, or of administrative penalties.¹⁹ Furthermore, in order to be able to make the payments and carry out the controls, the Member States shall set up the Integrated Administration and Control System (IACS).²⁰ This system consists of different elements and databases, such as the land parcel identification system (LPIS), and a control system that ensures checks of aid applications lodged by the farmers.

In brief, the Member States need to take various implementing measures to implement the direct payments rules. These practices will be discussed in more detail when searching for traces of the use of guidance documents in this process. For now, it suffices to note that despite the notion of 'shared management' the implementation of EU subsidy regulations is characterised by hierarchal elements. The Member States need the approval of the European Commission for the payments that have been made and face financial corrections if they do not fulfil their tasks in accordance with EU legislation.

5.1.3 Flexibility

The direct payments legal framework, especially after the 2013 reform, leaves flexibility or 'room for manoeuvre' to the Member States in the implement of the EU legislative provisions. Different forms of flexibility can be discerned in the direct payments rules. For instance, Member States can voluntarily apply certain aid schemes in order to further 'target' direct

15 Article 52 of Regulation 1306/2013 and Article 59 of Regulation 966/2012.

16 See also Hofmann, Rowe & Türk 2011, p. 347.

17 Article 59(2) of Regulation 966/2012 and Article 58 of Regulation 1306/2013.

18 Article 74 of Regulation 1306/2013; article 59(2) of Regulation 966/2012.

19 Article 63 and article 77 of Regulation 1306/2013.

20 Article 67 of Regulation 1306/2013.

payments;²¹ they need to make decisions on the implementation of different aid schemes and on the conditions under which aid is granted;²² and they need to decide on the form of technical implementing measures.²³ Furthermore, direct payments regulations contain provisions of which the meaning might not be clear from the outset and that could be understood in various ways.²⁴

According to the former Commissioner of Agriculture and Rural Development, Dacian Cioloş, the 'European Union of 28' can only grant more flexibility in implementation practices than in the past.²⁵ However, in light of the flexibility clauses, the open and vague norms as well as the complex character of direct payments legislation, it is not surprising that implementing questions, problems or uncertainty might arise when implementing these EU legislative rules. Problems in implementation practices may eventually result in financial corrections being imposed on the Member States and lead to the recovery of aid from final beneficiaries. The Member States therefore regularly request that the Commission provides clarity and assistance on the implementation of the direct payments regulations.²⁶ Former Commissioner Cioloş considers the belief that ambiguous provisions provide room for manoeuvre to the Member States to be a *faux espoir*.²⁷ Eventually, as Cioloş explains,²⁸ the Commissioner is asked to clarify the issue. This leads us to the next section that discusses the various direct payment guidance documents that complement the EU legal framework.

5.2 DIRECT PAYMENTS GUIDANCE DOCUMENTS

In the area of direct payments, the issuing of guidance documents by the Commission's services is not a recent phenomenon. Direct payments guidance documents have been issued since the introduction of the first direct payments schemes in 1992. Initially, guidance was provided in the form of letters or interpretative notes that were sent to the Member States in response to questions raised on the correct interpretation or application of the EU legislative rules. The first working documents or predecessors

21 For instance, the Member States can chose to apply a so-called redistributive payment (Article 41 of Regulation 1307/2013), they can provide support to small farmers (Article 61 of Regulation 1307/2013) and may grant limited coupled support (Article 52 of Regulation 1307/2013).

22 See for instance Article 4(1)(c)(ii) of Regulation 1307/2013.

23 Such as the techniques used for the identification and delineation of agricultural parcels in the Land Parcel Identification System See Article 70 of Regulation 1307/2013.

24 See for instance Article 4(1)(i) of Regulation 1307/2013.

25 Hervieu 2015, p. 8.

26 As followed from (formal and informal) interviews conducted with Commission and national officials.

27 Hervieu 2015, p. 3.

28 Hervieu 2015, p. 8.

to working documents were also issued already in the early 1990s. Since the reform in 2013, the Commission services have started to issue guidance documents more proactively and at an early stage of the implementation process.²⁹ The guidance documents now have a more general character; not answering specific questions but giving extensive guidance and explanation on the EU direct payment rules. The number of guidance documents has increased and their form and character are now more diverse. Guidance documents are issued in different forms and under different names, resulting in a scattered landscape, or in the words of one of the interviewees: in 'guidionitis'.³⁰

This section describes this scattered landscape of direct payments guidance documents. It first outlines some general characteristics of these documents, gives an overview of different categories of guidance documents, and describes the different types of direct payments guidance that can be identified within the various guidance documents.

5.2.1 A scattered landscape

Most of the time, guidance given to the Member States is laid down in a document, the main aim of which is to assist the Member States in the implementation of direct payments legislation. These documents then bear the name guidance documents, interpretative notes, or working documents and as such are relatively easily recognisable as guidance documents. However, guidance can also be included in other documents that do not have the form of a 'typical' guidance document. For instance, guidance may feature in minutes of committee meetings, or in the reactions of the European Commission to the notifications made by Member States as required by the direct payments legislation.³¹ Furthermore, guidance may also be given orally, in bilateral meetings or during committee meetings or expert groups. The various forms that direct payments guidance may take make it difficult, if not impossible, to provide an exhaustive overview of the guidance documents.

The high number as well as the various forms of guidance documents is not the only characteristic of direct payments guidance documents. Another feature is that these documents are often, even most of the time, not 'published' in the sense that they are not made accessible to the public. Direct payments guidance documents are in principle only distributed among the paying agencies responsible for the implementation of direct payments legislation. Previously, the direct payments guidance documents were sent to the national authorities in paper. Nowadays, the guidance documents are distributed to the national authorities via CircaBC, a plat-

29 Interview 1 – Commission official A.

30 Interview 1 – Commission official A; Interview 2 – Commission official A.

31 DS-CDP-2015-04-rev1.

form where the documents are electronically distributed to the national administrations but not made publicly accessible.

Nonetheless, it seems that increasingly Commission services are opening up the black box of direct payments guidance to the general public, and thus to the farmers. Certain guidance documents have been published at the 'Wikicap' website.³² The Wikicap website is maintained by the Joint Research Centre (JRC) that supports DG AGRI services in providing technical assistance to the Member States. For a few years now several general as well as technical guidance documents are freely accessible on this website. To the above characteristics of guidance documents (the high number, various forms and shapes, and invisibility of guidance documents), a fourth characteristic can be added. This is the changeable character of direct payments guidance documents: guidance documents are often are subject to a continuous process of updates and revisions. This changeable character may be the result of the issuing of guidance documents at an early, anticipatory stage in the implementation process. As a result, guidance documents often have to be revised at a later stage when more insights have been acquired on the successes or pitfalls of implementing processes and methods.

Table 5-1 provides an overview of the main categories of guidance documents issued in the area of direct payments. These categories bring together guidance documents that are comparable in terms of their form, name and issuing process. This overview draws on an inventory of guidance documents made by the author in the context of a traineeship conducted at the Directorate General of Agriculture and Rural Development of the European Commission from October 2015 to February 2016.

32 See https://marswiki.jrc.ec.europa.eu/wikicap/index.php/Main_Page. Last accessed on 17 October 2019. <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

Table 5-1 Categories of direct payments guidance documents

Category	Description
Guidelines on financial corrections.	The guidelines on the calculation of financial corrections (C(2015)367 final) are adopted in the framework of the conformity and financial clearance of accounts procedures. The guidelines clarify how the European Commission intends to use its own discretionary powers to apply financial corrections and thus fall in the category of 'decisional acts' (see section 2.1.3).
RIPAC notes	RIPAC notes are one of the oldest forms of guidance documents, which during the last years have no longer been issued. RIPAC notes are usually drawn up after a similar problem or question has been raised, orally or in writing, by several Member States. The interpretative notes are drafted according to a standard model, are translated to all official EU languages and distributed to the Member States.
DG AGRI letters	The Member States regularly send letters to the European Commission asking questions related to the implementation of the direct payments schemes. The DG AGRI services reply to these questions in the form of letters that as a general rule made available to the other Member States via CircaBC.
DG AGRI guidance documents	DG AGRI guidance documents provide general guidance to the Member States on aspects related to one overarching topic, such as the active farmer provision, the on-the-spot checks, the elaboration of aid applications, and the management of permanent grassland areas.
Other guidelines and working documents	This broad category consists of other documents containing guidance related to IACS and Direct Payments. These documents can take various forms, such as working documents, question and answer documents, documents with observations of the Member States concerning their implementing decisions or documents that, simply, contain an overview with examples that could help Member States to implement direct payment schemes.
JRC technical guidance documents	The Joint Research Centre issues various 'technical guidance documents' related to the direct payments legislation after the 2013 reform. The guidance documents complement the DG AGRI guidance documents. The documents are prepared by the JRC, and reviewed and validated by the DG AGRI services. The technical guidance documents usually are developed after an exchange of best practices with experts from the Member States.
Wikicap guidance	The Wikicap website of the JRC serves as a platform to provide technical guidance to the Member States related to the implementation of the integrated administration and control system. For instance, the website gives instructions on the quality assessment of the land parcel identification system and displays answers to the questions of the Member States related to technical issues. The Wikicap website also gives access to several guidance documents issued by the DG AGRI services.
Expert Workshops	Guidance may also be given during the expert workshops that are organised in Brussels. During these workshops, organised by the DG AGRI services, Member States are invited to exchange experiences and good practices on the implementation of the CAP. The organisation of workshops in the area of direct payments and IACS is a recent phenomenon and was initiated in the first half of 2015.

5.2.2 Types of guidance

The above overview demonstrates that the issuing of guidance documents in the area of direct payments has become one of the core activities of the DG AGRI services responsible for the regulatory and implementing aspects of the direct payments legislation. These categories of guidance documents do not necessarily reflect one of the five types of guidance documents introduced in section 3.2. Instead, the five different types of guidance feature in direct payments guidance documents.

Firstly, direct payments guidance documents often contain interpretative guidelines that address vague or openly formulated legal provisions. For instance, the permanent grassland guidance provides guidance on the interpretation of the definition of permanent grassland that gave rise to many questions from Member States.³³ Interpretative guidelines are also given in relation to the active farmer provisions, or concerning the question what it means that ecological focus areas need to be 'adjacent' to arable land.³⁴

Secondly, characteristic for many direct payments guidance documents is that they assist Member States in making choices on the form or method of implementing measures that outline how the provisions in direct payments regulations are 'best met'. These guidelines thus take the form of 'implementing guidance'. Such implementing guidelines can for instance be found in the EFA layer guidance document which makes clear that for the design of the EFA layer in the LPIS system, the Member States should 'as a minimum requirement' register the EFAs that have been declared by the farmers.³⁵

Thirdly, direct payment guidance documents also contain explanatory guidance that explains or summarises the complex direct payments schemes. An example is the paragraph that elaborates on 'what/why checking/controlling and measuring' in the guidance document on on-the-spot checks.³⁶ Another example is the aid applications guidance document, which comprises an extensive overview of the information that is to be included in the pre-established form to be provided by the beneficiary.³⁷ Remarkably, in several places the aid applications guidance also refers to implementing guidance laid down in other DG AGRI guidance documents, such as the LPIS guidance and the OTSC guidance document.

