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Guidance documents of the European Commission in the Dutch legal order

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This chapter explores the role of guidance documents related to ‘Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ (the Citizenship Directive).

In the policy areas that were previously discussed, that of Direct Payments and the Habitats Directive, guidance documents represent an important part of the EU regulatory landscape. In both areas, the issuing of guidance documents has become an established practice. The area of free movement of persons shows a different picture. In relation to the Citizenship Directive, the European Commission issued only two guidance documents, which is far less compared to the areas discussed previously. The first guidance document is the Communication ‘on guidance for better transposition and application of Directive 2004/38/EC’ and was issued in 2009.¹ The second guidance document, issued in 2014, is the Handbook addressing marriages of convenience.²

Like the previous case studies, this chapter consists of two parts. The first part introduces the two free movement of persons guidance documents (hereinafter FMP guidance documents) and describes the context in which the guidance documents were issued and used (sections 7.1 and 7.2). It is observed that FMP guidance documents are a means for the Commission to enter into dialogue with the Member States, addressing their concerns on the far-reaching implications of the free movement rules. This results in soft pressures to act guidance-proof (section 7.3). The second part of this chapter explores the use of FMP guidance documents in the Dutch legal order, which is characterised by a restrictive immigration policy (section 7.4). The empirical analysis reveals that the use of FMP guidance documents in the implementation process is guided by a ‘cherry picking approach’ (section 7.5). The rulings of the Judicial Division of the Council of State and the District Court of The Hague provide insights in the use of guidance in judicial decision-making practices (section 7.6). The analysis shows that the FMP guidelines are recognised and used as a judicial interpretation aid, and that the guidelines acquire a certain self-binding effect on the Dutch authorities. This leads to the conclusion that whilst the use of FMP documents as an implementation aid is guided by a practice of cherry picking;

1 COM(2009)313 final.

2 SWD(2014)284 final.

the Dutch courts act as facilitating actors, reinforcing the binding effect of the guidance documents on the Dutch authorities (section 7.7).

7.1 THE CITIZENSHIP DIRECTIVE

7.1.1 Free movement of persons: touching on national immigration policies

Free movement of persons is one of the cornerstones of the European integration process.³ The Treaty of Rome of 1957 introduced the free movement of workers as one of the four economic freedoms.⁴ Initially, the right to free movement thus only applied to economically active citizens of the Member States. In the course of the integration process, the right of free movement was gradually extended to other categories. The introduction of the notion of Union Citizenship in the Treaty of Maastricht in 1992 marks a milestone in the extension of the right to free movement beyond those who are economically active.⁵ The Maastricht provisions are still included in the Treaty on the Functioning of the European Union. Article 20 TFEU grants EU citizenship to ‘every person holding the nationality of a Member State’ and Article 21 TFEU provides for the right to free movement: ‘every citizens of the Union shall have the right to move and reside freely within the territory of the Member States’.

The Citizenship Directive, adopted on 29 April 2004, provides for further rules that govern the right to free movement of Union citizens and their family members.⁶ These conditions and limitations form the framework for the Member States that needs to be respected when deciding on applications for residence permits or when taking decisions restricting the right to free movement. Despite the fact that the Citizenship Directive is adopted under the legal framework of EU free movement law, the Directive touches upon the migration laws and policies in the Member States.

Over the years, administrative policies and practices in most EU Member States have shown a tendency towards restrictive immigration policies, especially in the area of family reunification.⁷ This tendency towards more national control contrasts with the developments of the notion of EU citizenship and EU free movement policies, sometimes against

3 Boeles et al. 2014, p. 31.

4 Article 48 of the Treaty establishing the European Economic Community (now Article 45 TFEU).

5 Article 17 of the Consolidated version of the Treaty Establishing the European Community; Boeles et al. 2014, p. 31.

6 The Directive substitutes previous secondary legislation that provided for the rules on free movement and codifies the case law of the Court of Justice of the EU, see Boeles et al. 2014, p. 32.

