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Guidance documents of the European Commission in the Dutch legal order

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The Habitats Directive, which is the informal name for ‘Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora’, was adopted on 21 May 1992. The Habitats Directive is accompanied by various guidance documents. The first guidance document, on the management of Natura 2000 sites, was issued in 2000 and since then various other guidance documents have followed.

This chapter traces the issuing guidance documents at the EU level and subsequently studies the use of Habitat guidance documents in the Dutch legal order. In the Netherlands, the implementation of the Habitats Directive is infamous for the problems that were experienced during the implementation process. It is, in the words of Van Keulen, ‘a contested case of Europeanisation’.¹ The various Habitat guidance documents seek to address implementing questions and problems experienced at the national level. Are the Habitat guidance documents used as an implementation aid, and what roles do the Habitat guidance documents play in implementation and judicial decision-making processes in the Netherlands?

Before tracing the use of Habitat guidelines in the Dutch legal order, this chapter first describes the ‘EU context’. It describes the features of the Habitats Directive (section 6.1), gives an overview of the forms and types of Habitat guidance documents (section 6.2), and explores whether expectations have been formulated as to the use of guidance by national authorities and courts (section 6.3). The second part of this chapter studies the use of guidance at the national level. It outlines the main characteristics of the implementation process (section 6.4) and traces the use of guidance in the implementation process, in which the Dutch provinces play an important role (section 6.5). The analysis of the use of Habitat guidelines in judicial practices (section 6.6) also leads to studying rulings of various courts: traces of Habitat guidelines feature in rulings of district courts, courts of appeal and of the Council of State.

The empirical findings reveal differences between the use of guidance in different phases of the implementation process and differences as regards the traces of Habitat guidelines in judicial practices. Despite these differences some trends can be observed: Habitat guidelines mostly fulfill a role as interpretation aid, and are guided by a ‘perspective of authoritative-ness’. Nonetheless, the main conclusion is that the role of Habitat guidance

1 Van Keulen 2007.

documents – both in implementing and judicial practices remains largely uncertain (section 6.7).

6.1 THE HABITATS DIRECTIVE

6.1.1 Leaving room for manoeuvre to the Member States

The choice was made, at the time, that EU biodiversity rules would take the form of a directive. This means that Member States are responsible for the result that is to be achieved but that it ‘shall leave to the national authorities the choice of form and methods’ (as follows from Article 288 TEU). This result-based approach is also reflected in the text of the Habitats Directive.² The Habitats Directive sets objectives and obligations for the Member States whilst leaving room for manoeuvre in the choice and forms of the measures that need to be taken in order to fulfill these obligations.³ The room for manoeuvre left to the Member States follows from the aim of the Directive, which is to promote the maintenance of biodiversity whilst taking account of ‘economic, social and cultural requirements and regional and local characteristics’.⁴

The structure of the Habitats Directive consists of two pillars.⁵ The first pillar entails the creation of ‘Natura 2000’, a coherent network of special areas of conservation. These special areas of conservation, or Natura 2000 areas, need to be designated and managed by the Member States. Article 6 of the Habitats Directive is the key provision of the first pillar of the Habitats Directive. The second pillar of the Habitats Directive consists of a system of strict protection for animal species that needs to be set up by the Member States. The central provisions are Article 12 and Article 16. Article 12 requires Member States to take ‘requisite measures’ to set up the system of strict protection and Article 16 lists a number of grounds for derogation from the protection regime.

6.1.2 The Commission as guardian of the Species

Whilst the Member States are responsible for the implementation of the Habitats Directive, the Commission acts as ‘guardian of the Species’.⁶ The Commission – as in other policy areas – has the power to initiate infringement proceedings in case of an alleged violation of the Habitats Directive. As guardian of the Species the Commission has an active role. The Annual Report on the monitoring of the application of Union law, mentions

2 See on the ‘obligation of result’ Clément 2015, p. 9-14.

3 Frederiksen et al. 2017338.

4 Recital 3 and Article 2(3) of the Habitats Directive.

5 Kingston, Heyvaert & Cavoški 2017, p. 418, 419.

6 Schoukens & Bastmeijer 2014;

‘enforcing environmental law’ as of one its focal areas and emphasises that the results of the Fitness check require an active approach in monitoring the implementation of the ‘Nature Directives’.⁷ The report also shows that the infringement procedures in the field of ‘Nature protection’ represent an important share of all 289 infringement procedures that are open at the end of 2018 in the field of environmental law.⁸

As in other policy areas, the Commission not only fulfills its monitoring role with the opening of infringement procedures. The Commission has also taken up the task to support the Member States in the implementation of the Habitat provisions. This approach is reflected by the large number of Habitat guidance documents and contrasts with the more passive approach taken in the years following the adoption of the Habitats Directive. Initially, the Commission was accused of not sufficiently supporting the Member States in the implementation process and of ‘only increasing miscommunication and uncertainty’.⁹

6.1.3 The Fitness check and focus on implementation on the ground

Despite the, now, more active approach of the Commission in assisting the Member States implementing problems remain. This is the conclusion of the Fitness check conducted in 2016 which measured the ‘performance’ of the Habitats Directive and of the Birds Directive.¹⁰ The result of the Fitness check is that ‘as part of the broader EU biodiversity policy, the Nature Directives are fit for purpose’. However, for the full achievement of the objectives of the Birds and Habitats Directives, improvement needs to be made with regard to the *implementation* of the Directives. In particular, more efforts should be made in order for the Directives to deliver practical results ‘on the ground’.¹¹

Based on the results of the Fitness Check, the Commission developed an action plan that ‘aims to rapidly improve practical implementation of the Nature Directives’. The action plan emphasises, on the one hand, the strong territorial dimension of the Directives and, on the other hand, notes that the different approaches in the Member States to implement the Directive ‘can lead to unnecessary conflicts and problems’.¹²

The first priority outlined in this action plan is that the Commission will improve its guidance documents: ‘The Commission will improve its guidance and promote greater understanding of the legislation on the

7 Annual Report of 2018 on the Monitoring and Application of Union law (p. 4) (available at https://ec.europa.eu/info/publications/2018-commission-report-monitoring-application-eu-law_en).

8 See Part II of the 2018 Annual Report on the Monitoring the application of Union Law, Part II: Policy areas, p. 28.

9 Van Keulen 2007, par. 3.3.

10 SWD(2016) 472 final.

11 SWD(2016) 472 final.

12 SWD(2017)139 final, p. 2.

ground to help public authorities apply it better'.¹³ The action plan also emphasises, as part of the second point of priority, the strengthening of compliance by working closely with the Member States, which also includes 'bilateral dialogue'.¹⁴ The Commission intends to promote the exchange of knowledge and to give more recognition to 'good management practices in Natura 2000 areas'.¹⁵ In brief, the action plan 'breathes' the important role of providing guidance documents as part of a broader strategy aimed at improving the implementation of the Habitats Directive at the level of regional and local authorities.

6.2 HABITAT GUIDANCE DOCUMENTS

What does the 'soft regulatory landscape' that accompanies the Habitats Directive look like, and where can Habitat guidance documents be found? To start with the latter question, Habitat guidance documents are published on the website of the Directorate-General for Environment.¹⁶ The webpages refer to various guidance documents that are scattered around on different subpages. The two 'core Habitat guidance documents' are the document on the Management of Natura 2000 sites and the Species guidance document.

This section describes the main features of these two core guidance documents, as well as the other guidance documents that complement the Habitats Directive. I will pay attention to three questions: how are the guidance documents issued?; what are the main driving forces behind the issuing of the guidance documents?; and what types of guidance can be discerned?

6.2.1 Natura 2000 guidance documents

The Managing Natura 2000 guidance document

The first Managing Natura 2000 guidance document (hereinafter also referred to as MN2000 guidance document) bears the name 'The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'. The document was issued in 2002 'following relevant informal discussions held with the nature protection authorities of the Member States'.¹⁷ National authorities were thus consulted prior to, and perhaps also during, the drafting process.

The introductory section of the MN2000 guidance document sheds light on the reasons behind the issuing of the guidance document. At the

13 SWD(2017)139 final, p. 2.

14 SWD(2017)139 final, p. 2.

15 SWD(2017)139 final, p. 2.

16 https://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm. (last accessed 30 September 2019).

17 Managing Natura 2000 sites, p. 6.

time, uncertainty existed with regard to the meaning of Article 6 of the Habitats Directive in practice: 'Many questions have been raised about the significance of this article by Member States and operators.'¹⁸ The drafters see added value in providing further guidance to Article 6: 'At first glance it [Article 6] seems to be broad and not well defined, but a thorough analysis, linking it with the other articles of the Directive, makes it easier to understand and apply.'¹⁹ The environment Commissioner believes that a clear and accessible understanding of key provisions of the Directive will provide the basis for application of the Directive 'on an equal footing'.²⁰

At the same time, the guidelines emphasise that they 'cannot go beyond the directive'. The introductory section explains that this is 'particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures (...)'.²¹ Thus, the MN2000 guidance document seeks to address uncertainty on the one hand, whilst on the other hand intends to leave flexibility to the Member States.

This 'double aim' is also reflected in the way in which the guidance document is drafted. Rather than giving detailed, instructive guidance, the MN2000 document has a highly explanatory character. In different paragraphs, the document explains the logic, purpose and context of Article 6 of the Habitats Directive.²²

Nonetheless, other types of guidance also feature in the MN2000 guidance document. In between the lines of the highly explanatory texts, traces of interpretative guidance can be found. For instance, the document provides interpretative guidance for concepts of 'disturbance' and 'deterioration'.²³ At other places the documents go beyond giving an explanation and interpretation of the openly formulated concepts of Article 6 of the Habitats Directive. The document gives concrete recommendations on the choice and form of 'appropriate' implementing measures – thus providing for 'implementing guidance'. The Commission services, for example, explain that the appropriate assessment should be recorded and that it should be reasoned, otherwise 'the assessment does not fulfil its purpose and cannot be considered 'appropriate'.²⁴ Although not as promi-

18 Managing Natura 2000 sites, p. 6.

19 Managing Natura 2000 sites, p. 6.

20 Managing Natura 2000 sites, p. 3.

21 Managing Natura 2000 sites, p. 6.

22 For instance, section I.I of the guidance document places Article 6 in 'a wider context', section 2.2 elaborates on the 'positive nature' of the obligation to provide for necessary conservation measures, and section 4.2 reflects on the logic between the different paragraphs of Article 6 of the Habitats Directive.

23 Managing Natura 2000 sites p. 28, 29. The Commission services define deterioration as 'a physical degradation affecting a habitat', whereas disturbance is considered to 'not directly affect the physical conditions of a site'. For each concept further indicators are given that could be used in order to identify the deterioration and disturbance of habitats.