Fourthly, the many technical guidance documents issued by the JRC and Commission services clarify what technical methodologies could or should be used by the Member States for the implementation of the inte-

33 DS/EGDP/2015/02 REV 4, p. 4, 5.

34 DSCG-2014-29 and DSCG/2014/31-FINAL REV 1.

35 DSCG/2014/31-FINAL REV 1, p. 19.

36 DSCG/2014/32 FINAL REV 1, p. 11.

37 DSCG/2014/39 FINAL – REV 1.

grated administration and control system. Illustrative is the technical guidance for on-the-spot checks of ecological focus area requirements.³⁸

Finally, during the so-called ‘workshops’, the Commission services facilitate and encourage an exchange of experiences and information on ‘good implementing practices’. The Member States provide information on their implementing decisions and methods, and discuss the various options during an informal expert meeting. These exchanges normally result in an overview of good practices developed by the Commission and shared with the Member States.

From the above, it follows that direct payments guidance documents assist the Member States in the implementation of direct payments legislation in various ways. The guidance documents seek to clarify vague and unclear provisions; explain the rationale and logic behind the complex direct payments legislation; support the Member States in dealing with the various implementing options; provide them with technical advice and inform them on good implementation practices. Different types of guidance can often be found in one and the same guidance document.

5.3 EU EXPECTATIONS ON THE USE OF DIRECT PAYMENTS GUIDANCE DOCUMENTS

Before turning to the national level, this section will explore whether the practices of the European Commission and the rulings of the Court of Justice reveal expectations as to how national authorities and courts should use direct payments guidance documents when implementing direct payments legislation. Do the practices of the European Commission and the rulings of the Court result in pressures to act guidance-proof?

5.3.1 Expectations of the Commission: guidance as an audit tool

‘Non-binding clauses’ in direct payments guidance documents

Despite their differences in form and shape, the direct payments guidance documents have one thing in common: they (generally) emphasise that they do not have legally binding force. The ‘oldest’ guidance documents in the form of interpretative notes already mentioned that the guidelines are not binding and that only the Court of Justice can give an authoritative interpretation of EU law. The more recent guidance documents elaborate further on the non-binding character of the guidelines. For instance, the introductory section to the on-the-spot check guidance document, revised in 2018, states that:

38 DSCG/2014/31-FINAL REV 1, p. 4.

'It [the guidance documents] is provided for information purposes only and is not a legally binding document. It was prepared by Commission services and does not commit the European Commission. In the event of a dispute involving Union law it is, under the Treaty of the Functioning of the European Union, ultimately for the Court of Justice of the European Union to provide a definitive interpretation on the applicable Union law.'³⁹

Similar references to the non-legally binding character can be found in technical guidance documents. For instance, the technical guide for on-the-spot checks of Ecological Focus Areas states that: 'only some general recommendations on how to possibly measure and check the different type of elements are given. (...) Ultimately it will [be] the Member State's choice to decide on the different rules to set up their methodology to implement, it should however be applied in a consistent way'.⁴⁰ Nonetheless, it needs to be noted that although direct payments guidance documents often emphasise the non-binding character of the guidelines, the text of the guidance documents can be compelling and prescriptive.

The European Commission: from partner to supervisor

Direct payments guidance documents are often drafted in cooperation with the Member States and discussed in expert committees. At this stage, the Commission acts more as a *partner*, assisting the Member States by providing guidance to them. However, at a later stage the Commission comes to act as 'guardian of the budget'. As already outlined above, the Commission has the power to impose financial corrections and to start an infringement procedure in the case of an alleged violation of EU direct payments rules.⁴¹

The protection of the financial interests of the European Union is high on the political agenda of the European Commission. It is included in the top three focus areas where the Commission closely monitors the implementation of EU law.⁴² This explains why in the area of EU subsidies, the European Commission actively monitors and 'watches' the Member States' implementing practices.⁴³ This means that the Member States run the risk of financial corrections when not acting in line with the direct payments legislation. Does the Commission also expect the Member States to act in accordance with the guidance documents?

39 DSCG/2014/32 – FINAL REV4.

40 DS-CDP-2015-09-FINAL, p. 4.

41 See above section 5.1.2

42 COM(2017)370 final, p. 4.

43 See on a discussion of different forms of Commission oversight Steunenberg 2010.

Generally speaking, the audit services of the Commission indeed expect the Member States to comply with the guidelines of the European Commission.⁴⁴ This was made clear by DG AGRI officials as well as by national officials working for the Dutch paying agency.⁴⁵ Indications about the use of the guidelines during audits can also be found in the case law of Dutch courts⁴⁶ as well in the explanatory notes to the ministerial regulation and policy rules that transpose guidelines of the European Commission.⁴⁷

Different roles for different types of guidance?

One of the Commission auditors who was interviewed in the context of this research, explained that in audit practices a distinction is made between the role played by the different types of guidance.⁴⁸ He mentioned that during audit missions the interpretative guidelines generally serve as the 'interpretation standard' as they represent the view of the Commission services as to how to interpret the direct payments rules. Implementing and technical guidance provisions are also used as an audit tool, but in a different way. The recommendations on the form and method of implementing measures are also, in principle, used to monitor implementing practices. However, there are alternatives: the Member States can also choose a different 'route' to implement the legally binding provisions.⁴⁹ 'We accept that a Member States applies a different route, as long as they respect the EU regulation'.⁵⁰

According to the official, guidance that has a highly explanatory character generally plays little role in auditing procedures.⁵¹ The explanatory guidance does not provide for standards or principles that can be taken into account, but rather explains the logic or rationale behind the legislative provisions. As a result, the explanatory guidelines may become irrelevant as an audit tool. Similarly, documents that provide for an overview of, and that communicate, best practices are likely to fade to the background in audit proceedings.⁵²

From the above, the conclusion can be drawn that through the use of the direct payments guidelines as an audit tool, strong pressure has been constructed vis-à-vis the Member States to comply with the guidelines.

44 Interview 1 – Commission official A; Interview 2 – Commission official A; and several informal interviews.

45 Interview 3 – National officials A and B; Interview 4 – National officials A and C; and several informal interviews.

46 See for instance CBB 13 October 2006, ECLI:NL:CBB:2006:AZ0218, par. 3.2.

47 See for instance the explanatory note that introduces the 'fifty trees rule' in the Dutch Ministerial regulation, which mentions that this rule is 'consistently' applied by the Commission services, See *Stcrt.* 2009, 62. p. 40 and below section 5.5.1

48 Interview 1 – Commission official A and Interview 2 – Commission official A.

49 Interview 1 – Commission official A.

50 Interview 2 – Commission official A.

51 Interview 1 – Commission official A and Interview 2 – Commission official A.

52 Interview 1 – Commission official A and Interview 2 – Commission official A.

Indeed, non-compliance with the guidelines can be taken into account by the Commission when it comes to the decision whether an alleged violation of the direct payments rules is at stake, and thus the decision whether to impose a financial correction. Even if in practice a distinction can be made for the role of different types of guidance in audit practices, the question remains whether at the national level the guidance documents are indeed perceived as having a different role than the audit instruments.

5.3.2 Expectations of the Court of Justice

Having concluded that the audit practices of the Commission lead to strong pressure on the Member States to act guidance-proof, the next question is whether and how the Court of Justice responds to these pressures. What expectations on the use of the direct payments guidelines can be derived from the case law of the Court?

As a first note, it can be remarked that no rulings were found in which the Court explicitly refers to direct payments guidelines for the interpretation or application of direct payments rules.⁵³ In the few rulings that were found in which it becomes clear that direct payments guidelines were invoked by one of the parties, the guidance documents are not referred to in the part of the rulings that sets out ‘the findings of the Court’.⁵⁴ Thus, it seems that references to direct payments guidance documents in the Court’s rulings are scarce. This invisibility of direct payments guidelines in the rulings of the Court contrasts with the numerous documents and their important role as a informal regulatory tool of the Commission.⁵⁵

Even though the Court does not refer to guidance documents in an explicit manner, the Court still acknowledges that the direct payments guidance documents can have a *de facto* binding effect on national authorities. As already discussed in section 3.3.3, the Court of Justice recognises that guidance documents may have informative or steering effects on the national authorities. In the ruling *Italy v Commission* the Court of Justice considers that the guidance ‘may have the effect of informing the Member States that they are running the risk of Community financing being refused’.⁵⁶

53 The search at www.curia.europa.eu for rulings in the field of ‘agriculture and fisheries’ was conducted with search terms: ‘interpretative notes’, ‘Wikicap’, ‘guidance document’, ‘working document’ and ‘guidelines’. Last search conducted at 15 June 2019.

54 See for example CJEU 15 May 2019, C-341/17, ECLI:EU:C:2019:409, par. 33 (*Hellenic Republic v European Commission*) in which the Hellenic Republic refers to a guide of the Commission, published by the Joint Research Centre, in support of its interpretation of ‘permanent pasture’.

55 In contrast, the decisional guidelines on the financial corrections feature frequently in the CJEU’s rulings. These guidelines, however, fall out of the scope of this research as they are adopted in the exercise of the Commission’s discretionary powers. See for an example: CJEU 15 October 2014, C-417/12 P, ECLI:EU:C:2014:2288 (*Denmark v European Commission*).

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

According to the Court, this risk is not a legal effect but ‘a mere consequence of fact’.⁵⁷ Similarly, the General Court considers the risk that guidance might be relevant for the decision of the European Commission to start an infringement procedure ‘a mere consequence of fact’.⁵⁸

Finally, the direct payments guidelines may also have a certain binding effect on national courts. Indeed, in light of the *Grimaldi* case law it cannot be ruled out that national courts can be bound to take certain direct payments guidance documents into consideration. An indication that points in this direction is given in the *Batlanta* ruling, in which the Court of Justice applies the *Grimaldi* formula by analogy to guidelines related to the granting of subsidies in the area of structural funds.⁵⁹ Nonetheless, even if the *Grimaldi* formula applies to direct payments guidelines, the question remains whether this is the case for all guidelines laid down in all different forms of guidance documents. Should, for instance, a distinction be made between the guidelines laid down in the general guidance documents and other, more informal documents such as letters and notices? For now, on the basis of the rulings of the Court of Justice, there is no clear answer to this question.

5.3.3 Strong pressures to act guidance-proof

From the above, it follows that national authorities are subject to strong steering pressures to act in conformity with the direct payments guidelines. This pressures stem in particular from the threat of financial corrections, but also from the risk that not following the guidelines may be relevant for the Commission’s decision to open an infringement procedure. By acknowledging these informative effects of the Commission guidelines on national authorities, the Court of Justice – in an indirect manner – facilitates the construction of these steering pressures on national authorities.⁶⁰ Less strong pressures to apply the Commission’s guidelines when reviewing the administrative practices are exerted on national courts. The *Grimaldi* formula ‘only’ provides that national courts are bound to take the guidelines into consideration. These conclusions lead us to the next section, which analyses the use of direct payments guidance documents by the authorities and courts in the Dutch legal order.