7 Martinsen 2011, p. 953; Ballesteros et al. 2016, p. 15.

the preferences of the Member States' governments.⁸ This background of political sensitiveness and increased involvement of the European Union makes it interesting to take free movement of persons as one of the policy areas to study the role of Commission guidance documents in the implementation of EU law.

7.1.2 The conditions and limitations governing the right to free movement

The conditions that apply for an EU citizen to obtain a right of residence vary according to the duration of stay of a Union citizen in a 'host' Member State.⁹ The Directive provides that during the first three months, the right of residence in a host Member State is not subject to any conditions or formalities other than the requirement of holding a valid identity card or passport.¹⁰ When a Union citizen resides in another Member State for a period longer than three months, certain conditions must be met.¹¹ For instance, the Union citizen must be a worker or self-employed person in the host Member State, or have sufficient resources. Union citizens who have resided in the host Member State for more than five years are granted a right of permanent residence.¹²

The Citizenship Directive extends the right of residence to the family members of Union citizens that have used their right to free movement, such as the spouses of Union citizens or the partner with whom the Union citizen has a durable relationship.¹³ Consequently, the right to free movement may also be granted to family members of a Union citizen from a non EU Member State ('third country nationals').

Restrictions on the right to free movement can be found in the final chapters of the Citizenship Directive. Article 27 provides that the Member States may restrict the right to free movement on the grounds of public policy, public security and public health and lays down further rules that need to be respected when taking such restrictive measures. For instance, it emphasises that measures taken on grounds of public policy and public security 'shall exclusively be based on the personal conduct of the individual concerned'. A limitation to the right to free movement can also be found in Article 35 of the Directive. Member States may take the necessary measures to refuse, terminate, or withdraw the right of residence 'in the case of abuse of rights or fraud, such as marriages of convenience'.

8 Martinsen 2011.

9 Compare Boeles et al. 2014, p. 51.

10 Article 6 Citizenship Directive.

11 Article 7 Citizenship Directive.

12 Article 16 Citizenship Directive.

13 Article 3(2)(a)(b) (a valid identity card or passport is of course still required).

7.1.3 The Member States' conception of discretionary control

From the above, it already transpires that the Citizenship Directive lays down general rules that contain openly formulated provisions.¹⁴ For instance, the rules that outline conditions to the right to free movement use concepts such as 'sufficient resources', 'unreasonable burden' and 'dependent family members'. The restrictions on the right to free movement also take the form of general rules. Article 27 introduces the grounds on which it is possible to restrict the right to free movement in the form of general principles. Article 35 speaks of 'abuse' without giving a definition and states that in order to tackle abuse the Member States may take 'the necessary measures'.

The general wording and openly formulated provisions of the Citizenship Directive can be explained in light of the wish of the Member States to maintain discretion in the interpretation and application of the Citizenship Directive.¹⁵ Indeed, when provisions are openly formulated this leaves, at least at first sight, room for manoeuvre in implementing practices at the national level. According to Martinsen, immigration policy is one of the areas where the Member States traditionally have wished to maintain political control and administrative discretion.¹⁶ In this area 'Member States have jealously guarded their autonomy to define who are to be members of the national communities'.¹⁷

At the same time, it can be questioned whether this room for discretion, or the conception thereof, will be 'preserved' in practice. Indeed, openly formulated provisions also give rise to questions before the Court of Justice on the interpretation of provisions of the Directive. Through the interpretation of the provisions of the Citizenship Directive, the Court of Justice draws and redefines the boundaries of the room for discretion of the Member States.¹⁸ Martinsen shows how the principle of proportionality is a powerful instrument enabling an extension of Union competences,¹⁹ and Barnard explains the development towards a 'right's based approach' in the Court's rulings, whilst the Member States fear the EU rules enabling 'welfare tourism'.²⁰

One of the rulings of the Court of Justice that has given rise to debate and controversy at the national level is the *Metock* ruling handed down by the Court of Justice in 2008.²¹ The *Metock* ruling not only encountered resistance in the Member States, the ruling also 'triggered' a request from the Member States for the issuing of the first 'FMP guidance document'.