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

nently visible as implementing guidance, good practices can also be found in the MN2000 guidance document, for instance in Annex II that contains 'considerations on management plans'.²⁵

In November 2018 an updated version of the MN2000 guidance document was issued, now with the somewhat more formal title: 'Commission notice C(2018)7621. Managing Natura 200 sites. The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'. This updated version largely follows the same structure as the original version adopted in 2000. As the introductory section states it 'builds upon a series of Commission notes addressing Natura 2000 management, as well as other relevant Commission guidance documents on Article 6'.²⁶

Other guidance documents related to Natura 2000

The Managing Natura 2000 guidance document is the 'main' guidance document related to Natura 2000 sites, yet not the only guidance document. Soon after the issuing of the MN2000 guidance document in the year 2000, the Commission services issued several other guidance documents on Article 6. For instance, the Commission provides further guidance in relation to the carrying out of appropriate assessments²⁷ and on the meaning and design of compensatory measures (Article 6(3) and 6(4) Habitats Directive).²⁸ Other guidance documents give an overview of the most important rulings of the Court of Justice.²⁹ Having a highly explanatory nature, these guidance documents include extracts from the most important Court rulings, explanatory notes, and provide for a list of guidance documents related to Article 6 of the Habitats Directive.³⁰

In addition to these 'general guidance documents' the Commission services have also issued 'sector-specific guidance' on the application of Article 6 of the Habitats Directive in specific policy areas such as wind energy developments, inland waterway transport and forestry.³¹ Particularly interesting is the Frequently Answered Questions section related to forestry.³² This FAQ section places the answers in different categories. For

25 Managing Natura 2000 sites, p. 54, 55. The considerations reflect the conclusions from two seminars where participants (the European Commission, NGO's, Member States and stakeholders) exchanged views on the elaboration of (successful) management plans.

26 Managing natura 200 sites (C(2018)7621), p. 5.

27 Methodological guidance on Article 6(3) and (4) of the Habitats Directive.

28 Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC.

29 Nature and Biodiversity Cases. Ruling of the European Court of Justice. An updated version was published in September 2014.

30 See also the introductory remarks in Article 6 of the Habitats Directive. Rulings of the European Court of Justice, p. 9.

31 Respectively: Wind energy developments and Natura 2000; Guidance document on Inland waterway transport and Natura 2000; Natura 2000 and Forests Part I-II; Natura 2000 and Forests Part III – Case studies.

32 http://ec.europa.eu/environment/nature/natura2000/management/faq_en.htm (last accessed 30 September 2019).

each answer the section clarifies whether the answer refers to: 1) a 'legal obligation' under the Habitats Directive; 2) whether the answer entails a 'recommendation' which aims to 'provide possible options to deal with certain aspects of the directives'; or 3) whether the answer is of an informational character aiming to provide for 'a better understanding of Natura 2000, the Birds and the Habitats Directives'. The idea of organising answers in different categories comes close to the exercise of discerning among the different types of guidance outlined in section 3.2 of this research.

Finally, the website of the European Commission also provides for a section that exhibits examples of good practices relating to the management of Natura 2000 sites. It mentions that 'the Commission has been actively encouraging the exchange of experiences and good practices on the management of different types of Natura 2000 sites'.³³ The Commission considers cooperation with stakeholders necessary in order to find agreement on the 'appropriate ways to conserve species and habitats whilst respecting the local socio-economic and cultural context'.

6.2.2 Guidance on Species protection

In 2007, the Commission services issued the 'Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC' (the Species guidance document).³⁴ This 88-page document gives guidance related to the second pillar of the Habitats Directive: the system of strict protection of animal species to be set up by the Member States. It is the second 'core' Habitat guidance document.

The introduction of the Species guidance document explains that 'up until now, most of the attention regarding the implementation of the Habitats Directive has focused on the establishment of the Natura 2000 network'. However, the implementation of the second pillar has also given rise to questions and problems in practice.³⁵ The species guidance document seeks to address these problems in practice and envisages to ensure *a common understanding* of the relevant provisions among national and regional authorities'³⁶ At the same time, the guidance document seeks to provide for flexibility in implementation practices:

'It [the guidance document] aims to assist in devising pragmatic and flexible ways of applying the provisions and making them effective and practical, while fully respecting the legal framework'.³⁷

33 http://ec.europa.eu/environment/nature/natura2000/management/best_practice_en.htm. (last accessed 30 September 2019).

34 Species guidance document.

35 Species guidance document, p. 4.

36 Species guidance document, p. 4.

37 Species guidance document, p. 4. See also p. 19 and 20.

Like the Managing Natura 2000 guidance documents, the Species guidance document has a dual purpose: promoting uniform implementing practices and leaving room for manoeuvre to the Member States, enabling them to take the specific measures to protect their Habitat Species.

When looking at the content of the Species document, a different picture arises than is the case for the MN2000 guidance document. In contrast to the MN2000 guidance document, the Species guidance document has a highly interpretative character. It provides detailed guidance for the interpretation as well as the application of the prohibitions and derogations spelled out in Article 12 and 16 of the Habitats Directive. Nonetheless, other types than detailed, interpretative guidelines also feature in the Species guidance document. The first paragraph of the document, for instance, has a highly explanatory character, explaining the aim of the Species protection regime and outlining some general principles that are inherent to the Habitats Directive.³⁸ Other paragraphs give concrete recommendations on the form that implementing measures could take³⁹ or spell out examples of good practices and approaches developed in the Member States.⁴⁰

Still today, the Species guidance document is the core guidance document in relation to the second pillar of the Habitats Directive. The website of the Commission does not refer to other Species guidance documents. This is in contrast with the high number and variety of guidance documents related to the first pillar of the Habitats Directive, the Natura 2000 network.

6.3 EU EXPECTATIONS ON THE USE OF HABITAT GUIDANCE DOCUMENTS

Like all guidance documents, Habitat guidance documents lack legally binding force. Despite their non-legally binding nature, Habitat guidance documents might still *de facto* or *de jure* acquire binding effect in practice. In what ways do the Commission and the EU Court of Justice expect national authorities as well as national courts to use Habitat guidance documents?

6.3.1 The Commission: a 'flexible approach'

As already transpires from the above section, a common characteristic of Habitat guidance documents is that the Commission seeks to give guidance to the Member States, whilst leaving the choice and form of implementing measures to the Member States. This is made explicitly clear throughout

³⁸ Species guidance document, p. 17-21.

³⁹ For instance, section II.2.3 elaborates on the content of 'measures to effectively implement the prohibitions of Article 12'. It explains that Article 12 requires the adoption and implementation of 'preventive measures', and provides for concrete examples of the form that such preventive measures could take. Species guidance document, p. 28.

⁴⁰ For instance, as an example preventive measures that could be taken to set up the system of species protection, the Species guidance document presents the 'National Species Actions Plans' in Sweden (see p. 29, 30).

the text of the documents. For instance, the MN2000 guidance document emphasises that Member States are free to choose the appropriate way they wish to implement the practical measures;⁴¹ the Species guidance document notes that it is 'the responsibility of national authorities to define the measures necessary to implement the prohibitions of Article 12'. This latter document also explains that the 'nature' of these measures will differ according to the different national systems.⁴²

In addition to these remarks related to 'leeway' of Member States to adopt implementing measures, Habitat guidance documents contain usual non-binding clauses.⁴³ These clauses stress the non-bindingness of, in particular, the *interpretative* guidelines given by the Commission. The MN2000 guidance document states for instance:

[T]he document reflects only the views of Commission services and is not of a binding nature. It should be stressed that in the last resort it rests with the European Court of Justice to *interpret* a directive. The *interpretations* provided by the Commission services cannot go beyond the directive.⁴⁴ [Emphasis added]

The Habitat guidance documents thus 'breathe' a flexible approach and emphasise their non-binding character. Yet, as discussed in section 6.1.2, in this policy area the Commission also takes an active approach in monitoring the Member States' practices when acting as 'guardian of the Species'. The question now is whether and how the Commission uses its guidance documents to fulfil its monitoring and supervising tasks. Do Habitat guidance documents play a role as monitoring aid to assess whether implementing measures are in accordance with the Habitats Directive? According to Beijen, the Commission takes account of Habitat guidance documents for the question whether to start an infringement procedure.⁴⁵ Nonetheless, further empirical research is needed in order to provide more insights into the use of Habitat guidelines by the Commission services when acting as guardian of the Species.

6.3.2 The CJEU: few references to Habitat guidelines

The next question is whether, and how, expectations as to the use of the Habitat guidance documents have been formulated in the case law of the Court of Justice. A search in the 'InfoCuria' database, only reveals two

41 Managing Natura 2000 sites, p. 6.

42 Species guidance document, p. 28.

43 See for instance Methodological guidance on Article 6(3) and (4) of the Habitats Directive, p. 6, 7; Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, p. 1; Nature and Biodiversity Cases. Ruling of the European Court of Justice, p. 4.

44 Managing Natura 2000 sites p. 6; See in a similar way Species guidance document, p. 4.

45 Beijen 2010, p. 193.

judgments in which the Court refers to a Habitat guidance document:⁴⁶ the *Waddenzee* ruling and the judgment *Commission v Finland* (wolf hunting).⁴⁷ In both rulings, the Court refers to the Habitat guidance documents for the interpretation of the provisions in the Habitats Directive.

The *Waddenzee* ruling refers to the MN2000 guidance document in relation to the question what it means that an appropriate assessment needs to be conducted for a plan or project that is 'likely to have a significant effect' on Natura 2000 sites, as stated in Article 6 of the Habitats Directive. The Court reasons that there needs to be a 'mere probability' for such effects to occur, and considers that this is 'moreover, clear from the guidelines for interpreting that Article drawn up by the Commission'.⁴⁸ The ruling *Commission v Finland* refers to the Species guidance document for the question whether Finland, by authorising wolf hunting, had breached Article 16(1) of the Habitats Directive.⁴⁹ The question is whether, despite the wolf hunting, the conservation status of wolves is maintained. The Court considers that 'following the example of the views formulated by the European Commission (...) it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive'.⁵⁰

The number of two rulings in which references to Habitat guidance documents can be found is not numerous compared to the high number of guidance documents issued in relation to the Habitats Directive. On the other hand, it cannot be ruled out that a guidance document has been consulted or taken into account by the Court, without this being reflected in the text of the judgment.

What is more, as is also shown by Eliantonio, Habitat guidance documents feature more frequently in the text of opinions of the Advocates General. For instance, the opinion on the case *Commission v France* refers extensively to the Species guidance documents. In this case, the Advocate General remarks that he will 'take into account' the Species guidance document in relation to the question is whether France has taken sufficient measures to protect the French Hamster. Although not legally binding, the Advocate General explains, the document 'contains useful guidance on the interpretation of the relevant provisions'.⁵¹

46 The documents were found with the key words 'guidance documents' and the key words 'guidelines' + 'habitat' and by choosing 'environment' as subject matter. Last search conducted at 10 April 2019. See for a discussion of the role of soft law in environmental law in the case law of the CJEU Eliantonio 2018.