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

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

59 CJEU 3 September 2014, C-410/13, ECLI:EU:C:2014:2134, par. 64 (*Batlanta*). This ruling has been discussed above in section 3.4.2.

60 Van Dam 2015, p. 194, 195.

5.4 IMPLEMENTING EU DIRECT PAYMENTS LEGISLATION IN THE NETHERLANDS

Before tracing the use of direct payments guidance at the different stages of the implementation process, this section describes the ‘context’ in which direct payments regulations are implemented. It outlines the legal framework, the actors involved in the implementation process and introduces the Trade and Industry Appeals Tribunal.

5.4.1 The legal framework: the Ministerial Regulation and policy rules

EU direct payments legislation, although laid down in regulations, cannot be directly applied at the national level. Norms and concepts that shape the eligibility criteria for direct payments need to be further defined and operationalised. In the Netherlands, the post-2013 EU direct payments regulations are operationalised in the *Uitvoeringsregeling rechtstreekse betalingen GLB*, which is a Ministerial Regulation.⁶¹ This Ministerial Regulation is complemented by Dutch policy rules laid down in the *Beleidsregel Uitvoeringsregeling rechtstreekse betalingen GLB*. These policy rules provide for the sanctions that are applied in the case of irregularities and spell out what conditions apply for direct payments to ‘young farmers’.

Characteristic for both the Ministerial Regulation and the policy rules is that amendments to these rules are made on a frequent, almost continuous basis. These frequent changes to the Ministerial Regulation and the policy rules can be explained in light of the complex character of EU direct payments legislation and the changing insights on what is the correct interpretation of EU legislation, or on the feasibility of policy choices. Moreover, as we will see, amendments to the Ministerial Regulation and the policy rules are also the result of the frequent issuing and revision of guidance documents by the Commission.

5.4.2 Actors: the ministry and paying agency

At the time of writing, the responsible ministry for the implementation of the EU direct payments legal framework is the Ministry of Agriculture, Nature and Food Quality (hereinafter: the Ministry). The Minister (and previously the State Secretary)⁶² plays an important role at the first stage of the implementation process. He or she not only adopts the Ministerial Regulation, but also decides about amendments to this Regulation. At subsequent stages of the implementation process, the paying agency plays

61 The Ministerial Regulation is based on the *Landbouwwet* (the ‘Agricultural Act’), which is a formal legislative act.

62 The Regulation was adopted by the State Secretary of Economic Affairs, who under the former government was responsible for the adoption of the Ministerial Regulation.

a key role in the implementation process. The Dutch paying agency is the *Rijksdienst voor Ondernemend Nederland* (the Netherlands Enterprise Agency, RVO) which is an agency of the Ministry of Economic Affairs.⁶³ The paying agency makes payments to the beneficiaries, carries out the checks and controls and is responsible for keeping the integrated administration and control system up to date.

The Ministry and the paying agency thus have distinctive roles, yet in practice work closely together in the implementation process as well as during negotiations in Brussels. For instance, representatives of both the Ministry and the paying agency take part in expert committees held in Brussels.⁶⁴ It is also in these committees where draft direct payments guidance documents are presented and discussed, and where national experts regularly request that the Commission services issue guidance documents.

5.4.3 The Dutch Trade and Industry Appeals Tribunal

The competent court to review the decisions taken by the paying agency in the area of direct payments is the Dutch Trade and Industry Appeals Tribunal (*het College van Beroep voor het Bedrijfsleven*). The Tribunal is one of the three highest administrative courts and in the area of direct payments the court of first and only instance.⁶⁵ Nonetheless, prior to challenging a decision before the Tribunal, a farmer still needs to lodge an objection with the Minister. It is only possible to challenge a decision taken at the objection stage before the Trade and Industry Appeals Tribunal when a decision at the 'administrative' objection stage is turned down. Eventually, only a small percentage of all decisions concerning the eligibility of aid applications ends up being contested before the Trade and Industry Appeals Tribunal.⁶⁶

5.5 THE USE OF DIRECT PAYMENTS GUIDANCE BY NATIONAL AUTHORITIES

Having outlined the legal framework and actors involved in the implementation process, this section explores the use of direct payments guidance documents at the different stages of the implementation process. The analysis draws on: 1) traces found in the text of the Ministerial Regulation and policy rules as well as the explanatory notes thereto; 2) information in the rulings of the courts that were found with the search for explicit references; and 3)

63 The fact that the paying is an agency of the Ministry of Economic affairs still reflects the structure of the previous government, where the Ministry for Economic Affairs was responsible for the implementation of direct payments legislation.

64 These expert committees take place in the context of the legislative process of adopting implementing and delegated acts.

65 See also above section 4.3.2

66 See *Stcrt.* 2014, 36127, p. 35.

information acquired through informal and formal interviews with Dutch officials working for the Ministry and the RVO, the Dutch paying agency.

The interviews already give a first general impression of the role of direct payments guidance documents in Dutch implementation processes. The officials consistently and repeatedly emphasised the binding character of the guidance documents. The guidance documents, the officials noted, in practice 'have the same status as legislation'.⁶⁷ The guidance documents are generally strictly followed when implementing EU direct payments legislation in practice.⁶⁸

Still, however, this general insight given by the Dutch officials does not give a full answer about the role of direct payments guidance documents. For instance, does the use of direct payments guidance as binding aid apply to all types of guidance? In what implementing instruments can traces of guidance documents be found? And, what are the (possible) reasons for the perception and use of guidance documents as a binding instrument?

This section traces the role of direct payments guidance documents at the different stages of the implementation process. It shows that direct payments guidelines leave traces in the Dutch Ministerial Regulation 'as if they were binding rules', that guidelines are used as a standard when making implementing and technical decisions related to the setting up of the integrated administration and control system and, finally, that the guidelines serve as a basis for decisions that address the final beneficiaries.

5.5.1 Bringing the Ministerial Regulation in line with Commission guidance

The use of guidance documents as a 'rulemaking instrument' does not immediately become clear from the text of the Ministerial Regulation: the Regulation does not contain explicit references to Commission guidance documents. A glimpse of direct payments guidelines is only given in the explanatory notes to amending decisions of the Ministerial Regulation where some traces of direct payments guidance documents have been found.⁶⁹ For instance amending decision *Stcrt.* 2016, 16496 explains that a change to Article 2.2 that operationalises the concept of a minimum activity is made 'in light of remarks made by the European Commission'.⁷⁰ The explanatory note to the amending decision that gives rules on the definition of an 'active farmer' explains that this change is a 'direct consequence of a stricter interpretation of the European Commission'.⁷¹

67 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

68 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

69 The search for explicit references in these explanatory notes to the amending decisions (only) revealed eight references to direct payment guidance documents or more indirectly to the 'opinion' of the European Commission. See Annex 1.2.1

70 *Stcrt.* 2016, 16496, p. 4.

71 See *Stcrt.* 2017, 13791, p. 4.

These glimpses of direct payments guidelines reflect the ‘tip of the iceberg’. In practice, the direct payments guidelines are an important rule-making instrument to operationalise the complex direct payments rules. This was made clear by Dutch officials involved in the drafting process of the Ministerial Regulation as well as the policy rules (the latter will be discussed below). The officials explained that direct payments guidance documents regularly lead to amendments to the Ministerial Regulation and described various examples of such changes.⁷² The guidance documents are used to further operationalise and define the conditions under which direct payments are granted.⁷³

With these general remarks in mind, we can set out to further explore the (often invisible) traces of direct payments guidelines in the Dutch Ministerial Regulation. This section discusses some examples that illustrate how Commission guidelines find their way into the Dutch Ministerial Regulation.

Light tillage: touching upon the limits of EU hard law

Guidance guidelines leave ‘direct traces’ in the Ministerial Regulation when they are ‘copied’ into articles of the Ministerial Regulation.⁷⁴ The provisions in the Ministerial Regulation then reflect the wording of guidelines included in the direct payments guidance documents. An example is provided by Article 2.15(3) of the Ministerial Regulation, which provides that under certain circumstances ‘light tillage’ is allowed on environmentally sensitive permanent grassland. This Article implements Article 45(1) of Regulation 1307/2013 that imposes a ban on ploughing on environmentally sensitive grassland. The allowance of light tillage, however, derives from the permanent grassland guidance, as is also made clear in the explanatory note to the introduction of Article 2.15(3) in the Dutch Ministerial Regulation.⁷⁵ This permanent grassland guidance issued by the DG AGRI Commission services provides that in spite of the ban on ploughing on this type of grassland, the use of light tillage is allowed provided it is only with the purpose of preparing the soil to restore the grass.⁷⁶ Thus, this first example already illustrates the ‘tangible’ effects that Commission guidelines may have on Dutch rulemaking practices. It also shows that the transposition of the guidelines into national legally binding rules may touch upon the limits of underlying EU legislation.

72 Interview 3 – National officials A and B; Interview 4 – National officials A and C.

73 Interview 3 – National officials A and B.

74 And thus take the form of linguistic similarities with the text of direct payment guidance documents.

75 *Stcrt.* 2016, 16496, p. 4.

76 See DS/EGDP/2015/02 REV 4, p. 9.

A five metres buffer zone: when guidelines become 'politically binding'

A second example of the transposition of direct payments guidelines into the Ministerial Regulation, is the adoption by the Ministerial Regulation of the Commission's guideline allowing for a 'five metres buffer zone'.⁷⁷ In line with the EFA layer guidance document, Article 2.17 allows for a five metres buffer zone between ecological focus areas and arable land. This article operationalises the legislative requirement that some ecological focus areas must be 'adjacent to arable land'.⁷⁸

The transposition of the Commission's five metres buffer zone guideline in the Ministerial Regulation is interesting since it shows how Commission guidelines could become 'politically binding'. In this case, the guideline was transposed contrary to Dutch policy preferences: Dutch officials preferred the criterion that the ecological focus areas and arable land had to be physically touching, as was provided for in the first version of the EFA layer guidance document.⁷⁹ The main reason to nevertheless proceed to transpose the Commission's rule is that Commissioner Hogan presented the guideline as one of his 'simplification measures'.⁸⁰ In light of the high 'political status' of the guidelines, it would be impossible to explain to farmers that a stricter interpretation was employed than the more lenient approach as allowed for by the Commission:

The guideline was presented as a simplification measure of Commissioner Hogan'. (...) 'Therefore the State Secretary cannot explain to parliament to not to implement the simplification measures'.⁸¹

The fact that the five metres buffer zone in the Dutch Ministerial Regulation transposes a guideline of the European Commission, does not become visible in the explanatory note to the amending decision. The explanatory note does not explain nor even mention that the five metres buffer zone derives from Commission guidelines.⁸²

The fifty trees rule: a good fit with national practices?