14 Beck 2012, p. 173.

15 Costello 2009.

16 Martinsen 2011, p. 953, 954.

17 Martinsen 2011, p. 945.

18 Compare Barnard 2014, p. 357, 358.

19 Martinsen 2011.

20 Barnard 2014, p. 358-362.

21 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449 (*Metock*).

7.1.4 The Metock ruling and the request for Commission guidelines

The preliminary question that leads to the *Metock* ruling is raised by the Irish High Court and concerns the Member States' competence to restrict the right of free movement of third country family members of Union citizens.²² The Irish High Court asks whether the Citizenship Directive precludes national legislation that only grants a right of residence to a third country national family member of a Union Citizen when the family member has previously lawfully resided in another Member State.²³

The Court of Justice does not accept the Member States' arguments. The right of residence of third country family members of a Union citizen cannot be made conditional on the question whether the third country national previously, lawfully or otherwise, resided in a Member State.²⁴ According to the Court, the Member States do not have an exclusive competence to grant or deny residence to third country nationals.²⁵ Such an exclusive right would go against the rationale of the right to free movement of persons, which is one of the core principles of the internal market.²⁶

The *Metock* ruling encounters resistance and criticism in the Member States, who fear a loss of control over the right of first entry of third country family members as well as an increase in the number of third country nationals claiming a right of residence on the basis of a marriage with a Union citizen.²⁷ During the Justice and Home Affairs Councils of September 2008 and November 2008 the 'Immigration Ministers' express their concerns and underline the importance the Member States attach to protecting the right to free movement from abuses.²⁸ This also led the Member States to request the Commission to issue guidelines:

'Concerned that the provisions of Directive 2004/38 should be fully and correctly implemented in order to improve the prevention and combating of misuses and abuses, whilst adhering to the principle of proportionality, the Council requests the Commission to publish guidelines for the interpretation of that Directive early in 2009.'²⁹ [Emphasis added]

22 Article 3 and Article 2(2) of the Citizenship Directive.

23 At the time when the Irish High Court raised this question, not only Ireland, but also other Member States had provided for similar 'prior lawful residence requirements'. Costello 2009, p. 595.

24 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 80 (*Metock*).

25 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 67 (*Metock*).

26 CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, par. 68 (*Metock*).

27 For instance, Denmark accused the Court of creating a 'loophole' in immigration policy making it easier for third country nationals to benefit from the right of free movement by means of marriage to an EU citizen. See; Martinsen 2011, p. 957, 958.

28 Press release 16325-1-08 REV 1, p. 27.

29 Press release 16325-1-08 REV 1, p. 28.

7.1.5 The Commission's response

The European Commission decides to act upon the request from the Council. The Commission announces its intention to publish guidelines in December 2008 in the report on the application of Directive 2004/38. The general conclusion of the report is that '[t]he overall transposition of Directive 2004/38/EC is rather disappointing'.³⁰ In order to ensure the correction transposition and implementation of the Directive, the Commission will 'use fully its powers under the Treaty and launch infringement proceedings when necessary'.³¹ Furthermore, the report mentions that:

'The Commission intends to offer information and assistance to both Member States and EU citizens *by issuing guidelines* in the first half of 2009 on a number of issues identified as problematic in transposition or application, such as expulsions and fight against abuse, in order to offer guidance as to how those may be resolved.'³² [Emphasis added]

Prior to issuing the guidelines, the European Commission creates an expert group and prepares a questionnaire in order to understand the concerns of the Member States 'on the ground'.³³ The Commission asks the Member States to identify issues that require further discussion and clarification,³⁴ which leads to at around 900 questions from the Member States being sent to Brussels.³⁵ Subsequently, the Commission services use the 'input' from the Member States on the transposition and implementation of the Directive in order to draft the guidelines.³⁶ According to Dutch officials, the elaboration of the guidelines in fact constitutes a 'compromise' and serves to 'reassure the Member States' after the concerns that had arisen in response to the *Metock* ruling.³⁷ Thus, by developing the guidelines with the help of the Member States, the Commission takes a dialogical approach.