47 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482 (*Waddenzee*); CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*).

48 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482, par. 43 (*Waddenzee*);

49 CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*); see also Beijen 2010, p. 193.

50 CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341, par. 29 (*Wolf hunting*).

51 Opinion to the judgment of the CJEU 9 June 2011, C-383/09, ECLI:EU:C:2011:23, par. 28 (*European Commission v. France*). See also Eliantonio 2018, p. 508.

What conclusion can be drawn from the few references to Habitat guidance documents in the rulings of the Court of Justice? The rulings show that references to Habitat guidance documents are the exception rather than the rule. As noted by Eliantonio, the rulings of the Court do not seem to attribute the Habitat guidance documents 'a special authoritative force'.⁵² What is more, the rulings of the Court do not give specific instructions as to how national authorities and national courts should or could use Habitat guidance documents. In this regard the question arises whether the '*Grimaldi* formula' applies in relation to Habitat guidance documents, which prescribes that national courts are bound to take Commission recommendations into consideration. As discussed in section 3.4.2, it is not yet clear whether the *Grimaldi* formula applies to 'other' guidance documents than recommendations. And, as we have seen above, Habitat guidance documents have not been issued in the form of recommendations. Therefore, it is uncertain whether the *Grimaldi* formula applies.

6.3.3 Conclusion: addressing heterogeneity

The above sections show that the Commission guidance documents stress the importance of leaving room for manoeuvre to the Member States. In this way, national authorities can adopt the implementing measures that are needed and appropriate to address the specific geographical and environmental circumstances at the local and regional level. Pressures to act Habitat guidance-proof might result from the active role of the Commission as 'guardian of the Species'. Specific instructions on how to use the Habitat guidelines have not been formulated in rulings of the Court of Justice. Instead, references to Habitat guidelines are hard to find and rather exceptional, which is in contrast to the high number of Habitat guidelines that accompanies the Habitats Directive.

6.4 THE IMPLEMENTATION OF THE HABITATS DIRECTIVE IN THE NETHERLANDS

The Dutch government was initially of the opinion that the Habitats Directive had been transposed correctly into national legislation,⁵³ but it soon became clear that there was a considerable 'misfit' between the Habitats Directive and existing environmental policies in the Netherlands.⁵⁴ On several occasions, the European Commission informed the Netherlands that the implementation measures were not sufficient and not compatible

52 Eliantonio 2018, p. 511.

53 Backes 1995, p. 216.

54 Van Keulen 2007, par. 2.2.2.

with the Habitats Directive.⁵⁵ The implementation of the Habitats Directive also became subject of political and societal debate, whilst national NGOs initiated court cases on inadequate implementing measures. In the words of Van Keulen, the Habitats Directive has been a 'case of contested Europeanisation'.⁵⁶ In brief, the implementation of the Habitats Directive has not run smoothly.

It is against this background that the reception of guidance documents in the Dutch legal order is being studied. This section outlines the main features of the implementation process. It discusses the previous legislative acts that implemented the Habitats Directive, in relation to which traces of Habitat guidance documents can still be found, and that have now been replaced by the Nature Protection Act. It sheds light on the layered system of judicial protection in this policy area and, finally, draws some conclusions on the potential, promising role of Habitat guidance documents as an implementation aid and as a judicial decision-making aid.

6.4.1 Previous legislative acts transposing the Habitats Directive

The two legislative acts that initially transposed the Habitats Directive are the Nature Protection Act 1998 and the Flora and Fauna Act. The 1998 Nature Protection Act transposed the provisions on the designation and protection of special areas of conservation, the Natura 2000 sites. The Flora and Fauna Act transposed the provisions of the Habitats Directive related to the setting up of a strict system of species protection.

The transposition of the Habitats Directive into these legislative acts was not without implementing problems and concerns. With regard to the 1998 Nature Protection Act the main problem was that the initial legal framework transposed the Natura 2000 regime using *existing* legislative acts and provisions. For instance, no specific provisions were introduced that regulated the conservation and management of Natura 2000 sites.⁵⁷ The Commission considered the legal framework insufficient and informed the Dutch government accordingly.⁵⁸ This led to a major revision of the Nature Protection Act in 2005, which aimed to bring the national implementing act in line with the obligations on the designation and management of Natura 2000 sites as laid down in the Habitats Directive.⁵⁹

The problem related to the transposition of the Species protection regime in the Flora and Fauna Act was that the articles in this act implemented different legal regimes. For instance, Articles 8 to 11 of the Flora

55 See for a detailed overview of the interactions between the European Commission and the Netherlands De Boer et al. 2010, p. 51-57.

56 Van Keulen 2007.

57 See *Kamerstukken 2001/02*, 28171, 3, p. 2, 4.

58 See *Kamerstukken 2001/02*, 28171, 3, p. 1, 7.

59 A second important revision of the 1998 Nature Act took place in the year 2009. See *Kamerstukken 2006/07*, 31038, 3, p. 14.

and Fauna Act transposes not only Article 12 of the Habitats Directive, but also the prohibitions in the *Birds* Directive⁶⁰ and, what is more, it sought to implement *national* policy objectives that did not follow from the Habitats Directive.⁶¹ As a result, the provisions in the Flora and Fauna Act raised questions and uncertainty in practice as to their scope and meaning.

The evaluation of the Dutch nature protection legislation in 2008 led to the conclusion that the legal framework had become too complex and intransparent.⁶² The integration of different legal regimes seeking to implement EU provisions and national provisions at the same time clouds the origins of the provisions and renders their application in practice problematic.⁶³ Another problem is that openly formulated provisions laid down in the legislative acts, some of which reflect the provisions in the Habitats Directive, are 'vague and unclear' in practice.⁶⁴ The transposition of the Habitats Directive into Dutch implementing legislation had evolved into a complex legal framework that needed to be more 'transparent', 'consistent', and 'simplified'.⁶⁵

6.4.2 The 2017 Nature Protection Act: decentralised implementation

Following the recommendations in the evaluation, the Dutch government issued a proposal for a new Nature Protection Act. This Act was adopted in 2015 and entered into force on 1 January 2017. With the aim of simplifying the previous legislative framework, the Nature Protection Act 2017 integrates both the Managing Natura 2000 regime and the Species protection regime.⁶⁶ Simplification was also to be achieved by transposing the obligations laid down in EU legislation in a transparent and recognisable manner. The act makes a clearer distinction between the rules that have a European origin and rules that have a national origin, and more directly reflects the formulation used in the *Birds* and *Habitats* Directive.⁶⁷

What is more, a characteristic of the 'new' Nature Protection Act is that it delegates, as much as possible, implementing responsibilities to the Dutch provinces.⁶⁸ The Dutch provinces are considered best capable of making decisions taking into account the specific circumstances and regional and local particularities.⁶⁹ Consequently, the Dutch provinces fulfill different tasks related to the management of Natura 2000 sites and grant derogations from the prohibitions in Article 12 of the *Habitats* Directive.

60 Council Directive (EEC) 79/409 of 2 April 1979 on the conservation of wild birds.

61 *Kamerstukken* 2011/12, 33348, 3, p. 142.

62 *Kamerstukken* 2007/08, 51536, 1.

63 *Kamerstukken* 2011/12, 33348, 3, p. 145.

64 *Kamerstukken* 2007/08, 51536, 1, p. 27.

65 *Kamerstukken* 2007/08, 51536, 1, p. 75; see also Braaksma & De Graaf 2016.

66 *Kamerstukken* 2011/12, 33348, 3, p. 6.

67 Kajaan 2016.

68 *Kamerstukken* 2011/12, 33348, p. 51-55.

69 *Kamerstukken* 2011/12, 33348, p. 52.

This also means that in the implementing measures taken by the Dutch provinces traces of Habitat guidance documents may be found. The various guidance documents on the management of Natura 2000 sites could be used, for instance, for the elaboration of management plans,⁷⁰ as an aid to decide whether an appropriate assessment is needed,⁷¹ or as an aid to examine whether an exception could be made on the basis of Article 6(4) of the Habitats Directive.⁷² The detailed and interpretative guidelines in the Species guidance document could serve as an aid to interpret and apply Articles 12 and 16 of the Habitats Directive: the Dutch provinces apply these provisions, as transposed into the Nature Protection Act, in individualised decisions and are empowered to adopt general derogations in the form of binding provincial regulations.⁷³

6.4.3 A layered system of judicial protection

The Habitats Directive is infamous not only for the problems that have been experienced in implementing practices. Especially in the early years after the transposition date had expired, the Dutch judiciary encountered difficulties in interpreting and applying the openly formulated provisions of the Habitats Directive.⁷⁴ Therefore, Habitat guidance documents could, at least in theory, serve as a helpful judicial decision-making aid for national courts when reviewing the measures that are taken in the context of the implementation of the Habitats Directive. Traces of Habitat guidance documents feature, as we will see in section 6.6, in rulings of various courts. This is not surprising as in the Netherlands, the implementation of the Habitats Directive is subject to a 'layered system' of judicial oversight. District courts are competent to review administrative decisions taken on the basis of the Nature Protection Act, after which appeal is possible before Judicial Division of the Dutch Council of State. What is more, implementing practices, or a lack thereof, of the Dutch government have also been challenged in civil proceedings. The analysis of the rulings of Dutch courts in section 6.6.2, shows that in civil proceedings Habitat guidelines could come to play a role as a judicial interpretation aid as well.

6.4.4 Conclusion: a promising role for Habitat guidance documents

The above sections show that Habitat guidance documents could come to play a role as an implementation aid at different stages and at different levels in the implementation process. The Commission's guidelines could

70 The necessary conservation measures mentioned in Article 6(1) of the Habitats Directive; Article 2.3 Nature Protection Act.

71 Article 2.7(3) and Article 2.8 of the Nature Protection Act.

72 Article 2.8 Nature Protection Act.

73 Article 3.8 Nature Protection Act.

74 Van Keulen 2007, par 2.2.1. See *Kamerstukken 2001/02*, 28171, 3, p. 7.

fulfil their role as an implementation aid in relation to the transposition of the Habitats Directive in formal legislation, currently the Nature Protection Act. The documents could fulfil this role also, or in particular, at the provincial level, as the Dutch provinces are responsible for the implementation of the Nature Protection Act 'on the ground'. What is more, the guidelines could also be used as a judicial decision-making aid to interpret and apply the openly formulated provisions in the Habitats Directive. In brief Habitat guidance documents could be expected to play a promising role, both as an implementation and judicial decision-making aid. Whether and what roles the documents fulfil in practice will be examined in the next sections.