The above two examples of the transposition of Commission guidance feature in the Ministerial Regulation that is currently in force. Traces of Commission guidelines were also found in previous Ministerial Regulations.

77 DSCG/2014/31-FINAL REV 1.

78 The requirement can be found in article 46(2) of Regulation 1307/2013.

79 Interview 3 – National officials A and C.

80 The announcement of the simplification measures can be found via https://ec.europa.eu/agriculture/newsroom/204_en (last accessed 5 August 2019).

81 Interview 3 – National officials A and B.

82 See *Scrt.* 2015, 46132, p. 7.

One of these early traces⁸³ is the transposition of the Commission's fifty trees rule laid down in Article 21 of the '*Regeling GLB-inkomenssteun*'.⁸⁴ In line with the rule laid down in the 'on-the-spot-check working document',⁸⁵ Article 21 of the Ministerial Regulation provides that agricultural parcels with more than fifty trees cannot be eligible for aid. This Article implements Article 8(1) of Regulation 796/2004 according to which areas containing trees are eligible for aid, provided agricultural activities can be carried out in the same way as on agricultural parcels without trees.⁸⁶

The transposition of the Commission's fifty trees rule is one of the exceptional cases where the explanatory note that introduced this rule sheds light on the reasons for transposing the fifty trees rule into the Ministerial Regulation. It explains that the fifty trees rule was transposed into the Ministerial Regulation for reasons of feasibility, controllability and certainty for the farmer:

'These guidelines are, although consistently applied by the European Commission, not binding. For reasons of clarify for the farmers and for the reason that the norm is easily controllable, it was decided to transpose the 50 trees norm into national legislation.'⁸⁷

As transpires from the cited paragraph, the explanatory note also mentions that the Commission services 'consistently apply' the fifty trees rule. Here, in an indirect manner, the explanatory note refers to the use of the fifty trees rule as an audit tool by the Commission services. Perhaps the use of the fifty trees rule as an audit tool also played a role in transposing the fifty trees rule into the Ministerial Regulation?

What makes the fifty trees rule an even more interesting case is that application of the fifty trees rule is challenged before the Dutch Trade and Industry Appeals Tribunal. As we will see, the strict adherence to the fifty trees rule and the critical response of the Tribunal are illustrative for the dynamics that shape the role of direct payments guidance in the Dutch legal order.

83 Another early trace to Commission guidelines features in the Ministerial Regulation that laid down rules on EC animal premiums, the *Regeling dierlijke EG-premies of 1996* (See *Stcrt.* 2002, 143). The interpretative note is referred in the ruling of CBB 13 October 2006, ECLI:NL:CBB:2006:AZ0218, par. 2.2.

84 The fifty tree rule was introduced at 20 March 2009, see *Stcrt.* 2009, 62. The fifty trees rule still features in the current Ministerial Regulation (Article 2.2(4)). This article implements Article 9(3) of Delegated Regulation 640/2014 that now explicitly allows Member States to define a maximum density of trees per hectare (which shall not exceed 100 trees per hectare).

85 AGRI/60363/2005-REV.

86 Article 8(1) of Regulation 796/2004 and later Article 34(1) of Commission Regulation 1122/2009.

87 See *Stcrt.* 2009, 62, p. 40. The explanatory note to the current Ministerial Regulation provides that the maximum of fifty trees per hectare is in line with traditional practices and environmental circumstances. See *Stcrt.* 2015, 8489, p. 5.

The maintenance obligation: defining the margin of manoeuvre

In the above cases Commission guidelines are transposed into provisions of the Ministerial Regulation: the text of the Ministerial Regulation 'reflects' the text of the guidance provisions.⁸⁸ Nonetheless, direct payments guidelines may influence provisions of the Ministerial Regulation in an even more indirect manner.

This is illustrated by Article 2.2(1) of the Ministerial Regulation that defines the criteria that need to be met for an agricultural area to be maintained in a state that makes it suitable for grazing or cultivation and thus eligible for aid.⁸⁹ In this case, the Dutch State Secretary changed the initial criteria formulated in the Ministerial Regulation after critical remarks expressed by the Commission.⁹⁰ According to the Commission services, two of the initial criteria formulated in the Ministerial Regulation (the removal of grass clippings and the annual grazing of the agricultural area) did not meet the requirement, formulated by the Commission services that the criteria had to be 'non-production related'.⁹¹ In response to these remarks, the Dutch State Secretary changed the Ministerial Regulation and took out the two criteria laid down in Article 2.2.⁹²

In this case Commission guidelines shape the eligibility criteria in the Ministerial Regulation, without the text of the guidelines being reflected in the text of the legislative provision. Indeed, the non-production requirement formulated by the Commission services is not mentioned in text of the Ministerial Regulation. Thus, the guidelines are used to define the margin of manoeuvre, rather than to transpose a rule into the national implementing rules.

5.5.2 A silent influence of Commission guidance in Dutch policy rules

Direct payments guidelines not only leave their imprint in the Ministerial Regulation, the guidelines are also used as an aid when drafting the policy rules that complement the Ministerial Regulation. Article 5 of the policy

88 And therefore takes the form of a linguistic similarity.

89 See Article 4(c)(ii) of basic regulation 1307/2013 and Article 4(2)(a) of Regulation 1307/2013.

90 Interview 3 – National officials A and B.

91 The non-production requirement is laid down in document DS-CDP-2015-04-rev1. This document, as we will see in section 5.6.3, also features in rulings of the Trade and Industry Appeals Tribunal.

92 See *Stcrt.* 2016, 16496, p. 4. Article 2.2(1) of the Ministerial Regulation was – again – revised in 2017 since for reasons of controllability it appeared sufficient to provide that the agricultural area needs to be free from bushes (*verstruiking*) and from overgrowth (*verruiging*). See *Stcrt.* 2017, 70783, p. 11.

rules that further operationalise the eligibility criteria for the young farmers payment have been shaped by Commission guidelines.⁹³

In letters sent to the Dutch and Danish authorities, the DG AGRI Commission services give further guidance on the concept of ‘effective and long-term control’, which is one of the conditions for the young farmers payment.⁹⁴ The Commission services make clear that a young farmer is considered to have effective and long-term control when the structure of the holding is not organised in such a way that the young farmer may be overruled by non-young farmers.⁹⁵ The letters also give examples of situations where the young farmer can, or cannot, be considered to have sufficient decision-making power.

The two criteria in the Dutch policy rules that define when the young farmer has effective and long-term control derive from the answers given by the DG AGRI Commission services in these letters.⁹⁶ In line with the Commission’s guidelines, the Dutch policy rule requires that the young farmer must have overruling decision-making power for decisions over 25,000 euros and that the young farmer must take part in the daily management of the farm.⁹⁷ The explanatory memorandum reiterates the two criteria and provides for further rules that reflect the guidelines given by the DG AGRI services.⁹⁸

When reading through the text of the policy rules, the influence of the Commission guidelines is, however, hard to discern and to retrace. Neither the text of the policy rule nor the explanatory guidance in the note to the policy rules refers to the correspondence with the Commission services. What is more, the letters that have guided the Dutch policy rules are only published on CircaBC: a digital platform that is only accessible to the payment agencies of the Member States. Thus, the policy rules on the young farmers payments provide another example of where Commission guidelines silently influence Dutch rulemaking practices.

Conclusion: a strong steering effect of interpretative guidelines on rulemaking practices

Having explored the use of direct payments guidelines in relation to the Ministerial Regulation and policy rules, some general conclusions can be drawn as to the role that the direct payments guidelines play at this first stage of the implementation process. In the first place, from the above it

93 The young payment scheme can be found in Article 50 in Regulation 1307/2013 and Article 49 of delegated regulation 639/2014.

94 Interview 3 – National officials A and B.

95 This is made clear in the letter of 17 March 2015 sent by the DG Agri Commission services to the Dutch Ministry of Economic Affairs. The letters have not been published.

96 Interview 3 – National officials A and B.

97 See Article 4 of the policy rules. See also *Strcrt.* 2015, 13313, p. 4; Interview 3 – National officials A and B.

98 See *Strcrt.* 2015, 13313, p. 4.

follows that the guidelines in particular take a role as aid to interpret provisions in the EU direct payments legislation. Second, the above examples also show that generally the Commission's interpretative guidelines seem to be strictly followed. Third, reasons for applying Commission guidelines have been found in the aim to provide for legal certainty and controllability, in the objective to act in line with audit practices of the Commission services as well as in political pressure to act in accordance with the views of the Commissioner and the Commission.

5.5.3 Guidance as a standard for implementing and technical decisions

The above sections show how interpretative guidelines affect, directly or indirectly, the provisions in the Dutch Ministerial Regulation and policy rules. Direct payments guidance, however, often goes beyond interpretative rules, taking the form of implementing guidance, technical guidance or good practices. These types of guidance play a role in relation to the setting up and keeping up to date of the integrated administration and control system, as well as in relation to conducting administrative and on-the-spot controls.⁹⁹

The question is whether, and to what extent, these types of guidance guide Dutch implementing and technical practices. Officials of the Ministry as well as of the Dutch paying agency indicated that these types of guidance have a similar status to the guidelines with an interpretative character.¹⁰⁰ The various documents that provide implementing and technical guidance are perceived as binding and 'in fact have the same force as legislation'.¹⁰¹ The main reason, according to the interviewees, is not to take any risk in view of the possible financial consequences.¹⁰²

In that regard, the interviewees referred to the 'LPIS experience' in 2009.¹⁰³ During audits conducted in 2007 and 2009, Commission auditors concluded that the Dutch Land Parcel Identification System (LPIS) was not up to date. For this conclusion, the Commission services found support in guidelines of the Joint Research Centre: the Netherlands had used methods that according to the JRC guidelines would give rise to 'difficulties related to location of reference parcels'.¹⁰⁴ As a result, aid had been granted for non-eligible elements such as lines of trees, wooded banks and ditches.¹⁰⁵ Eventually, in September 2009 the Netherlands was given a financial correction of 16.6 billion euros.¹⁰⁶

99 See chapter II of Regulation 1306/2013.

100 Interview 4 – National officials A and C.

101 Interview 3 – National officials A and B.

102 Interview 3 – National officials A and B.

103 Interview 3 – National officials A and B and Interview 4 – National officials A and C.

104 See JRCIPSC/G03/P/skaD(2004)2575, p. 7 and *Kamerstukken II* 2009/10, 28625, 87, p. 2.

105 *Kamerstukken II* 2009/10, 28625, 87, p. 2.