7.2 THE FMP GUIDANCE DOCUMENTS

7.2.1 The 2009 Communication

In July 2009, as announced, the European Commission issues the first guidelines related to the Citizenship Directive. The guidelines are laid down in the Communication COM(2009)313 on guidance for better transposition and application of Directive 2004/38/EC (hereinafter: '2009 Communica-

30 COM(2008)840 final, p. 3.

31 COM(2008)840 final, p. 10.

32 COM(2008)840 final, p. 10.

33 COM(2008)840 final, p. 10.

34 COM(2008)840 final, p. 10.

35 Interview 7 – National officials E, F, G.

36 Interview 7 – National officials E, F, G.

37 Interview 7 – National officials E, F, G.

tion' or '2009 guidelines'). The Communication is published on the EUR-lex website, where it can be found in 24 different languages.³⁸ It thus has a 'formalised' character compared to the other guidance documents in the policy areas previously discussed.

The text of the guidelines issued by the Commission reflects three types of guidance provisions. Firstly, most introductory sentences of the sections or subsections in the guidance document have a highly explanatory character, paraphrasing general rules and principles formulated in the Citizenship Directive and the case law of the Court of Justice.

The second and main type of guidance that features in the document are the guidance provisions with an interpretative character. The interpretative guidelines may take the form of an interpretative rule, such as the rule that '[in] certain circumstances persistent petty criminality may represent a threat to public policy despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above'.³⁹ However, interpretative guidance is also given in the form of elements or factors that can or should be taken into account when applying the interpretative rules. For instance, in order to assess whether persistent petty criminality represents a threat to public policy, the guidelines state that 'the authorities may in particular take into account the following factors: the nature of the offences, their frequency, and the damage or harm caused'.⁴⁰

Thirdly, the 2009 Communication provides for recommendations on the method that could be followed in order to investigate whether there is a marriage of convenience.⁴¹ The guidelines make clear that the Member States 'may rely on previous experiences' to develop criteria on the basis of which suspect marriages can be detected. Subsequently, the Communication lists possible 'indicative criteria' in light of which it can be examined whether an abuse of EU rights exists and also outlines appropriate investigation methods. The recommendations on these methods given in the 2009 Communication are complemented with best practices in the second FMP guidance document, which is the Handbook addressing alleged marriages of convenience.

7.2.2 The Handbook addressing alleged marriages of convenience

The first request for a 'a handbook on marriages of convenience, including indicative criteria to assist in the identification of sham marriages' is made during the Justice and Home Affairs Council of 23 April 2012. The respon-

38 See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0313> (last accessed 12 August 2019).

39 COM(2009)313 final, p. 12.

40 COM(2009)313 final, p. 12.

41 As we will see, these guidelines come to play an important role in Dutch implementing practices. See section 7.4.3.

sible Ministers take the view that action is needed to respond to increased migratory pressures.⁴² Two and a half years later, in September 2014, the Commission publishes the 'Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens'.

The Handbook is laid down in Staff Working Document SWD(2014)284 final and accompanies a Communication that announces and summarises the content of the handbook.⁴³ The Communication and the Staff Working Document emphasise that the document has been requested by the Member States and has been prepared 'in close cooperation' with them.⁴⁴ The Commission thus pursues the 'dialogical approach' initiated some years earlier with the issuing of the 2009 Communication.

The introduction to the Handbook explains that it seeks to complement the guidance on marriages of convenience laid down in the 2009 Communication.⁴⁵ The Handbook 'expounds' the legal framework spelled out in the Communication of 2009 and provides guidance of an 'operational character':

'It [the guidance document] spells out what the application of these rules mean in practice, offering national authorities operational guidance to assist them in effectively detecting and investigating suspected cases of marriages of convenience'.⁴⁶

The 'operational guidance' on detecting and investigating suspected cases of marriages of convenience takes the form of dissemination of good practices (the fifth type of guidance identified in section 3.2.5). These good practices can be found in section 4 of the Handbook that exhibits 'operational measures within national remit'.⁴⁷ From the opening sentence of this section, it transpires that the operational guidance has been drawn from experiences and practices of the Member States:

'This section reflects practices distilled from national practices across the Member States and is not intended as a blueprint for all investigational patterns and processes'.⁴⁸

The operational measures propose a 'double-lock mechanism' which entails that national authorities should detect whether it is possible to identify 'hints of no abuse' before verifying the existence of 'hints of abuse'. In different sub-sections the handbook presents possible hints of abuse as well as inves-

42 8714/1/12 REV 1 EU Action on Migratory Pressures. A Strategic Response, p. 19.

43 COM(2014)604 final.

44 SWD(2014)284 final, p. 2 and COM(2014)604 final, p. 3.

45 SWD(2014)284 final.

46 SWD(2014)284 final.

47 SWD(2014)284 final, p. 32.

48 SWD(2014)284 final, p. 32.

tigation techniques that could be used by national authorities to investigate marriages of convenience. The Handbook also encourages cross-border co-operation as well as the exchange of information between national actors, such as national immigration authorities and national courts.⁴⁹

The Handbook not only provides for 'good investigation practices'. Most pages of the Handbook are devoted to explaining the phenomenon of marriages of convenience and to giving an overview of the legal framework that applies when detecting and investigating marriages of convenience. These reflections can be found in the second and third section of the Handbook and mainly have an explanatory character.

Nonetheless, the operational guidance on detecting and investigating marriages of convenience remains the most innovative part of the Handbook. What is more, this dissemination of good practices can be expected to have the most 'tangible' effect on national investigation practices.

7.2.3 A request for further guidance and a spill-over effect to family reunification

At the time of writing, the two guidance documents that complement the Citizenship Directive are the 2009 Communication and the Handbook addressing marriages of convenience discussed above.

A request for further guidance is made in the 2016 report commissioned by the European Parliament on the implementation of the Citizenship Directive.⁵⁰ The study concludes that issues and problems concerning the implementation of the Citizenship Directive remain, despite the judicial guidelines given by the Court of Justice as well as the guidelines issued by the European Commission. One of the main problems is the risk of inconsistencies in and 'various interpretations' of the openly formulated concepts laid down in the Citizenship Directive.⁵¹ The report recommends the Commission to 'clarify terms' by updating and expanding its guidance 'in order to include the recent developments of the CJEU as well as additional clarifications on aspects of the Directive which were not covered'.⁵²

In addition to the issuing of possible future guidance documents, it is worth noting that the 2009 Communication leaves traces in a guidance document issued in relation to the Family Reunification Directive.⁵³ The Communication on guidance for application of Directive 2003/86/EC on the right to family reunification refers to both the Communication of 2009 and to the Handbook in relation to investigating alleged marriages of convenience. The Communication mentions that despite the different legal regimes, the definitions, investigation and detection techniques are

49 SWD(2014)284 final, p. 45.

50 Ballesteros et al. 2016, p. 136.

51 Ballesteros et al. 2016, p. 11, 15.

52 Ballesteros et al. 2016, p. 11, p. 126, 136.

53 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

the same.⁵⁴ Therefore, section 4.2 of the 2009 Communication may '*mutatis mutandis* be referred to for guidance on definitions'.⁵⁵ Similarly, the guidance in the Handbook 'on investigation tools and techniques on cross-border cooperation' is considered useful in relation to cases of potential fraud and abuse of family reunification.⁵⁶

In light of these 'spill-over effects' of the FMP guidance on detecting and investigating marriages of convenience to the Family Reunification Directive, similar spill-over effects could be found at the national level. In other words, traces of the use of FMP guidelines might be found in relation to the implementation of the Family Reunification Directive.

7.3 EU EXPECTATIONS ON THE USE OF FMP GUIDANCE DOCUMENTS

As we have seen in the previous case studies, expectations formulated at the EU level may influence or shape the role of FMP guidelines in national implementing practices. What expectations as to how national authorities and national courts should use guidance documents related to the Citizenship Directive can be found in the guidance documents, the practices of the Commission and in the rulings of the Court of Justice?