6.5 THE USE OF HABITAT GUIDANCE DOCUMENTS BY NATIONAL AUTHORITIES

This section studies the role or roles of Habitat guidance documents in the implementation of the Habitats Directive. The analysis is structured along the lines of the different stages of the implementation process. It explores the use of Habitat guidance documents in relation to the issuing of the Nature Protection Act and then turns to the level of the Dutch provinces. In what ways are guidance documents used in provincial regulations and policy rules, for the elaboration of management plans, appropriate assessments, and individualised decisions? The final section draws the lines together and explores whether behind the traces of the use of the Habitat guidelines perspectives on their binding character can be discerned.

6.5.1 Translating guidance in the explanatory memorandum to the Nature Protection Act

As described above, the current formal legislative act that transposes the Habitats Directive is the Nature Protection Act that was adopted in 2017. Several provisions of the Nature Protection Act directly transpose (or 'copy paste') provisions of the Habitats Directive, and do not include references or visible traces of the use of the Habitat guidance documents. Does this mean that the Habitat guidelines played no role in relation to the establishment of this act?

The answer to this question is that the guidelines *did* play a role, but not in the drafting of the text of the legislative provisions. The Habitat guidelines played an important, and visible, role during the drafting of the explanatory memorandum that is attached to the proposal for the Nature Protection Act.⁷⁵ This is witnessed by numerous references to Habitat guidelines that feature throughout the text of the explanatory memorandum, which is 312 pages long. The memorandum includes 27 references to the

75 Interview 6 – National official D; The search for explicit references in the text of this act and the explanatory memoranda related thereto is described in Annex section 1.2.2.

Managing Natura 2000 guidance document and 20 references to the Species guidance document.⁷⁶

Most references to Habitat guidelines feature in the sections of the explanatory memorandum that describe the 'European framework',⁷⁷ of which subsections are titled '*interpretation of the Court of Justice and of the Commission*' [Emphasis added].⁷⁸ The guidelines of the Commission have been used to explain, interpret and give guidance on the implementation of the Nature Protection Act to the Dutch provinces.⁷⁹ According to a senior official who was involved in the drafting process, the explanatory memorandum 'in fact serves a reference book' (*naslagwerk*).⁸⁰ The guidelines were used as an aid 'to clarify the origin and meaning of the provisions in the Habitats Directive'.⁸¹ Furthermore, the guidance given in the explanatory memorandum was considered to promote uniformity and consistency in the provincial implementing practices.⁸² In brief, the guidelines were used to address the implementing problems that were experienced under previous legislative acts.

In the explanatory memorandum, references to the different types of Habitat guidance provisions can be found. Mostly, the memorandum refers to Habitat guidelines with an interpretative character.⁸³ At some places, these interpretative guidelines are even literally translated, such as is the case for the part of the memorandum that elaborates on the concept of deterioration in Article 6(2) of the Habitats Directive. The memorandum explains that:

"Deterioration is – according to the guidance document – a physical degradation affecting a habitat. This means all the influences on the environment in the habitats, such as the available space, water, air and soils'.⁸⁴

76 This number of references in the current Nature Protection Act is remarkably higher than the number of references in the explanatory memoranda to the previous legislative acts that transposed the Habitats Directive. The amending act adopted in 2005 that transposed the MN2000 regime in the Nature Protection Act 1998, refers 11 times to the MN2000 guidance document. The explanatory memorandum to the Flora and Fauna was adopted several years before the Species guidance document was issued and therefore in this document no explicit references to the Species guidelines have been found.

77 *Kamerstukken 2011/12*, 33348, 3, p. 70.

78 *Kamerstukken 2011/12*, 33348, 3, p. 109, 136.

79 Interview 6 – National official D.

80 Interview 6 – National official D.

81 Interview 6 – National official D.

82 Interview 6 – National official D; This objective is also pointed out in the explanatory memorandum: *Kamerstukken 2011/12*, 33348, 3, p. 109, 136. p. 52.

83 Cf. Interview 6 – National official D.

84 *Kamerstukken 2011/12*, 33348, 3, p. 100. The explanatory memorandum does not finish here, it continues paraphrasing the guidance provided by the European Commission in the rest of the first half of the paragraph that interprets the concept of disturbance.

The explanatory memorandum also refers to implementing guidance. For instance, the choice for management plans as conservation measures that need to be adopted under Article 6(1) of the Habitats Directive, is explained and justified in light of the Commission's recommendations and good practices on this point.⁸⁵ At other places, the Commission's implementing guidelines are used to give guidance to the Dutch provinces and other actors. It is noted, for instance, that according to the Commission's view the appropriate assessment needs to be recorded and well-reasoned, and that it is recommended to use the methodology envisaged by Directive 85/337/EEC.⁸⁶ Finally, the explanatory memorandum also has a highly explanatory character. Although in these sections references to the Commission's guidelines are not manifold, the structure of the memorandum clearly resembles the Commission's approach in its guidance documents.

6.5.2 Provincial regulations and policy rules: a limited role for Habitat guidance

On the basis of the Nature Protection Act the Dutch provinces take implementing measures related to the management of Natura 2000 areas and the species protection regime. One of these implementing measures is the possibility to adopt provincial regulations providing for general derogations or licences for certain projects and actions.⁸⁷ The Dutch provinces can also adopt policy rules for the exercise of their power to grant derogations and licences.⁸⁸ What role, if any, do the Habitat guidance documents play in relation to the adoption of the provincial regulations and policy rules?

The search for traces of the use of Habitat guidelines in the text of the provincial regulations and policy rules only reveals one reference to one of the Habitat guidance documents.⁸⁹ The explanatory note to the policy rules on nature protection of the province of Noord-Holland cite a section of the Species guidance document for the interpretation of the concept of serious damage in Article 16(1)(b) of the Habitats Directive.⁹⁰ In the provincial regulations and policy rules of the other eleven Dutch provinces, no references to Habitat guidance documents were found.

From the twelve interviews that were conducted with officials from ten Dutch provinces, a similar picture arises. Most officials mentioned that in their view Habitat guidance documents do not play any role, or only fulfill a limited role as an implementation aid when drafting provincial

85 See Article 6(1) Habitats Directive and Article 2.3. Nature Protection Act.

86 *Kamerstukken 2011/12*, 33348, 3, p. 110.

87 Article 2.9(3) and Article 3.8(2) of the Nature Protection Act.

88 The basis for the issuing of policy rules is Article 4:84 of the Dutch General Administrative Law Act.

89 See Annex section 1.2.2.

90 *PB*, 103, p. 15.

regulations or policy rules.⁹¹ The officials indicated that the guidelines may be consulted,⁹² but that in this situation the document is used only as 'background information',⁹³ or that it does not play an 'active role' as an implementation aid.⁹⁴ An explanation given for the limited role of Habitat guidelines is that 'interpretative questions seldom arise when drafting policy rules'.⁹⁵ Another explanation is that thus far, the provinces have not (yet) very often used the possibility to provide for 'general derogations' from Article 12 Habitats Directive. When adopting such general derogations, interpretative questions might arise and the guidance documents could thus fulfill their role as an interpretation aid.⁹⁶

What is more, all officials pointed out that when guidance documents are consulted, this is most likely not mentioned in the explanatory notes to the provincial regulations and policy rules. The reference to the Species guidance document in the policy rules of the Province of Noord-Holland is an exception.⁹⁷ This invisibility of the use of Habitat guidance documents in the provincial rulemaking practices contrasts with the explicit and transparent approach taken in the explanatory memorandum to the Nature Protection Act. On the other hand, the absence of references in the explanatory notes is not surprising in view of the fact that explanatory notes to the provincial regulations and policy rules are usually very short.⁹⁸ One of the officials explained that a very detailed explanation could make the explanatory note unnecessarily complex and mentioned that it 'probably won't be read by anyone'.⁹⁹

6.5.3 Management plans and appropriate assessments: guidance for interpretation only?

Habitat guidance documents not only provide interpretative guidelines, but also give guidance on the form and method of implementing measures, such as management plans (Article 6(1) Habitats Directive) and appropriate assessments (Article 6(3) Habitats Directive). What roles do these types of guidance play in Dutch provincial practices?

91 Interview 11 – National official J; Interview 13 – National official L; Interview 10 – National official M; Interview 15 – National official N; Interview 19 – National official R; Interview 21 – National official T.

92 Interview 12 – National official K; Interview 16 – National official O; Interview 18 – National official Q; Interview 17 – National official P.

93 Interview 12 – National official K; Interview 17 – National official P.

94 Interview 11 – National official J.

95 Interview 16 – National official O.

96 Interview 18 – National official Q; Interview 17 – National official P.

97 Interview 21 – National official T.

98 Interview 17 – National official P.

99 Interview 17 – National official P.

Most officials interviewed for this research could not tell with certainty whether the guidance documents are used for the elaboration of management plans or appropriate assessments.¹⁰⁰ Nonetheless, most officials explained that if the guidance documents are used, this is for interpretative questions. This also seems to be the case when examining appropriate assessments or elaborating on management plans. Interesting is the following remark made by one of the officials:

'I was involved in the elaboration of management plans both for the Ministry of Infrastructure and Water Management and also with the Province of (...) and I can say that in both situations [management plans and appropriate assessments] the guidance was not used to see what the best practices are or how you should approach this. If it [the guidance documents] was used, it was for the meaning of concepts and how you should interpret certain questions.'¹⁰¹

The provincial official cited above further clarified that in the context of the examination of appropriate assessment, the guidance documents are generally consulted when *interpretative* questions arise that relate to the distinction between mitigation measures or compensation measures.¹⁰²

'When we conduct an appropriate assessment and in this process the question arises whether it is compensation or mitigation and whether I interpret these concepts correctly, as well as for the question what risks are involved, it is possible that I might consult the guidance documents. That is dependent on the case and the complexity of the problem concerned'.¹⁰³

In this regard, it is relevant to note that the concept of mitigation measures is not mentioned in the Habitats Directive. Instead, the possibility of including mitigation measures is introduced in the Managing Natura 2000 guidance document. In the Netherlands, the inclusion of mitigation measures in the appropriate assessment of plans or projects has become an established practice.¹⁰⁴ Although it seems reasonable that this practice has been derived from the Commission's guidance documents, no clear indications have been found that there indeed is a causal relationship between this established practice of including mitigation measures and the Commission's guidance documents.

100 Interview 11 – National official J; Interview 13 – National official L; Interview 14 – National official M; Interview 15 – National official N; Interview 17 – National official P; Interview 18 – National official Q; Interview 20 – National official S; Interview 21 – National official T.

101 Interview 16 – National official O.

102 Interview 12 – National official K.

103 Interview 12 – National official K.

104 See Woldendorp & Schoukers 2014. The authors explain that the practice of nature inclusive design has been developed to circumvent to the complicated test laid down in Article 6(4) of the Habitats Directive. See also for instance ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504 (*Briels e.a.*); The inclusion of mitigation measures may also be required by the competent authority as condition for a licence to be granted to a plan or project, see for instance ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5684, par. 2.4.12 (*Elektricity station Eemshaven*).