106 See *Kamerstukken II*, 2009/10, 21501-32, 359, p. 1-2.

From this LPIS experience, Dutch officials learned their lesson. When designing and setting up the new LPIS system in 2009, the Dutch authorities worked closely with the Commission services and followed the Commission recommendations on the methods to measure and identify agricultural parcels.¹⁰⁷ This LPIS experience in 2009 still shapes the role of LPIS Commission guidelines today:

'The letter of the audit of the previous direct payments framework refers to JRC guidance and therefore the [current] LPIS guidance document is considered to be very binding. Indeed the auditors take it into account. (...)'.¹⁰⁸

The officials made similar remarks about the *de facto* binding nature of other implementing and technical guidance documents, whilst repeatedly referring to the possible financial consequences that may occur when the guidelines are not followed. For instance, in relation to a guidance document on the increase of on-the-spot checks, the officials remarked:¹⁰⁹

'The increase of on-the-spot checks [document] is perceived as highly binding from which it is not possible to depart. (...) That could lead to the remark of the Commission that we have not conducted sufficient numbers of controls.'¹¹⁰

Thus, from the interviews it follows that not only the interpretative guidelines, but also the guidelines that outline appropriate implementing measures and technical methodologies, are perceived and used as binding measures. Consequently, the issuing or revision of these guidelines can have far-reaching consequences on the design of the integrated administration and control system.

Nonetheless, despite the strong steering effects, the influence of the technical and implementing guidance generally remains largely invisible. The decisions on the form and design of the different elements of the integrated administration and control system are laid down in internal framework documents.¹¹¹ These internal framework documents guide the implementing practices within the Dutch paying agency, but are not published or accessible to the public. What is more, traces of technical and implementing guidance also do not generally feature in the text of the Ministerial Regulation and policy rules.

107 *Kamerstukken II* 2009/10, 28625, 87, p. 2.

108 Interview 3 – National officials A and B. This also follows from CBb 4 June 2019, ECLI:NL:CBB:2019:227 par. 5.1 and CBb 23 April 2019, ECLI:NL:CBB:2019:161, par. 5.1.

109 DS/CDP/2015/02 FINAL.

110 Interview 3 – National officials A and B.

111 In the context of this research it has not been possible to gain access to the documents, yet information on their role and general content was given to the author during interviews with national officials.

5.5.4 Individualised decisions: guidance as a ‘binding instruction’?

Eventually, the paying agency decides on the eligibility of aid applications and allocates the direct payments to the farmers. The paying agency applies the general rules laid down in the Ministerial Regulation and the policy rules, in individual cases. Also at this final stage of the implementation process, direct payments guidelines play an important role. From the interviews with Dutch officials, a picture emerges that also at this final stage of the implementation process, the Commission guidelines tend to be strictly followed.¹¹² Deviation from guidance documents, also at this stage, is considered ‘not an option in view of the potential financial consequences’.¹¹³

The use of guidelines as a decision-making standard also transpires from rulings of the Dutch Trade and Industry Appeals Tribunal. Some groups of rulings (to be discussed below in section 5.6) reveal that the Minister develops a policy line or takes decisions based on Commission guidelines. Illustrative for the use of guidance as binding decision-making aid are the obvious error rulings and the fifty trees rulings.

Example 1: the obvious error guidelines as basis for a policy line

Generally, the use of guidance documents as a decision-making aid is not mentioned in the text of the individualised decisions.¹¹⁴ There are nevertheless some exceptions. This, according to the Dutch officials, is most clear in the obvious error decisions. These decisions assess whether errors in submitted aid applications can be considered as obvious, in the case of which EU direct payments rules allow the errors to be adjusted.¹¹⁵ The obvious error decisions refer to the guidelines in the obvious error working document that was issued in the year 2002.¹¹⁶

The use of obvious error guidelines as a decision-making aid also transpires from the ‘obvious error rulings’ of the Trade and Industry Appeals Tribunal.¹¹⁷ For instance, the contested decision that is cited in one of the obvious error rulings handed down in 2003 concludes that ‘there is no obvious error as referred to in the working document of the commission, therefore your application (...) cannot be adjusted’.¹¹⁸ From these rulings it also follows that the Minister intends to give binding force to the obvious

112 Interview 3 – National officials A and B and interview 4 – National officials A and C.

113 Interview 4 – National officials A and C.

114 Interview 4 – National officials A and C.

115 See Article 5bis of Article 12 of Commission Regulation 2419/2001; Article 19 in Commission Regulation 796/2004; Article 21 in Commission Regulation 1122/2009; and Article 4 of Commission Implementing Regulation 809/2014.

116 AGR 49533/2002.

117 The obvious error rulings are discussed below in section 5.6.1.

118 CBb 11 July 2003, ECLI:NL:CBB:2003:AI0376, par. 3.

error guidelines (which as we will see is not accepted by the Trade and Industry Appeals Tribunal).¹¹⁹

Later rulings repeatedly note that based on the obvious error guidelines, the Dutch paying agency developed the *policy line* that an error can be classified as obvious 'only if the error is detected as a result of contradictory information which is the result of a mistake and not the intention of the farmer'.¹²⁰ As will be discussed below, the obvious error guidelines not only resonate in decision-making practices, but are also used as a judicial interpretation aid by the Dutch Industry and Appeals Tribunal.¹²¹

Example 2: the use of the fifty trees rule as a binding rule

Other rulings also give an insight into the role that direct payments guidance documents can come to play in decision-making practices. The fifty trees rulings, for instance, show that the Minister adhered strictly to the fifty trees rule laid down in DG AGRI working document.¹²² In line with the Commission's fifty trees rule, the Minister refused the application for aid for the reason that the agricultural parcel contains more than fifty trees per hectare.¹²³ From these rulings, it follows that the contested decision substantiates the refusal of aid with a single reference to the fifty trees criterion laid down in the Commission working document.¹²⁴ In the words of the Tribunal, the Minister uses the fifty trees rule 'as if it were a binding instruction'.¹²⁵

Like the obvious error rulings, the fifty trees rulings show how Commission guidelines can become pivotal for the question whether an agricultural parcel is eligible for aid. As will be discussed in the next section, according to the Trade and Industry Appeals Tribunal, the strict adherence to the fifty trees rule raises problems in light of the underlying legislative provision which states that agricultural parcels that contain trees are eligible if agricultural activities can be carried out in the same way as on parcels without trees.¹²⁶

119 For instance CBb 6 June 2001, ECLI:NL:CBB:2001:AB2130, par. 5. See below section 5.6.1.

120 For instance; CBb 24 June 2005, ECLI:NL:CBB:2005:AT8903, par. 3; CBb 7 July 2006, ECLI:NL:CBB:2006:AX8376, par. 5.4; CBb 2 October 2009, ECLI:NL:2009:BJ9441, par. 5.3; CBb 20 November 2009, ECLI:NL:CBB:2009:BK5141, par. 2.4.1; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6817, par. 5.3; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1829, par. 2.4.1; CBb 18 July 2012, ECLI:NL:CBB:2012:BX5079, par. 5.3; CBb 1 February 2013, ECLI:NL:CBB:2013:BZ4272, par. 2.3.2.

121 Section 5.6.2

122 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249.

123 AGRI/60363/2005-REV, p. 4

124 As already discussed above in section 5.5.1 this fifty trees rule of the European Commission is later transposed into Article 21 of the Ministerial Regulation.

125 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.6.

126 Article 8 of Regulation 796/2004 and later Article 33 of Regulation 1122/2009. The fifty trees rule provides further guidance to this provision.

5.5.5 Conclusion: direct payments guidance as binding rule or standard

From the above sections, a general picture arises that in the Dutch implementation process, direct payments guidance is perceived and used as a *de facto* binding implementation aid. As a result, direct payments guidelines have a strong steering effect on the implementation of EU direct payments legislation in the Dutch legal order.

The main reason, as repeatedly remarked by Dutch officials, for the use of direct payments guidance as a binding implementation aid is the threat of financial consequences when guidance documents are not followed. The Dutch officials learned their lesson after past experience, such as the LPIS in 2009 when Commission guidelines played a role in the decision that the Dutch parcel identification system was not up to date. This binding role of guidelines in practice contrasts with the non-binding and flexible character that guidance documents ‘promise’ to have when they are issued.

Nevertheless, when studying the use of direct payments guidance more closely, other reasons have been identified that also explain the strict adherence to direct payments guidance documents. It has been found that the tendency to strictly follow guidance given by the Commission services, might also be related to the aim of the Dutch administration to provide for legal certainty as well as to the aim of creating a level playing field. What is more, as the fifty trees rule shows, following direct payments guidelines may also serve the aim for controllability and feasibility of implementing practices.¹²⁷

From the above analysis, it transpires that three types of guidance most clearly leave traces in Dutch implementing practices. These are the guidelines with an interpretative, implementing and technical character. Interpretative guidelines have the strongest effect on Dutch implementing practices. These guidelines steer the operationalisation of EU direct payments rules into the Dutch Ministerial Regulation and in policy rules, and play an important role in individual decisions on the eligibility of individual aid applications. In particular, the guidelines on implementing methods and technical measures leave their imprints on the measures related to the integrated administration and control system.

Traces of the two remaining types of guidance – explanatory guidance and the dissemination of good practices – do not feature among the traces of the use of direct payments guidelines. The invisibility of the use (or effects) of explanatory guidance could be explained in light of the fact that this type of guidance is most apt to be used as background information and does not lend itself for being translated into implementation measures. The Dutch

127 These additional reasons transpire from the above analysis and were also mentioned by the officials during Interview 3 – National officials B and C and Interview 4 – National officials C and D.

officials mentioned that explanatory guidance documents, such as the aid application guidance, are considered a useful implementation aid to understand the complex direct payments rules.¹²⁸

As regards the absence of traces of ‘good implementing practices’, the officials remarked that this type of guidance is perceived as somewhat less binding than the other types of guidance.¹²⁹ The officials noted that ‘it only concerns the dissemination of good practices of other Member States’. These good practices, indeed, do not reflect the ‘best’ method recommended by the Commission services.¹³⁰ This is an indication that guidance in the form of good practices is perceived and used as having less *de facto* binding force than the four other types of guidance.

5.6 THE USE OF DIRECT PAYMENTS GUIDANCE BY THE TRADE AND INDUSTRY APPEALS TRIBUNAL

From the above it follows that the use of direct payments guidance documents as a binding implementing standard has far-reaching consequences on the implementation of direct payments legislation. As argued in the introductory chapters of this book, national courts may play an important role in shaping the role of guidance documents as implementation aid. This section explores the use of direct payments guidance documents in the judicial decision-making process of the Trade and Industry Appeals Tribunal. Does the Tribunal strengthen or downplay the role of direct payments guidance documents as implementation aid?

Nine groups of rulings

This search for explicit references to direct payments guidance documents reveals 220 rulings which refer to various guidance documents.¹³¹ Along the lines of these different documents, nine groups of rulings can be identified. The groups of rulings and corresponding guidance documents, as well as the number of rulings are displayed in Table 5-2.

As transpires from table Table 5-2 the largest group of rulings is the group of rulings that refers to the obvious error guidelines. These obvious error rulings also include the earliest rulings that were found with the search for explicit references: the first obvious error rulings were handed down in 2001. Today, still, the obvious error working document features in the rulings of the Trade and Industry Appeals Tribunal.