From the interviews with officials of the Dutch provinces, the general picture thus emerges that guidelines are used particularly for interpretative questions. A similar view is expressed by the senior official of the Ministry of Economic Affairs, who was involved in drafting the Nature Protection Act. According to his experience, the Habitat guidelines fulfill a role as an interpretation aid rather than as an aid to decide on the best implementing method to be followed when:¹⁰⁵

'The method that is used when elaborating management plans is a purely national exercise (...) As far as it concerns the Netherlands, we have not been guided in any way by what the guidance on this point says about the content of management plans.'¹⁰⁶

Here, it seems that a pattern is arising. The Habitat guidelines seem to become particularly relevant when interpretative questions are at stake, even when elaborating management plans or when conducting or examining appropriate assessments. This is in line with the observation that in the drafting of provincial regulations and policy rules Habitat guidance documents are consulted if interpretative questions arise.

6.5.4 Granting derogations and licences: guidance as (silent) interpretation aid

At the final stage of the implementation process, when individualised decisions need to be taken, Habitat guidance documents fulfill their role as an interpretation aid most clearly. This was indicated by almost all the provincial officials who were interviewed for this research.¹⁰⁷ At this stage of the implementation process, it is most likely that interpretative questions arise:

'The guidance documents are generally used more often in relation to licences than in relation to policy questions. Most procedures take place in the sphere of granting derogations and it is there that *questions on the interpretation* of the Directive are most pertinent and where the guidance documents need to be taken account of.' [Emphasis added].¹⁰⁸

105 Interview 6 – National official D.

106 Interview 6 – National official D.

107 Interview 11 – National official J; Interview 12 – National official K; Interview 14 – National official M; Interview 16 – National official O; Interview 17 – National official P; Interview 18 – National official Q; Interview 20 – National official S; Interview 21 – National official T. Only National official N mentioned that in his Province N the guidance documents are not consulted for the granting of derogations and licences.

108 Interview 12 – National official K.

Interpretative questions particularly arise in relation to the granting of licences related to the Species protection regime.¹⁰⁹ Therefore, the guidance document that is used most often as a decision-making aid is the Species guidance document. The officials pointed out that this guidance document could be a helpful interpretation aid in applying and interpreting Article 12 and Article 16 of the Habitats Directive in individual cases.¹¹⁰ This is not surprising in light of the highly interpretative character of the Species guidelines.

What is more, the Species guidance document can be expected to fulfill a more important role as an interpretation aid in the coming years. Indeed, at the time the interviews were conducted, the Dutch provinces had only recently become responsible for the granting of decisions in relation to the Species protection regime. At that time, the application of Articles 12 and 6 of the Habitats Directive, as indicated by one of the officials, was still 'unchartered waters'.¹¹¹ Therefore, the Species guidance documents are likely to be consulted more often in the future by Dutch provincial officials.¹¹²

Silent use of Habitat guidelines

When Habitat guidelines are used as a decision-making aid, it is likely that this is not mentioned in the text of the decisions. All provincial officials interviewed for this research mentioned that generally speaking, individualised decisions do not mention whether or not a guidance document of the Commission has been taken into account.¹¹³ The officials gave answers such as: 'Generally, we never use it [the guidance document] when drafting a derogation or licence';¹¹⁴ or 'Only exceptionally is a reference included in a decision';¹¹⁵ and 'You will actually never see it [the use of a guidance document]'.¹¹⁶ Thus, when Habitat guidance documents are used in decisions on derogations or licences, the documents usually take the role of a silent interpretation aid.

109 Interview 11 – National official J; Interview 14 – National official M; Interview 18 – National official Q; Interview 20 – National official S.

110 Interview 11 – National official J; Interview 14 – National official M; Interview 18 – National official Q; Interview 20 – National official S.

111 Interview 20 – National official S.

112 Interview 20 – National official S; see also National official Q.

113 Interview 16 – National official O; Interview 18 – National official Q; Interview 20 – National official S; Interview 11 – National official J; Interview 17 – National official P; As well as the officials cited below.

114 Interview 13 – National official L.

115 Interview 14 – National official M.

116 Interview 12 – National official K.

Habitat guidelines as 'justification aid' in statements of defence

The interviews with officials from ten Dutch provinces revealed another interesting insight. All officials indicated that Habitat guidance documents could come to play a role when drafting the statement of defence after the granting of a derogation or licence, or the refusal to do so, is challenged. The guidance documents could then act as a helpful aid to explain or defend the decision that has been taken. Furthermore, it is more likely that the statements of defence include explicit references to guidance documents (in contrast to the silent use of guidance in individualised decision-making practices).¹¹⁷ One of the officials responded for instance by saying:

'As far as I can remember it [a guidance document] is not mentioned in the individualised decision but it is mentioned in the statements of defence (verweerschriften).'¹¹⁸

Finally, some officials remarked that Habitat guidance documents can also be referred to before a national court, as is for instance made clear in the following response:

'In an individualised decisions you will not see it [the guidance document]. (...) If necessary you can use it [the guidance document] when you are standing before the Judicial Division [of the Council of State]. When making your plea it is of course helpful to mention it [the guidance document] once in a while.'¹¹⁹

Remarkably, however, the use of guidance documents to justify and motivate decisions on whether to grant a derogation or licence has not become visible in the rulings of the Dutch courts that were found in the search for explicit references. It only follows from two rulings that a Habitat guidance document was invoked by the Provincial Deputy Council or by the Minister.¹²⁰

6.5.5 Different types of guidance, different perspectives?

The above sections provide an insight into the use of the Habitat guidance documents at different stages of the implementation process. The analysis reveals traces, in particular, of the use of interpretative guidelines. The other types of guidance leave their imprints on implementing practices less clearly. The above analysis, however, has not yet provided insights into any

117 Interview 13 – National official L; Interview 14 – National official M; Interview 16 – National official O; Interview 21 – National official T.

118 Interview 11 – National official J.

119 Interview 16 – National official O.

120 See ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*); Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503.

perspectives behind the use of the Habitat guidelines. This section, therefore, explores whether the use, or non-use, of Habitat guidelines is guided by a clear perspective on the binding character of these guidelines. In order to be able to provide insights into any perspectives, I draw on information acquired during the interviews with an official who was involved in the drafting of the explanatory memorandum to the Nature Protection Act as well with officials from the Dutch provinces.

Interpretative guidelines: a perspective of authoritativeness?

The official who was involved in the drafting of the explanatory memorandum to the Nature Protection Act explained that the interpretative guidelines are considered 'most relevant and useful' for the drafting of the explanatory memorandum and are 'certainly considered authoritative'.¹²¹ The authoritative character of Commission guidelines is, in his view, related to the role of the European Commission as guardian of the Treaties:

'The documents are considered authoritative. This has to do with the role of the European Commission, which is to guard over the correct implementation of the Treaties. The European Commission also has the initiative to start infringement procedures, and therefore it is useful to act in line with the interpretation given by the European Commission'.¹²²

Due to this authoritative character, Commission guidelines are, in principle, followed. However, this does not mean that the guidance documents are applied as if they were binding rules:

'I think it would go too far to consider the guidance documents binding. We consider the guidance documents an authoritative interpretation aid that in practice is generally followed unless the EU Court of Justice has given a different interpretation. However, in the situation where it is clear that we do not share the interpretation given by the European Commission, I could imagine that we would choose to not to follow the interpretative guidance given by the European Commission'.¹²³

A similar perspective transpires from the interviews with officials from the Dutch provinces. Most of the interviewed officials also consider the guidelines to be an authoritative aid, and in particular for the interpretation of the provisions of the Habitats Directive. I include some of the answers below, starting with the answer from the official of the Province G:

121 Interview 6 – National official D.

122 Interview 6 – National official D.

123 Interview 6 – National official D.

'The documents are to a certain extent authoritative because they are issued by the European Commission and they give a certain explanation on how you should read and interpret the Directive. This gives a minimum of certainty on how you should explain national legislation.'¹²⁴

The official from the Province H also emphasises the authoritative status of the Habitat guidance documents:

'For me it has a high status. Perhaps it has not the status of the law but it certainly has an authoritative status. I think the Council of State also looks at the guidance documents in this way.'¹²⁵

To the question what the main reason is for taking the guidance documents into account, the official from the Province H answers:

'We do not really have an alternative. It [the guidance documents] comes from the European Commission and that is just *the* interpretation. You can see it in practice, the public authorities or the Council of State, that they take account of it and look at it [the guidance documents] in that way. Somehow it has given itself a status.'¹²⁶

The official from the Province M links the authoritative status to use of the guidance documents by the Council of State:

'I would say that they are authoritative. The Judicial Division of the Council of State also takes them into account for the interpretation of legal questions. Consequently, we also attach importance to them, but this value is not so much that we consult the guidance documents for every licence that is granted. We consult them when we have questions on a specific question. In practice that does not happen very often.'¹²⁷

The official from the Province P compares the status of guidance documents to that of explanatory memoranda at the national level. In his view, the tendency is also to follow the guidance documents of the Commission:

'for the reason that it comes close to a kind of explanatory memorandum to the Directive, an explanation of how Europe explains it. Thus, in that respect you take it very seriously. (...) It is certainly important and authoritative, within an administrative and political context.'¹²⁸

124 Interview 12 – National official K.

125 Interview 13 – National official L.

126 Interview 13 – National official L.

127 Interview 18 – National official Q.

128 Interview 21 – National official T.

One of the officials, the official from the Province K, sheds a slightly different view on the authoritativeness of the Habitat guidance documents. 'Perhaps the European Commission thinks that the guidance documents are authoritative'.¹²⁹ However, he doubts whether the guidance documents indeed have such an authoritative status in practice:

'I think that they [the guidance documents] should be more authoritative than they now are in practice. (...). When you [the European Commission] want[s] guidance documents to be more authoritative than they are now, you [the European Commission] should do more to promote them and to explain and indicate in what way they should be used.'¹³⁰

Nevertheless, still the majority of the answers that were given by the interviewees seem to come close to the perspective of guidance documents as an authoritative interpretation aid that in principle is followed when implementing the Habitats Directive. Thus, from the interviews with Dutch officials, a picture emerges that the interpretative Habitat guidelines are used and perceived as an authoritative source of interpretation.

What perspective for implementing guidance and good practices?

The above sections provide an insight into the perceived authoritativeness of interpretative guidelines. What about the other types of guidance, such as implementing guidance and good practices that also feature in the Habitat guidance documents?