128 Interview 3 – National officials A and B.

129 Interview 4 – with National officials A and C.

130 Interview 4 – with National officials A and C.

131 For an overview of these ruling see Annex 1.2.1.

Table 5-2 Groups of rulings that refer to direct payments guidance documents

Groups of rulings	Name of guidance document	No. of rulings
Obvious error rulings	Working document VI/7103/98 Rev2-NL and Working document AGR 49533/2002 on the concept of obvious error.	182
Fifty trees rulings	Working document AGRI/60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) 796/2004.	4
Interpretative note rulings	'Interpretative notes no. 26 and 51'	12
JRC rulings	Information on the Wikicap website of the Joint Research Centre on the measurement method	5
Permanent grassland rulings	Information on the WikiCAP website of the Joint Research Centre on permanent grasslands	10
Active farmer rulings	Guidance document on the implementation of Article 9 of Regulation (EU) 1307/2013, DSCG/2014/29.	2
Observations on notifications	Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) 639/2014 (DS-CDP-2015-04-rev1).	3
LPIS guidance document	Guidance document on the Land Parcel Identification System (LPIS) under Article 5, 9 and 10 of Commission Delegated Regulation (EU) 640, DSCG/2014/33.	2
Guidance on simplification of administrative penalties	Guidance for implementation of Article 19a of Regulation (EU) No. 640/2014 on the simplification of administrative penalties for certain direct payment schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016.	1
Total		222

The other groups of rulings are less numerous, yet also cluster around guidance documents that have various forms. The obvious error rulings and fifty trees rulings relate to 'old' working documents. The interpretative note rulings also reflect 'guidance from the past'.

The active farmer guidance document, the LPIS guidance document, as well as the guidance on administrative penalties, are more recent guidance documents. The active farmer guidance document has a highly explanatory nature: it explains the purpose and context of the active farmer provision in EU direct payments legislation. The document with observations on notifications could be seen as 'guidance in disguise': the title does not reflect that it has been issued for guidance purposes. Both the document with observations on notifications and the active farmer guidance have not been published. Finally, the JRC rulings and the permanent grassland rulings refer to technical guidelines published on the Wikicap website. The JRC rulings, as we will see, reveal a glimpse of how technical guidance may come to play a role in proceedings before national courts.

Two lines of case law

The analysis in this section is structured along the lines of the groups of rulings introduced above. In these rulings, two lines can be discerned that provide insights into the role of direct payments guidelines.

The first line shows that the Trade and Industry Appeals Tribunal does not accept the use of guidance documents as if they were a binding rule by the Minister (section 5.6.1). In this way, the Tribunal provides guidance to the Minister as to how to use, or not use, Commission guidance.

The second line that can be discerned in the rulings is that the Tribunal uses direct payments guidance documents as a judicial decision-making aid. The guidelines, most often, take the role of interpretation aid, yet also reveal traces of the use of other types than interpretative guidelines (see sections 5.6.2 and 5.6.3). However, the Tribunal does not always follow the Commission guidelines as the ‘airports rulings’ show that are discussed in section 5.6.4.

The final section then draws these two lines together. It concludes that the Trade and Industry Appeals Tribunal counterbalances the role of direct payments guidelines as implementation aid whilst at the same time it recognises the authoritative character of the Commission guidelines.

5.6.1 No use of guidance ‘as if it were a binding rule’

The first line that can be identified in rulings of the Trade and Industry Appeals Tribunal is, as mentioned above, that the Tribunal does not accept the use of direct payments guidelines as a binding rule. This section sets out with a discussion of the fifty trees rulings, which are illustrative for the ‘critical approach’ taken by the Tribunal. It subsequently discusses the obvious error rulings and the interpretative note rulings, in which the Tribunal emphasises that when using the Commission guidelines, the Minister still has the responsibility to take account of the circumstances of the case when this is required by the EU legislative rules.

The fifty trees rulings: ‘no use as a binding instruction’

As discussed in sections 5.5.1 and 5.5.4, the Commission’s fifty trees rule laid down in working document 60363/2005-REV1¹³² was strictly followed and applied by the Dutch paying agency. It was first used as a decision-making aid and later transposed into Article 21a of the Ministerial Regulation. The fifty trees rule provides, as said, that agricultural parcels with a density of more than 50 trees/ha should, as a general rule, be consid-

132 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 5.2.1; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3; CBb 13 March 2013, ECLI:NL:CBB:2013:BZ6298, par. 4.2; CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.5.2.

ered ineligible.¹³³ The application of this fifty trees rule has been challenged before the Trade and Industry Appeals Tribunal.

In two rulings of 2010 and 2011, the Tribunal reviews decisions of the paying agency that apply the fifty trees rule in the situation where this rule had not yet been transposed into the Dutch Ministerial Regulation. The use of the fifty trees rule as a decision-making aid transpires from the text of the rulings: the contested decision refuses aid for the reason that the agricultural parcel concerned contains more than fifty trees, and refers to the rule laid down in working document 60363/2005-REV1.¹³⁴ In these rulings, the Tribunal first notes that ‘the Minister could use the working document as a policy reference point [*beleidsuitgangspunt*] when reviewing the eligibility of parcels containing trees’.¹³⁵ However, the Tribunal considers, in the fifty trees case the Minister uses the Commission’s document ‘not as a guideline but as a binding instruction’.¹³⁶ This, the Tribunal makes clear, is not acceptable:

‘In this way, the Minister denies the nature of the working document. It concerns a recommendation of the Commission, which cannot be given the status of a legally binding rule.’¹³⁷

Instead of adhering strictly to the fifty trees rule, the Minister should carry out an individual assessment of the eligibility of agricultural parcels, especially when the farmer has put forward exceptional circumstances.¹³⁸ To this end, the Tribunal refers to Article 8 of Regulation 796/2004, according to which an agricultural parcel that contains trees shall be considered eligible for aid where agricultural activities can be carried out in the same way as on agricultural parcels without trees. This leads to the Tribunal to conclude that the contested decisions are not sufficiently substantiated.

The other two fifty trees rulings deal with the situation where the fifty trees rule has been transposed into Article 21a of the Ministerial Regulation.¹³⁹ Despite the fact that the fifty trees rule is now anchored in a legally binding rule, the Tribunal still does not allow the application of the fifty trees criterion by the Dutch paying agency. The Tribunal again requires the Minister to make an individual assessment and to make sufficiently clear

133 AGRI/60363/2005-REV, p. 4.

134 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.2; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 3; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par 2.3.1.

135 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

136 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

137 CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par 2.6.

138 The contested decisions are considered to be in violation with Article 7:12 GALA (see CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.7 and CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3) and in one of the rulings also with Article 3:2 GALA (see CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912, par. 5.2.1).

139 CBb 13 March 2013, ECLI:NL:CBB:2013:BZ6298, par. 4.2; CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.5.2.

that on the agricultural parcels agricultural activities cannot be carried out, despite the presence of more than fifty trees per hectare.¹⁴⁰

The approach taken in these rulings is in line with the fifty trees rulings that were handed down before the fifty trees rule was transposed into Dutch legislation. Indeed, in these rulings the Tribunal also requires the Minister to make an individual assessment instead of strictly applying the fifty trees rule. Thus, the fifty trees rulings reflect the Tribunal's critical stance towards the use of the guidance documents as a binding standard by the Minister and paying agency, even when the guidelines have been transposed into a Dutch Ministerial Regulation. At the same time, the rulings leave questions open with regard to the status and even the validity of the fifty trees rule. Indeed, by requiring the Minister to not apply the fifty trees rule, the Tribunal seems to suggest that this rule is not in line with Article 34 of Regulation 1122/2009. It is therefore remarkable that the Tribunal does not refer a preliminary question on the interpretation or validity of the fifty trees rule to the Court of Justice.¹⁴¹

The obvious error working document: 'not the binding force the Minister grants to it'

The fifty trees rulings are not the only rulings in which the Tribunal emphasises the non-binding character of direct payment guidelines. The Tribunal's critical stance also transpires from the obvious error rulings. These rulings represent, as said, the largest group of rulings, and relate to the question whether an error in an application can be considered as 'obvious', in the case of which the aid application can be adjusted after its submission.

Already in the early obvious error rulings issued in 2001, it is made clear that the Minister cannot attach binding force to the obvious error guidelines.¹⁴² The Tribunal considers that:

'the Working Document is not a regulation, directive or decision as mentioned in Article 249 EC (now Article 288 TFEU) and does not have the binding force the defendant [the Minister] intends to attach to it. Moreover, the document does not contain an exhaustive list of possible grounds that allow for an adjustment of the aid application.'¹⁴³ [Emphasis added]

140 In these late fifty tree rulings, the Tribunal takes a less explicit approach. The Tribunal does not explicitly link the need to make an individual assessment to Article 34 of EU regulation 1122/2009 which replaces Article 8 of Regulation 796/2004.

141 See the case note to CBb 16 September 2013, ECLI:NL:CBB:2013:152, AB 2014/187, ann. J.E. Van den Brink and J.C.A. van Dam; See also Van den Brink & Van Dam 2014, p. 20.

142 See for instance CBb 6 June 2001, ECLI:NL:CBB:2001:AB2131, par. 5; CBb 16 January 2002, ECLI:NL:CBB:2002:AD9058, par. 5; CBb 12 March 2003, ECLI:NL:CBB:2003:AF6804, par. 5; CBb 30 March 2005, ECLI:NL:CBB:2005:AT3912, par. 2.5; CBb 29 March 2006, ECLI:NL:CBB:2006:AX8790, par. 5.3.

143 See for instance: CBb 2 May 2001, ECLI:NL:CBB:2001:AB1500, par. 5; CBb 6 June 2001, ECLI:NL:CBB:2001:AB2131, par. 5. Some rulings only mention that the documents do not have binding force. See for instance CBb 12 March 2003, ECLI:NL:CBB:2003:AF6804, par. 5.

The non-legally binding character of the guidelines, does not mean that the guidelines cannot fulfill their role as a decision-making aid:

‘This [the non-legally binding character] does not prevent the *Dienst Regelingen* from developing a policy line on the basis of the guidelines of the European Commission provided that the policy line remains within the limits of EU Regulation (EC) 2419/2001’.¹⁴⁴

In later obvious error rulings, it becomes ‘settled case law’ that the Tribunal considers acceptable that the Minister develops a policy line in light of the Commission guidelines.¹⁴⁵ However, the Tribunal emphasises that when taking account of the guidelines, the Minister should still take account of the circumstances of the case. According to the Tribunal: ‘the obvious error working document formulates the principle that each decision on whether there is an obvious error depends on the facts and circumstances in the individual case’ and that ‘therefore, each case needs to be assessed individually’.¹⁴⁶ As a result, the Minister had to take a more lenient and individualised approach when assessing errors in aid applications.¹⁴⁷ *Interpretative note rulings: Minister, take your responsibility*

The group of twelve ‘interpretative note rulings’ refers to interpretative notes 51 and 26.¹⁴⁸ These interpretative notes give a response to questions raised by the British and Spanish Ministries of Agriculture. Interpretative note 51, which is most extensively referred to in the rulings, was adopted in 1996. It gives guidance – in the form of examples – as to what could constitute ‘exceptional and duly justified cases’ which according to Regulation 2342/1999 are exempted from the rule that non-used premium rights will be returned to the national reserve.