The official involved in the drafting of the explanatory memorandum remarked that 'the guidance on the type and content of implementing measures', is generally followed only in so far as this is in line with Dutch practices and experiences.¹³¹ For instance, the Netherlands has made its own choices regarding the use of management plans as conservation measures and has used its own experiences when designing the management plans.¹³² 'We did not need the guidance provided by the European Commission since we had already developed similar practices'.¹³³ A similar remark was made by one of the officials from the Dutch provinces, who indicated that:

'The guidance documents are not used to see what the best practices are or how you should approach this. If they [the guidance documents] are used it is to clarify the meaning of concepts and how you should interpret certain questions.'¹³⁴

129 Interview 16 – National official O.

130 Interview 16 – National official O.

131 Interview 6 – National official D.

132 Interview 6 – National official D.

133 Interview 6 – National official D.

134 Interview 16 – National official O.

These answers indicate that implementing guidance and good practices do not have the same status or role in implementing practices as the 'authoritative interpretative guidelines' included in the Habitat guidance documents. Rather, these other types of guidance seem to be perceived and used as a voluntary implementation aid: the Commission recommendations and good practices on the form and method of implementing measures are used in so far as they fit in with national implementing policies and experiences.

6.6 THE USE OF HABITAT GUIDANCE DOCUMENTS BY DUTCH COURTS

The above sections show how Habitat guidance documents find their way into the implementing practices of the Dutch provinces. This section explores the use of Habitat guidance documents by the Dutch courts. In order to explore what role Habitat guidance documents play in the judicial decision-making process, I have searched for explicit references to Habitat guidance documents in the rulings of the Dutch courts. This search resulted in 31 rulings by district courts, courts of appeal, as well as the Judicial Division of the Council of State.¹³⁵ Out of the 31 rulings, 20 rulings refer to the Species guidance documents. Six rulings refer to the Managing Natura 2000 guidance document issued in 2000, and four rulings refer to the 'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC'. One document refers to the guidance document on 'Wind energy development and Natura 2000' (see Table 6-1).

This section studies the rulings of the Dutch courts more closely along the two lines of types of guidance and perspectives on their binding character. The analysis is structured along the lines of the guidance documents on Natura 2000¹³⁶ and the Species protection guidance document. It finds that, in particular the Species guidance document leaves traces as an interpretation aid in the rulings of the Dutch courts. The guidance documents on Natura 2000 play a less visible role. Subsequently, these findings are complemented with the insights provided during interviews with judges and a senior official of the Council of State. Do Habitat guidance documents, in practice, play a more important role than transpires from the text of the rulings?

¹³⁵ See for an overview Annex 1.2.2

¹³⁶ The Managing Natura 2000 guidance document issued in 2000 and the 'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC'.

Table 6-1 Number of rulings that refer to Habitat guidance documents

Guidance document	Number of rulings (31)
'Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' (2000)	6
'Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC' (2007)	20
'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC' (2007/2012)	4
'EU Guidance on wind energy development in accordance with the EU nature legislation' (2011)	1

6.6.1 MN2000 guidance: few references in the rulings of Dutch courts

The MN2000 guidance document is one of the two 'core' Habitat guidance documents and is accompanied by various other guidance documents. Yet, the MN2000 guidance documents have received little *explicit* attention in the rulings of the Judicial Division of the Council of State. This section discusses the *Briels* ruling which remains silent on the MN2000 guidance documents; the 'low-level overflight ruling' in which the Council of State mentions that there is no role for the Commission's guidelines; and the *Blankenburg* ruling which seems 'exception to the rule' as in this ruling MN2000 guidelines are given a role as a judicial interpretation aid.

Briels: no role for the MN2000 guidance document?

In the *Briels* ruling, the Council of State assesses the lawfulness of a decision of the Dutch Minister to widen the A2 motorway.¹³⁷ The question is whether the so-called 'mitigation measures' proposed by the Dutch minister can be taken into account in the appropriate assessment for the decision whether or not the plan negatively affects the Natura 2000 site. These measures include the development of a new area of molinia meadows on the Natura 2000 site in order to compensate for the negative effect of the widening of the A2 motorway on another part of that site.

The concept of 'mitigation measures' was introduced and elaborated on in the MN2000 guidance documents of the European Commission.¹³⁸ The *Briels* ruling refers to these guideline documents only once, namely in the part that outlines the view of the appellants. The appellants refer to the fact that the term mitigation measures is only mentioned in the Commission's guidance documents. They argue that if the Council of State decides

137 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504 (*Briels e.a.*).

138 The Managing Natura 2000 guidance document introduces the possibility of taking account of mitigation (p. 37); the Guidance document on Article 6(4) of the Habitats Directive elaborates on the distinction between mitigation measures and compensatory measures (p. 6).

to follow the guidance of the Commission nevertheless, the measures proposed by the Minister do not constitute mitigation measures as defined in this document of the European Commission.¹³⁹

The remaining paragraphs of the ruling are silent on the Commission's guidelines. The Council of State takes the view that the answer to the question whether the proposed measures can be taken into account, cannot be found in the Habitats Directive nor in the case law of the Court of Justice and decides to refer a question for a preliminary ruling to the Court of Justice.¹⁴⁰ The Council of State asks, in essence, whether the integrity of the site is not adversely affected if an area of that natural habitat of equal or greater size is created in another part of the site that is not directly affected by the project.¹⁴¹ The guidance document, however, remains unmentioned.

In the preliminary ruling, the Court of Justice takes a similar, silent approach to the Managing Natura 2000 guidance documents.¹⁴² The Court of Justice considers that the competent national authority is required to take 'into account the protective measures forming part of that project aimed at avoiding or reducing any adverse effects for the site'.¹⁴³ However, the measures proposed by the Dutch government cannot be taken into account in the context of Article 6(3) of the Habitats Directive. The creation of molinia meadows elsewhere, not on the part of the site that is directly affected, tends to compensate and not to mitigate the adverse effects of the widening of the A2 motorway.

By taking this view, the Court of Justice in fact acknowledges the possibility of taking mitigation measures.¹⁴⁴ However, like the Council of State, the Court of Justice does not refer to the Commission's guidance documents. Thus, both in the *Briels* ruling of the Council of State and in the preliminary ruling of the Court of Justice, the MN2000 guidance document does not play a visible role. Does this mean that the Courts have not taken account of the Habitat guidance documents? Have the documents, perhaps silently, played a role in the decision-making process? What status do the Habitat guidance documents have according to the Council of State and according to the Court of Justice? In the *Briels* ruling these questions remain unanswered.

139 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 86 (*Briels e.a.*).

140 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 87.4 (*Briels e.a.*).

141 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504, par. 87.7 (*Briels e.a.*).

142 CJEU 15 May 2014, C-521/12, ECLI:EU:C:2014:330 (*Briels e.a. v Minister van Infrastructuur en Milieu*).

143 See also Fleurke 2014, p. 277.

144 As is argued by Woldendorp & Schoukers 2014, p. 4.

Overflying Natura 2000: guidance 'overruled' by the case law of the EU Court of Justice

Although the *Briels* ruling remains silent on the role of the guidance documents on Natura 2000, in the 'Overflying Natura 2000' ruling¹⁴⁵ the Council of State takes a more explicit approach. In this case, the Council of State makes clear that there is no role for the Commission guidelines.

The question in this ruling is whether low-level military flights can be considered a project in the sense of Article 6(3) of the Habitats Directive. The appellants, three environmental organisations, argue for a broad interpretation of the term 'project' that includes non-physical activities such as the low-level military flights. They refer to the Commission's interpretation of the term 'project' given in the MN2000 guidance document in support of their argument.¹⁴⁶

The Council of State does not share the appellants' view that such a broad interpretation is to be employed and considers that for an activity to be considered a project, a physical change in the Natura 2000 site is needed.¹⁴⁷ The Council of State does not derive this interpretation from the Commission's guidelines, but from rulings of the Court of Justice.¹⁴⁸ The guidelines in the MN2000 guidance documents, the Council of State explains, were issued *before* the Court of Justice handed down the relevant rulings in light of which the question in this case could be decided.¹⁴⁹ Moreover, the Council of State adds, 'the interpretation given by the European Commission in the MN2000 guidance document is in line with the case law of the CJEU'.¹⁵⁰

Thus, in this ruling the interpretative question can be solved in light of the case law of the Court of Justice. As a result, the Managing Natura 2000 guidance document has become 'outdated' and has lost its role as an interpretation aid – at least for the question in this ruling.

Post-Briels: towards a more explicit approach?

In the above rulings, the guidance documents on Natura 2000 do not play a prominent role. This, however, does not mean that the MN2000 guidelines could never come to play a visible role in the Council of State reasoning. In a more recent ruling, of July 2018, the Council of State refers to the Commission guidelines as an interpretation aid. In this ruling the Council of State

145 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380 (*Low-level overflight*).

146 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.1 (*Low-level overflight*); Managing Natura 2000 sites, p. 31, 32.

147 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.3 – 3.5 (*Low-level overflight*).

148 The Council of State refers to 17 March 2011, C-275/09, ECLI:EU:C:2011:154 (*Brussels Hoofdstedelijk Gewest*), and CJEU 19 April 2012, C-121/11, ECLI:EUL:2012:225 (*Pro-Braine ASBL*).

149 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.4 (*Low-level overflight*).

150 ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380, par. 3.4 (*Low-level overflight*).

refers to the Management Natura 2000 guidance document for a question that – like the *Briels* ruling – touches on the distinction between mitigation and compensatory measures.¹⁵¹ The question is whether compensatory measures need to have exerted their effect before the MN2000 site is negatively affected by the envisaged plan or project.

The Council of State remarks that an answer to this question has not yet been given by the Court of Justice¹⁵² and refers to the document that provides further guidance on Article 6(4) of the Habitats Directive. The ruling cites the paragraph in this guidance document which makes clear that compensatory measures do not necessarily need to be effective at the moment when the MN2000 areas concerned are affected – provided that additional compensatory measures are taken.¹⁵³ In this case, the compensatory measures will have exerted their effect before the area is significantly affected, and therefore pass the test of Article 6(4) of the Habitats Directive.¹⁵⁴

Thus, in contrast to the *Briels* ruling that was issued six years earlier, the Council of State now explicitly refers to the Commission guidelines and uses the guidelines as an interpretation aid. The different approaches towards the Habitat guidance documents indicate that the role that these guidelines play as a judicial interpretation aid are uncertain and unpredictable. What role the Natura 2000 guidelines really play in judicial decision-making practices can be discovered, it seems, only through interviews with judges. Before conducting this ‘reality-check’, the next section first explores the rulings that refer to the Commission’s guidance on species protection.

6.6.2 Species guidelines as judicial interpretation aid

Most references in the rulings of Dutch courts relate to the Species guidance document. This document is referred to in 20 rulings. The general picture that arises from these rulings is that this document fulfills the role of judicial interpretation aid more prominently and visibly than the Natura 2000 guidance documents. The role of the Species guidance documents as an interpretation aid features in different groups of rulings (for an overview of these groups rulings see Annex section 1.3.2). This section will analyse the use of the Species guidance document in these different groups of rulings.

The analysis sets out with a discussion of the foraging area rulings which show how the guidelines can become silently embedded in judicial discourse (*group 1*). Subsequently it discusses the breeding sites rulings where the guidelines are not given a role as an interpretation aid (*group 2*). The two ‘otter rulings’ of the district court of the Hague and the court of Appeal show how the courts, in one case, may deal differently with the Commission guidelines (*group 3*). The ‘incidental killing ruling’ of the

151 ABRvS 18 July 2018, ECLI:RVS:2018:2454 (*Blankenburgverbinding*).

152 ABRvS 18 July 2018, ECLI:RVS:2018:2454, par. 30.3 (*Blankenburgverbinding*).

153 Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC, p. 19.

154 ABRvS 18 July 2018, ECLI:RVS:2018:2454,), par. 30.4 (*Blankenburgverbinding*).

Council of State sheds light on the question whether the Minister is allowed to use the Commission guidelines as an interpretation aid (group 4).

1) *On foraging areas and flying routes: a silent influence of the Species guidelines*

In the foraging area rulings, the Species guidelines serve as an interpretation aid to decide on the question whether foraging areas and flying routes of bats fall within the scope of 'breeding sites and resting places' and therefore need to be protected on the basis of Article 12(d) Habitats Directive. What is interesting about this group of rulings, is that there is one 'leading case'¹⁵⁵ that is subsequently referred to in other foraging area rulings.

The leading case is the ruling of 7 November 2012¹⁵⁶ In which the Council of State first derives from the Species guidelines that Article 12(d) of the Habitats Directive should be interpreted as aiming to safeguard the ecological functionality of breeding sites and resting places. Subsequently, the Council of State assesses the facts of the case in light of this interpretation given in the Commission's guidelines. This part of the foraging area ruling that refers to the Species guidance document, is referred to and even 'copied' in later rulings. These rulings not only copy the reasoning of the Council of State, but also make explicitly clear that this interpretation on the scope of breeding sites and resting places derives from the Species guidance document.¹⁵⁷

Other rulings also refer to and adopt the reasoning of the Council of State in the foraging area ruling of 7 November 2012 *without* however referring to the Species guidance document.¹⁵⁸ In these rulings, that were not found with the search for explicit references, the courts assess whether the ecological functionality of the breeding sites and resting places has been affected, but does not make clear that this criterion has been derived from the Species guidance document. Thus, in these rulings the Dutch courts apply the interpretative guidance given in the Species guidance document in an indirect manner, namely by following the approach set out in the foraging area ruling. In this way, the Species guidance document 'silently' influences the interpretation of Article 12(d) of the Habitats Directive by the Dutch courts.

155 I draw inspiration from Sadl 2015.

156 ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464 (*Foraging area*).

157 Rb. Leeuwarden 17 December 2012, ECLI:NL:RBLEE:2012:BY6864, par. 5.6; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503, par. 7.4; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024, par. 14.2; See also Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748, par. 18.

158 For instance: ABRvS 16 September 2015, ECLI:RVS:2015:2938, par. 53.3; ABRvS 26 April 2016, ECLI:NL:RVS:1099, par. 16.5; ABRvS 18 February 2015, ECLI:NL:RVS:2015:487, par. 10.4; ABRvS 10 December 2014, ECLI:NL:RVS:2014:4438, par. 12.2; ABRvS 10 December 2014, ECLI:NL:RVS:2014:4491, par. 20.5; ABRvS 31 October 2014, ECLI:NL:RVS:2014:4013, par. 4.5; ABRvS 16 April, ECLI:NL:RVS:2014:1291, par. 14.5.

2) *Birds' breeding sites: the irrelevance of Species guidelines*

The foraging area rulings show how the Species guidelines on the interpretation of 'breeding sites or resting places' have become embedded in the judicial discourse of the Council of State. A different trend becomes visible in the 'breeding sites' rulings. In these rulings the question is whether the notion of 'breeding site' in the context of the Birds Directive must be given a broad interpretation, so that it includes the area to which the bird species *lepelaar* (spoonbill) and *grutto* (godwit) return every year.¹⁵⁹

In this group of rulings, again a leading case can be identified. This is the ruling of the Dutch Council of State of 25 February 2009.¹⁶⁰ The appellants argue that according to the Species guidance document, the definition of breeding sites must be given a broad interpretation. The Council of State, instead, considers that the notion of 'breeding site' as laid down in the Species guidance document is not to be interpreted in such a broad manner.¹⁶¹ The area the birds return to is considered too spacious to be considered a breeding site or resting place: Article 11 of the Flora and Fauna Act concerns the protection of species, not of areas.¹⁶² The Council of State does not refer to the interpretative guidelines on this questions in the Species guidance document.

This line of reasoning is reiterated in later rulings, despite other attempts by environmental organisations to convince the Council of State that the Species guidance document leads to a broader interpretation of the birds' breeding sites.¹⁶³ One of the rulings, a civil case, even explicitly 'overrules' the opinion of the European Commission.¹⁶⁴ In this case, the claimant argues that according to the opinion of the Commission, areas where *gruttos* return to should be considered a 'breeding site'.¹⁶⁵ The District Court of Alkmaar considers that the 'non-legally binding opinion of the European Commission (...) does not lead to a different conclusion'. 'Indeed', the Court concludes, 'there already is a clear line in the case law of the Council of State'.¹⁶⁶

159 ABRvS 25 February 2009, ECLI:NL:2009:BH3985; Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647 and in appeal ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561; Rb. Alkmaar, 16 March 2012, ECLI:NL:RBALK:2012:BV8951.

160 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.

161 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.1.

162 ABRvS 25 February 2009, ECLI:NL:2009:BH3985, par. 2.4.1.

163 Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; Rb. Alkmaar, 16 March 2012, ECLI:NL:RBALK:2012:BV8951; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561.

164 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951. Strictly speaking, this case is out of the scope of this research as the case does not review 'implementing practices' of national authorities. Nonetheless, I mention this case as it illustrates how the 'leading ruling' of the Council of State is referred to by a lower court.

165 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951, par. 4.6; 4.13.

166 Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951, par. 4.13.

This group of rulings on birds' breeding sites and resting places thus shows how the Species guidelines have lost some of their normative force due to the fact that there is an established line of interpretation of the Dutch highest administrative court.

3) *Establishing a system of protection: different approaches towards Species guidelines*

Amongst the rulings that refer to the Species guidance document is the 'otter ruling' of the District Court of The Hague of 22 May 2013.¹⁶⁷ This ruling is peculiar as it extensively elaborates on the role of the Species guidelines as an interpretation aid. The case was initiated by two environmental organisations who claim that the Dutch State has not taken sufficient measures to protect the conservation status of the Dutch otter.¹⁶⁸ In order to be able to answer this question, the District Court needs to determine the scope of the obligation to set up a system of species protection. Should the Dutch State have taken specific measures to ascertain a favourable conservation status of the otter? The Species guidance document is – according to the District Court – one of the sources for the interpretation of the Habitats Directive, in addition to the preambles of that Directive and the case law of the Court of Justice.¹⁶⁹ The Court considers:

'On the basis of the case law of the CJEU and *within the legal boundaries* the Species guidance document gives clarification on the scope of the obligation for the Member States to undertake research and of the obligation to set up a system of protection.'¹⁷⁰ [Emphasis added]

The District Court thus presumes that the Commission's guidelines respect the legal boundaries of the Habitats Directive. This is remarkable, as only the Court of Justice has the final judicial authority to rule on the validity of the Commission's guidance documents.¹⁷¹

Subsequently, after having cited entire sections of the Commission's guidance document, the District Court refers to the opinion in the case *Commission v France* on the protection of the European hamster.¹⁷² In this Opinion the Advocate General concludes that a broad interpretation of Article 12(1) of the Habitats Directive needs to be employed 'in part on the basis of the above mentioned guidelines of the European Commission'.

167 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'the dispute'.

168 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'the dispute'.

169 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'enforceability'.

170 Rb. 22 May 2013, ECLI:NL:RBDHA:2013:CA0593 (*Otter*), under 'enforceability'.

171 See above section 3.4.4.

172 Opinion to the judgment of the CJEU 9 June 2011, C-383/09, ECLI:EU:C:2011:23 (*European Commission v. France*). See also above section 6.3.2

By mentioning that the Advocate General also referred to the Habitats guidance document, it seems that the District Court seeks to underline the possibility of using the guidelines as an interpretation aid. This, however, is not made explicit in the text of the ruling.

Eventually, in light of the interpretation given in the guidance document, the Court reaches the conclusion that in this case the room for discretion of the Dutch State has become confined.¹⁷³ The Dutch Council of State is urged to take specific measures in relation to five 'traffic bottlenecks' that are needed to ensure the conservation status of the otter.

This ruling of the District Court is interesting in light of the explicit way in which the Court uses the Species guidance document. The explicit approach chosen in the ruling of the District Court not only contrasts with the rulings that have been discussed thus far, it also contrasts with the ruling of the Court of Appeal of The Hague in the same case that was delivered after the Minister had appealed against the ruling in first instance. In this ruling, the Court of Appeal does not mention nor refer to the Species guidance document. This is at least remarkable since the Court of Appeal also reflects on the scope of the room for discretion of the Dutch State in the implementation of Article 12(4) of the Habitats Directive. According to the Court of Appeal, the District Court has gone too far with regard to the measures that were required to be taken by the Dutch State.¹⁷⁴

The silence of the Court of Appeal on the Commission's guidelines, however, does not mean that the guidance document did not play any role during the proceedings. One of the lawyers in the 'otter case' was interviewed for this research and explained that:

'The guidance document did play a role during the proceedings before the Court of Appeal, perhaps an even more important role than during the proceedings before the District Court'.¹⁷⁵

Thus, even when Commission guidelines are not explicitly referred to in the text of a ruling, this does not preclude the possibility that the guidelines, in some way, have played a role in the judicial decision-making process.

173 Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593. The room for discretion is limited by the circumstance that with the measures the number of traffic accidents must be reduced in such a way that there is no longer a negative impact on the otter population. In view of the conservation status of the Otter and the number of car accidents heightens the urgency for such measures.

174 Hof Den Haag 4 November 2011, ECLI:NL:GHDHA:2014:3522, par. 3.9 and 3.10 (*Otter, appeal*). In order to reduce the deaths of otters caused by traffic accidents, the Court of Appeal considers it sufficient that the Dutch government is obliged to solve the most urgent traffic bottlenecks. The Dutch State is not required to also take measures solving the non-urgent bottlenecks as was decided by the District Court.

175 Interview 22 – Lawyer A.

4) *Incidental killing? The use of the Species guidelines by the Dutch Minister*

The above sections show that in some rulings the Species guidelines are used as an interpretation aid. In other rulings, the Commission's guidelines are not used as a point of reference for interpretative questions, as the breeding sites rulings show. What is more, the use or influence of Habitat guidance may even be silent, or invisible as shown in the foraging area rulings. As a result, it is difficult to say whether the use of the Species guidelines as an interpretation aid is common practice, or whether the document is used only incidentally.