When deciding whether a case is exceptional and duly justified, the Minister ‘let himself be guided by the Interpretative notes 26 and 51’ and assesses whether the cases are similar to the examples given in the interpretative notes.¹⁴⁹ The Tribunal considers that:

144 In Dutch: ‘Dit neemt niet weg dat verweerder de bevoegdheid om aan de hand van het werkdocument, binnen de door Verordening (EG) nr. 2419/2001 getrokken grenzen, een vaste beleidslijn te ontwikkelen, zeker niet ontzegd kan worden.’ See for instance CBb 30 March 2005, ECLI:NL:CBB:2005:AT3912 par. 2.5.

145 See for instance CBb 8 March 2017, ECLI:NL:CBB:2017:83, par. 4.4.

146 CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9418, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9420, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9441, par. 5.3; CBb 2 October 2009, ECLI:NL:2009:BJ9445, par. 5.3.

147 See on the *kruisjesproblematiek Kamerstukken II*, 2009/10, 28625, 85, p. 3.

148 CBb 21 March 2004, ECLI:NL:CBB:2003:AF6914; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3571. For the other ten rulings, see Annex 1.3.1.

149 See for instance CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3568, par. 5.6.

Although it is acceptable that the interpretative notes are used as a reference point, the Dutch paying agency *has its own responsibility* to assess in light of the facts and circumstances of each case whether there is an exceptional and duly justified case. The interpretative notes do not contain legally binding rules, but instead elaborate on some hypothetical situations.¹⁵⁰ [Emphasis added]

The Tribunal's response to the use of the interpretative note by the Minister shows similarities to the approach taken in the fifty trees rulings as well as in the obvious error rulings. The Tribunal accepts that the Minister uses the Commission guidance, yet requires the Minister to take his or her responsibility and assess in light of the facts and circumstances of the case whether a case is exceptional and duly justified.

5.6.2 Direct payments guidelines as an (authoritative) judicial interpretation aid

Despite its critical approach to the use of direct payments guidelines as binding rules, the Tribunal does not refrain from using direct payments guidelines as a decision-making aid itself. In several groups of rulings, the Tribunal uses the guidance documents as an aid to interpret and apply the EU direct payments regulations. This section discusses two groups of rulings that provide insight into the use of direct payments guidelines as an interpretation aid. The next section explores the rulings of the Tribunal that reveal traces of other types than interpretative guidance.

The obvious error rulings: 'guidance from an authoritative institution'

One of the groups of rulings where the Tribunal uses Commission guidelines as an interpretation aid are the obvious error rulings. In these rulings the Tribunal uses the guidelines itself as an aid in order to assess the practices of the Minister – which are based on the Commission's guidelines.¹⁵¹ The Tribunal derives from the guidelines the principle that the Minister should take an individualised approach when assessing whether there is an obvious error.¹⁵² In these 'early obvious error rulings', the Tribunal uses the obvious error guidelines as a judicial decision-making aid, without elaborating on the reasons for doing so. This is not exceptional; also in other rulings the Tribunal refers to Commission guidelines without elaborating on the status of the guidelines. A recent example can be found in the LPIS ruling of 4 June 2019, in which the Tribunal found support in the LPIS document on the question of whether a path is eligible.¹⁵³

150 CbB 30 November 2006, ECLI:NL:CBB:2006:AZ3568, par. 5.6.

151 See above section 5.5.4.

152 See CbB 2 October 2009, ECLI:NL:CBB:2009:BJ9418, par. 5.3. See also above section 5.6.1

153 CbB 4 June 2019, ECLI:NL:CBB:2019:227, par. 5.1.

Remarkably, in recent obvious error rulings issued in 2018, the Tribunal takes a more explicit approach and provides some insights into why it takes account of the Commission guidelines.¹⁵⁴ The Tribunal first extensively cites entire paragraphs from the obvious error guidelines and notes that the obvious error guidelines ‘have obviously been used’ to draft the current obvious error provision in the EU direct payments legislation (Article 4 of Regulation 809/2014).¹⁵⁵ The Tribunal also notes that the wording of this article has changed slightly compared to previous versions and now reflects the wording used in the guidelines.¹⁵⁶ Subsequently, and this is the most interesting part of the ruling, the Tribunal announces that it will take account of the obvious error guidelines, and why it will do so:

‘The working document is not in itself binding. However, since the working document is issued by an authoritative institution and used by the defendant [the Minister] for the assessment whether there is an obvious error, the Tribunal will take the working document into account when assessing the appellant’s appeal’.¹⁵⁷

In the cited paragraph the Tribunal not only announces that it will take the document into account, it also gives reasons for doing so. The Tribunal refers to the authoritative ‘source’ of the guidance document (the European Commission) as well as to the use of the guidelines by the Minister. These recent obvious error rulings are much more explicit about the use of the obvious error guidelines than previous obvious error rulings. On the other hand, this paragraph also raises questions. For instance, would the Tribunal also have taken account of the document had it not been used by the Minister? Does this reasoning also apply to guidance documents other than the obvious error guidelines?

154 CBb 24 April 2018, ECLI:NL:CBB:2018:129; CBb 8 May 2018, ECLI:NL:CBB:2018:323; CBb 17 July 2018, ECLI:NL:CBB:2018:360; CBb 8 May 2018, ECLI:NL:CBB:2018:314; CBb 17 July 2018, ECLI:NL:CBB:2018:379.

155 CBb 24 April 2018, ECLI:NL:CBB:2018:129, par. 3.4; CBb 8 May 2018, ECLI:NL:CBB:2018:323, par. 9; CBb 17 July 2018, ECLI:NL:CBB:2018:360, par. 3.4; CBb 8 May 2018, ECLI:NL:CBB:2018:314, par. 5.4.

156 Article 4 of Regulation 809/2014 provides that obvious error should be recognised ‘on the basis of an overall assessment of the particular case and provided that the beneficiary acted in good faith’, whilst the previous Article 12 in Regulation 2419/2001 only provided that ‘in cases of obvious errors’ and aid application may be adjusted at any time. This text corresponds to the guidance given in the obvious error guidelines in Working document AGR 49533/2002.

157 CBb 24 April 2018, ECLI:NL:CBB:2018:129, par. 4.1; CBb 8 May 2018, ECLI:NL:CBB:2018:323, par. 10; CBb 17 July 2018, ECLI:NL:CBB:2018:360, par. 3.5; CBb 8 May 2018, ECLI:NL:CBB:2018:314, par. 5.7.

How ‘Observations on notifications’ are given a role as interpretation aid

The obvious error rulings in which the Tribunal takes an explicit approach seem to be the exception rather than the rule. An example is provided in the rulings that refer to the document with ‘Observations on the notifications due by Member States pursuant to Commission Delegated Regulation (EU) No 639/2014’. In these rulings the Tribunal refers to the document with observations such as ‘interpretative document’, without elaborating on the reasons for doing so.¹⁵⁸

These two rulings, however, are also interesting for another reason and that is that these rulings show how a seemingly internal document still features in the rulings of the Dutch highest administrative court. Indeed, the document with observations does not have the title of, nor does it look like, one of the ‘standard’ direct payments guidelines. The document with observations on notification has not been published on the Wikicap website of the Commission.

Dutch officials explained that in this case, the Tribunal was informed about the existence and content of this document in cases where the document was invoked by the Minister in support of his argument.¹⁵⁹ Subsequently, in other cases the Tribunal used the document as interpretation itself. The Court uses it, for instance, to support its reasoning that certain activities included in the ‘negative list’ cannot be considered as ‘not predominantly used for agricultural activities’ and therefore are to be excluded from aid.¹⁶⁰ The Tribunal notes that according to the Observations on notifications ‘only those areas may be included in the list which are *typically* not predominantly used for agricultural activities’ [Emphasis added].¹⁶¹ Thus, via the use of a guidance document by one of the parties (in this case the Dutch paying agency), an unpublished, seemingly internal document is brought to the attention of the Court and subsequently, by that Court, given a role as an interpretation aid.

5.6.3 Beyond interpretation: what roles for other types of guidance?

Direct payments guidance documents not only take different forms, the documents also reflect different ‘types’ of guidance. The groups of rulings discussed above refer to guidelines that provide further interpretative rules. Traces of the other types of guidance were found in three groups of rulings. The ‘active farmer rulings’ show how guidelines with an explanatory char-

158 DS-CDP-2015-04-rev1. Three rulings were found that refer to this document: CBb 9 October 2017, ECLI:NL:CBB: 2017:316, par. 4.2; CBb 25 January 2018, ECLI:NL:CBB: 2018:41, par. 4.2; CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

159 Interview 4 – National officials A and C.

160 CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

161 CBb 11 July 2017, ECLI:NL:CBB:2017:212, par. 7.6.

acter may come to play a role in the judicial decision-making process; the JRC rulings give a glimpse of technical guidance and good practices.

The active farmer guidance: explanatory guidance as an aid to define purpose and context

The active farmer guidance document (DSCG/2014/29) was issued in 2014 and, as the title says, provides guidance on the implementation of the 'active farmer provision' (Article 9 of Regulation 1307/2013).¹⁶² The search for explicit references reveals two rulings in which the active farmer guidance document plays a prominent role.¹⁶³ This is already made clear at the very beginning of the rulings: the Tribunal mentions that in the course of the procedure both parties were informed that the Tribunal would take account of the active guidance document. And, the part of the ruling that outlines the applicable legal framework extensively cites from paragraphs of the active farmer guidance document.

In the next paragraphs of the ruling the Tribunal refers to the active farmer guidance document in order to define the purpose and context of the active farmer provision. The Tribunal, for instance, considers that 'as also follows from the guidance document' the purpose of the active farmer provision is to exclude from aid entities whose main business purpose is not or only marginally aimed at agricultural activities.¹⁶⁴ In the concluding paragraph, the Tribunal again refers to the active farmer guidance. The Tribunal finds support in the guidance for the conclusion that the activities employed in these cases (the operation of 'any sport or recreational activity'¹⁶⁵ or the renting out of some holiday houses¹⁶⁶) cannot be equated with operating a permanent sport or recreational ground. This is one of the activities mentioned in the second subparagraph of Article 9 of Regulation 1306/2013 that are presumed not to be agricultural activities and therefore to be excluded from aid.

The active farmer rulings show how not only interpretative guidelines, but also explanatory guidelines, can help a national court to interpret and explain a provision laid down in Union law. Nonetheless, many rulings in which explanatory guidance plays an explicit role have not been found, at least not in the area of direct payments.

162 DSCG-2014-29.

163 CBb 21 June 2017, ECLI:NL:CBB:2017:239; CBb 21 June 2017, ECLI:NL:CBB:2017:241.

164 See CBb 21 June 2017, ECLI:NL:CBB:2017:241, par. 5.3; CBb 21 June 2017, ECLI:NL:CBB:2017:239, par. 4.3.

165 CBb 21 June 2017, ECLI:NL:CBB:2017:241, par. 5.3.

166 CBb 21 June 2017, ECLI:NL:CBB:2017:239, par. 4.4.

JRC rulings: a glimpse of technical guidance and good practices

Often, direct payments guidance documents go beyond interpretation and explanation. This raises the question whether and how the other types of guidance – such as technical guidance, implementing guidance and good practices – play a role as a judicial decision-making aid. The search for explicit references reveals five JRC rulings that refer to technical guidance and good practices published on the Wikicap website of the Joint Research Centre.¹⁶⁷

In these rulings, the question is whether the Minister used the appropriate method for the measurement of agricultural parcels. In all five cases the Minister follows the measurement method recommended by the JRC and the Commission and, as follows from the text of the rulings, also brought this forward during the legal proceedings. The Minister finds support in the guidance of the JRC as the EU legislative rules do not specify what measurement method is to be followed.¹⁶⁸

The guidelines play a less visible role in the part of the rulings that provides insight into the reasoning of the Tribunal when reviewing the Minister's practices. Only in three JRC rulings does the Tribunal briefly refer to the good practices published on the Wikicap website.¹⁶⁹ In these rulings, the Tribunal first notes that the underlying EU legislation does not specify what measurement method should be followed, and that therefore the paying agency is free to choose between different measurement methods that are 'reasonably justifiable'.¹⁷⁰ Subsequently, the Tribunal refers to the good practices of other Member States to underline that the two-dimensional measurement method used by the Minister is in line with the EU legislative requirements:

'Furthermore, the fact that other Member States that have mountain rich areas, such as Germany and Italy, have also chosen for a two-dimensional measurement method pleads for the defendant's [the Minister's] choice to measure the agricultural parcels in a two-dimensional manner.'¹⁷¹

167 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876; CBb, 11 January 2013, ECLI:NL:CBB:2013:BZ3408; CBb 26 November 2014, ECLI:NL:CBB:2014:440; CBb 17 December 2014, ECLI:NL:CBB:2014:478; CBb 5 March 2018, ECLI:NL:CBB:2018:90.

168 CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.2; CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.4; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.2.

169 This is the case in the following three rulings: CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

170 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

171 CBb 20 December 2012, ECLI:NL:CBB:2012:BY6876, par. 2.4.3; CBb 11 January 2013, ECLI:NL:CBB:2013:BZ3408, par. 4.1.3; CBb 5 March 2018, ECLI:NL:CBB:2018:90, par. 6.3.

These JRC rulings thus reveal a glimpse of the role that guidance in the form of good practices could take in the process of judicial decision-making: the fact that the two-dimensional measurement method is widely used, provides an extra argument for the Tribunal that the method is correct or 'appropriate'. It is, however, remarkable that the Tribunal does not explicitly mention that the two-dimensional method is also recommended by the JRC (as emphasised by the Minister).

5.6.4 Commission guidance overruled

Having discussed several groups of rulings in which Commission guidelines are used by Dutch courts as a judicial decision-making aid, the Tribunal does not always apply the Commission's guidelines when interpreting EU direct payments rules. Several rulings show that the Tribunal could also deviate from the Commission guidelines. An example of an implicit 'non application' of the Commission's fifty trees rule has already been identified in the fifty trees rulings, as in these rulings the Tribunal annuls the decision of the paying agency that applies the Commission's fifty trees rule.¹⁷²

A more explicit deviation of Commission guidelines by the Tribunal can be found in the 'permanent grassland rulings' issued in 2013 and 2014.¹⁷³ In these rulings, it is – again – the Dutch Minister who first refers to the Commission guidelines. The Minister argues that grasslands on airports cannot be eligible for aid and emphasises that this 'also follows from the Commission's viewpoint as expressed by the Joint Research Centre'.¹⁷⁴ The Commission expressed this view during several audits, warning the Netherlands that it had unlawfully considered grasslands on airports as not eligible for aid.¹⁷⁵ The Tribunal, in contrast, considers that grassland on airports cannot be precluded from being eligible for aid. 'The remarks made by the Minister about the opinion of the European Commission (...) do not lead to a different conclusion'.¹⁷⁶ Hence, with a few words the Tribunal sets the Commission's opinion aside and follows a different line of reasoning.

It is remarkable that – like in the fifty trees rulings – the Tribunal does not refer a question to the Court of Justice in this case, especially because some years later the Danish Court did refer a question to the Court of Justice that shows similarities to the Dutch airport rulings.¹⁷⁷ In the *Demmer* ruling of 2 July 2015, the Court of Justice considers that, in line with the Tribunal's point of view – grassland on airports cannot per se be excluded

172 See above section 5.6.1

173 See for instance CBb 6 December 2013, ECLI:NL:CBB:2013:300; For the other nine permanent grassland rulings see Annex section 1.3.1.

174 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 4.1.

175 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 4.1.

176 CBb 6 December 2013, ECLI:NL:CBB:2013:300, par. 6.3.1.

177 See CJEU 2 July 2015, C-684/13, ECLI:EU:C:2015:439 (*Demmer*).

from aid. Following Article 34(a) of Regulation 73/2009, the eligibility of the agricultural parcel depends on whether the parcel is *predominantly* used for agricultural activities and, to this end, account must be taken of the facts of the case.¹⁷⁸

The permanent grassland rulings thus show that the Trade and Industry Appeals Tribunal does not, as a general rule, follow the Commission guidelines. Yet, the cases in which the Tribunal explicitly deviates from Commission guidelines, seem to be the exception rather than the rule.

5.6.5 Conclusion: the Tribunal as counterbalancing actor

Compared to the numerous and various direct payments guidance documents issued by the Commission, only a few guidance documents leave traces in the rulings of the Dutch Trade and Industry Appeals Tribunal. The analysis of the traces of direct payments guidance in the different groups of rulings nevertheless reveals some trends as to the role(s) that different types of direct payments guidelines take in the decision-making process of the Tribunal.

The analysis reveals that most references in rulings of the Tribunal refer to interpretative Commission guidelines. The Tribunal then uses the Commission to interpret provisions in direct payments regulations, and assesses the Minister's practices in the light of those guidelines. Nonetheless, the Tribunal also occasionally uses 'explanatory guidelines' to define the purpose and rationales of provisions in EU legislation (e.g. the active farmer rulings).

The other types of guidance feature less frequently in the reasoning of the Court. It is remarkable that despite the manifold implementing and technical guidance documents adopted by the Commission services, that these types of guidance do not play a prominent role in the Tribunal's decision-making process. A glimpse of technical guidance and good practices can be found in the JRC rulings, where the Court refers to 'good measurement practices' in support of its conclusion that the measurement method chosen by the Minister can be considered 'appropriate'.

The above observations relate to the types of guidance. Does the analysis also give insights into the perspective of the Tribunal on the binding character of direct payments guidelines?

From the rulings it becomes clear that the Tribunal does not view the Commission guidelines as if they were binding rules. Indeed, the Tribunal does not accept the use of direct payments guidance 'as a binding instruction' by the Dutch paying agency. Only the use of the guidelines as a 'policy reference point' is permitted, according to the Tribunal. Thus, the Tribunal plays the role of counterbalancing actor, giving guidance a more modest role as an implementation aid (instead of as an implementing standard) in the implementation process.

178 See CJEU 2 July 2015, C-684/13, ECLI:EU:C:2015:439, par. 73 (*Demmer*).

Yet, this does not mean that the Tribunal does not regards the direct payments guidelines as 'authoritative'. In the recent obvious error rulings, the Tribunal notes that it takes account of the guidelines, for the reason that the guidelines are issued by an authoritative institution (the European Commission), as well as for the reason that the Minister himself adhered to the obvious error guidelines. In other rulings, the authoritative character of Commission guidance documents seems to be 'assumed' by the Tribunal, but is not acknowledged explicitly.

Most of all, however, the rulings of the Tribunal leave questions open as regards the status of the Commission guidelines. It is uncertain whether the Tribunal perceives the Commission guidelines to be a mandatory judicial interpretation aid that in principle should be followed and from which deviation needs to be explained, or whether the guidelines are used and perceived as a voluntary interpretation aid. The role of the guidelines also remains uncertain for the reason that in none of the rulings in the search for explicit references does the Tribunal refer to the *Grimaldi* case law of the Court of Justice. This silence by the Tribunal on the *Grimaldi* case in the direct payments rulings contrasts with a ruling handed down in the field of telecommunication. In the *KPN v ACM* case, the Tribunal referred a question to the Court of Justice on the meaning of the *Grimaldi* formula in relation to a recommendation of the European Commission to the Telecommunications Directive.¹⁷⁹ This reference led to the *KPN v ACM* ruling of the Court of Justice, that is discussed in chapter 3 (sections 3.3.2 and 3.4.2).¹⁸⁰

5.7 CONCLUSION

The main driving force behind the issuing of guidance documents that complement the EU direct payments legislation is the aim to prevent financial corrections. The guidance documents promise to provide clarity and certainty in the implementation of the complex rules laid down in EU regulations. It is, however, the same power of the Commission to impose financial corrections that makes national authorities exposed to strong pressures to act 'guidance-proof'.

This chapter shows that these strong pressures to act guidance-proof are the main factor that gives direct payments guidance documents in the Netherlands the role of a binding rule or implementing standard. Deviation from the guidelines is not considered an option in view of the risk of financial consequences that would arise in that case. Nevertheless, other factors have also been identified that explain the strict adherence to Commission guidance documents. The strict adherence to direct payments guidelines can also be understood in light of the aim to provide for legal certainty, to create a level playing field and the aim of feasibility and controllability.

179 CBb 13 January 2013, ECLI:NL:CBB:2015:4.

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

The use of direct payments guidelines as a binding standard occurs at different stages of the implementation process. The steering effect of Commission guidelines is most strong for interpretative, implementing and technical guidelines. Traces of the use of interpretative guidelines can be found in the Dutch Ministerial Regulation, policy rules and in individualised decisions. Traces of implementing and technical guidelines can be found in practical implementing measures and internal guidelines. These guidance documents in particular affect the setting up of the integrated administration and control system and the various administrative and 'on-the-spot' controls.

Finally, this chapter has shown that the role of direct payments guidelines as a binding rule is counterbalanced by the Trade and Industry Appeals Tribunal. The highest administrative court guards the guidelines from being used as a binding rule and that account is taken of the underlying EU direct payments regulations. At the same time, the Tribunal also uses the direct payments guidelines itself as a judicial decision-making aid, in particular for interpretative questions. A clear perspective on the status of the direct payments guidelines does not transpire from the text of the rulings. Are the guidelines used and perceived as a voluntary, or rather as a mandatory interpretation aid? Future rulings of the Trade and Industry Appeals Tribunal might shed more light on this question.