Furthermore, a clear perspective as to the role or status of the Species guidance document does not transpire from the above rulings either. It remains uncertain whether, and to what extent, the Dutch courts consider themselves bound by the Commission's guidelines. The rulings also do not explicitly reflect on the question whether the Species guidance document could or should be taken into account by the Dutch Minister and/or the provinces.

In one ruling, found with the search for explicit references, the Council of State spends some words on this question. It concerns the 'incidental killing' ruling of 8 February 2012, in which 24 appellants challenge the decision of the Dutch Minister of Economic Affairs and the Minister of Infrastructure and Environment to build 86 wind turbines along the side of the *Noordoostpolder*.¹⁷⁶ In this ruling, which is 74 pages long, the Species guidance document is just briefly mentioned in one paragraph which makes clear that the Species guidance document was invoked by the Ministers during the proceedings before the Court.¹⁷⁷ The Council of State considers that the Ministers were allowed to attach importance to the Species guidance document and in particular to the guidance on page 49 of the document regarding the incidental killing of animals. Furthermore the Council of State adds that in this regard, the Council has taken notice of the value that the Court of Justice attaches to the Species guidance document in the judgment *Commission v Finland*.¹⁷⁸

Thus, the incidental killing ruling clarifies: 1) that the Minister is allowed to use the Species guidance document as a decision-making aid; and 2) that the Council of State considers it relevant that the document is used as an interpretation aid by the Court of Justice. At the same time, by making clear that the Minister is allowed to take the document into account, the question remains whether this is the case irrespective of whether the Court of Justice uses this document as an interpretation aid. Furthermore, the ruling also remains silent on the question as to whether the Council

176 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215 (*Incidental killing*).

177 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*).

178 ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215, par. 2.33.5 (*Incidental killing*) and CJEU 14 June 2007, C-342/05, ECLI:EU:C:2007:341 (*Wolf hunting*). See also above section 6.3.2.

considers the Minister to a certain extent bound by the guidelines of the Commission. Thus, the Council of State not only clarifies the role of the Species guidelines as an interpretation aid, the Court also, and perhaps foremost, leaves questions open.

6.6.3 Beyond explicit references: do the rulings give a misleading picture?

On the basis of the rulings of the Courts, some preliminary conclusions can be drawn with regard to the use of these guidance documents in implementing practices. The MN2000 guidance document seems to be used exceptionally as a judicial decision-making aid, since only a few explicit references were found from which it follows that the Court took this guidance document into account. These rulings also do not provide a clear perspective on the authoritative status of the guidance document. The Species guidance document is mentioned more frequently in the case law of the Courts. This document serves as a judicial interpretation aid. However, also in the case of the Species guidance document, the rulings do not provide for a clear perspective as to how the guidance document is used.

This section complements these findings with insights acquired during interviews with two State Councillors (*staatsraden*), one former State Councillor and a senior official at the Dutch Council of State.¹⁷⁹

A silent role for Managing Natura 2000 guidance document?

Although the above sections reveal little references in the rulings of Dutch courts to the Managing Natura 2000 guidance document, in practice the Managing Natura 2000 guidance document has played an important role when adjudicating on questions related to Article 6 of the Habitats Directive. The State Councillors mentioned that in particular this guidance document on the management of Natura 2000 sites that is consulted quite consistently.¹⁸⁰ Vice versa, although more references were found to the Species guidance document, this does not mean that this document is consulted more often:

The Species guidance document might be referred to a bit more often, but in my view it is not consulted more often. It [the number of references] does not say anything about what happens internally, when reflecting on a case. That is my impression.¹⁸¹

179 The judges' views are not a formal statement as to the use of the guidance documents by the Council of State. The purpose of the interviews is limited to providing a 'reality-check' that puts into perspective the findings of the search for explicit references.

180 Interview 26 – State Councillors C and D.

181 Interview 26 – State Councillors C and D.

The MN2000 guidance document thus plays a 'silent' role in judicial decision-making processes. The invisibility of the use of the MN2000 guidance document might have to do with the highly explanatory character of the guidelines, as is noted by the State Councillors:

"This guideline, on management, was made in the very beginning and gives very useful, yet considerably general instructions and explanations from concepts (...). It is about the logic between the different paragraphs, about the concepts that are used. A larger part of what is included in this [guidance document] plays a role more in the background and less in the direct decision-making process"¹⁸²

On the other hand, the more specific and detailed character of the Species guidance document makes this guidance document more suitable to refer to when interpreting the Habitat provisions. The State Councillors remark:

'[T]he Species guidelines are more specific about the result of derogations that can or cannot be made. The guidelines much more concern the actual decision making with regard to what is and what is not allowed on the basis of the Directive.'¹⁸³

The above answers suggest that the different way in which the guidance documents are used by the State Councillors might be related to the types of the guidelines included in the guidance documents. The highly explanatory MN2000 guidance document is primarily used as an aid to understand the logic and system behind Article 6 of the Habitats Directive, whilst the interpretative Species guidelines visibly fulfills a role as a decision-making aid.

A perspective of authoritativeness

As said in the introduction to this section, the above analysis of the rulings of Dutch courts does not reveal a clear perspective on the degree of bindingness of the Habitat guidance documents. What is the view taken by State Councillors and officials of the Council of State? The State Councillors emphasised the authoritative, yet non-binding character of the Habitat guidance documents:

'It [the guidance documents] is of course issued by the European Commission', but it is also not 'the truth'. Eventually the Court of Justice decides. (...) But authoritative it certainly is'.¹⁸⁴

182 Interview 26 – State Councillors C and D.

183 Interview 26 – State Councillors C and D.

184 Interview 26 – State Councillors C and D.

Now, what does it mean for a guidance document to be 'authoritative'? The State Councillors clarified that the guidance documents are 'more than only useful' and that, in principle, the documents must be followed. There is, however, no obligation to follow the Commission's guidelines: 'it is possible to deviate from the guidelines', but 'the guidance documents cannot be set aside without any reason'.¹⁸⁵ This means that the binding effect of Habitat guidance documents comes close to that of a 'comply or explain' obligation.¹⁸⁶ What is more, the State Councillors emphasised that not only should national courts take account of the Commission guidelines: competent national authorities should also take account of the guidelines and explain a deviation from the guidelines accordingly.¹⁸⁷

Finally, the State Councillors indicated that this 'perspective of authoritativeness' not only encompasses the Habitat guidance documents. It reflects a more general perspective that guides the use of Commission guidelines within the Council of State. It means that the Commission guidelines as an authoritative interpretation aid also encompass guidance documents issued by the Commission in other policy areas.¹⁸⁸

These observations raise the question whether the use of Habitat guidelines by other Dutch administrative courts are driven by a similar perspective. From informal interviews that have been conducted with judges of other courts, a picture arises that in practice indeed differences exist when it comes to their views on the degree of bindingness and status of Habitat guidelines. According to a former Councillor of State, the ways in which guidance documents are used and perceived, might differ from person to person, and from judge to judge.¹⁸⁹ The attitude towards guidance documents might, for instance, be influenced by whether or not the person dealing with the guidance documents has a background in EU law or a background in national administrative law.¹⁹⁰

6.7 CONCLUSION

In the Netherlands, where the implementation of the Habitats Directive has not always been a smooth process, the role of guidelines as an implementation aid is promising. The Habitat guidelines could provide a helpful aid in implementing the openly formulated provisions in the Habitats Directive. In this regard, the aim of the Habitat guidelines to leave 'room for

185 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

186 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

187 Interview 26 – State Councillors C and D; Interview 28 – State Councillor C.

188 The State Councillors specified that this is the case in so far as it concerns 'unregulated guidance' that do not have a specific legal basis in secondary legislation. See on those unregulated guidance documents section 2.4.1.

189 Interview 27 – State Councillor E.

190 Interview 27 – State Councillor E.

manoeuvre' fits well with the decentralised implementation approach in the Netherlands. The Dutch provinces are responsible for the implementation of the Dutch Nature Protection Act 'on the ground.'

I expected that traces of the Habitat guidelines would be found in particular in the 'provincial practices', as in this phase implementing questions would certainly arise. The result seems somewhat disappointing: the guidelines do not, or not yet, play a prominent role in the provincial practices. Nonetheless, *if* the guidelines are used this is mostly as an aid for the *interpretation* of the Habitat provisions. The guidelines take this role most clearly when individualised decisions are to be taken or defended. A more visible role is given to the guidelines in the explanatory memorandum to the Nature Protection Act. The memorandum refers extensively to the Commission's guidelines with the aim of providing for some consistency in the practices of the twelve different provinces. Here again, it is in particular the interpretative guidelines that are mostly referred to and – at several places – even 'copied' in the text. Although this is not made explicit in the text of the memorandum, interviews with a senior official learned that the guidelines are perceived as an authoritative interpretation aid, that cannot be set aside without giving good reasons for doing so. Interestingly, a similar 'perspective of authoritativeness' was articulated by nearly all officials of the Dutch provinces who were interviewed in the context of this research. Thus, in the implementation process, the Habitat guidelines seem to take a role as an 'authoritative interpretation aid'.

The use of the Habitat guidance documents by the Dutch courts shows similarities with the role of the guidelines in the implementation process. In the rulings of the courts, the guidelines take the role of an interpretation aid. References to the detailed, interpretative Species guidelines feature in rulings of district courts as well as of the Council of State. Other types of guidance are also consulted and taken into account, without this becoming visible in the text of the rulings. This seems to be the case, in particular, for the explanatory guidance in the MN2000 guidance document, which is consulted as 'standard practice', without this becoming visible in the rulings of Council of State.

This silence of Dutch courts also concerns the legal status of the Habitat guidelines; the rulings remain implicit about the 'legal relevance' of the guidelines. The rulings do not state more than that the courts use the guidelines as an interpretation aid, and that the Minister is permitted to take account of the guidelines – as appears from the incidental killing ruling. Again, interviews with State Councillors provide interesting insights: the Habitat guidelines are considered an authoritative source for interpretation. Therefore, guidelines are to be taken into account, and deviation needs to be justified; by both administrative authorities and national courts. The question remains, however, whether this perspective is shared by other courts.

From the above, it follows that the interpretative Habitat guidelines in particular leave traces in Dutch implementing as well as in judicial decision-making practices. A clear perspective on the binding character

of the guidelines does not transpire from the legislative, administrative or judicial branch. Even when in practice the use of guidance is perceived and used as a mandatory interpretation aid governed by a 'comply-or-explain like approach', to the 'outside world' the status of Habitat guidelines as an implementation aid as well as a judicial decision-making aid remains highly uncertain.