7.3.1 Expectations of the European Commission

Non-binding clauses in the FMP guidance documents

The introductory sections of guidance documents issued by the European Commission often state that the guidelines are not legally binding and 'only' reflect the views of the European Commission. The FMP guidance documents are no exception. The documents include general clauses that emphasise the non-binding character of the Commission guidelines. For instance, the introduction to the 2009 Communication states that:

'The guidelines state the views of the Commission and are without prejudice to the case law of the Court of Justice (...) and its development'.⁵⁷

Similarly, the introductory section to the Handbook makes clear that:

'The Handbook is neither legally binding nor exhaustive. It is without prejudice to existing EU law and its future development. It is also without prejudice to the authoritative interpretation of EU law which may be given by the Court of Justice'.⁵⁸

54 COM(2014) 210 final, p. 27.

55 COM(2014) 210 final, p. 27.

56 COM(2014) 210 final, p. 27.

57 COM(2009)313 final, p. 2.

58 SWD(2014)284 final, p. 4.

The above cited sections in the Communication and the Handbook do not refer to a specific type of guidance. In this regard, it is interesting to note that section 4 of the Handbook explicitly refers to the non-binding character of the good practices in the form of operational guidance:⁵⁹

‘This section reflects practices distilled from national practices across the Member States and *is not intended as a blueprint* for all investigational patterns and processes. Rather, *it should serve as a toolbox of solutions* allowing Member States to set up tailored operational schemes fitting their specific needs and available resources.’ [Emphasis added]

The Commission as guardian of the Treaties

Even when presenting guidance documents as an instrument to give ‘non-binding assistance’ to the Member States, the fact remains that the European Commission is also the guardian of the Treaties. The question therefore is whether the Commission uses the FMP guidelines as an aid or standard to monitor implementing practices of the Member States, formulating (implicit or explicit) expectations vis-à-vis the Member States to act in line with the FMP guidance.

The Citizenship Directive is not the area where the European Commission most actively ‘watches the Member States’.⁶⁰ The number of infringement proceedings in the area of free movement of persons represents a small proportion of all pending infringement cases in the area ‘Justice and Consumers’.⁶¹ Since 2009, the Commission has initiated 32 infringement proceedings for non-compliance with the Citizenship Directive.⁶² According to a study conducted in 2016 on the implementation of the Citizenship Directive, the number of infringement procedures is not sufficient to tackle the problems that still exist and calls for a more active enforcement policy by the European Commission.⁶³

The conclusion that in this policy area the Commission does not have the most active monitoring role, still does not tell us whether the Commission uses its guidelines as an aid or standard when monitoring the Member States’ practices. The impression of a Dutch official interviewed for this research, is that the Commission might take account of the guidelines

59 SWD(2014)284 final, p. 32.

60 Steunenberg 2010 distinguishes between situations where the Commission acts actively as guardian of the Treaties ‘watching the Member States’ and areas where the Commission acts as a ‘silent witness’.

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

62 See the database of the European Commission with infringement decisions: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=2&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=Directive+2004%2F38&submit=Search. Last accessed 12 August 2019.

63 Ballesteros et al. 2016, p. 15.

during an infringement procedure. However, in the official's experience, the Commission does not use the FMP guidelines as 'a standard to monitor' national implementing practices.⁶⁴ This might mean that in this policy area there is less pressure to act in conformity with guidance documents than in other policy areas where the Commission uses its powers more actively to initiate infringement proceedings as well as where guidelines serve as a monitoring standard. Further empirical research could provide further insights into the expectations formulated by the European Commission on the use of the FMP guidelines during its monitoring practices.

7.3.2 Silence of the Court of Justice

Even if it is hard to discern clear expectations on the basis of the practices of the European Commission, expectations might still be formulated in the case law of the Court of Justice. In a vast amount of rulings, mostly preliminary references, the Court of Justice has given further clarification the provisions laid down in the Citizenship Directive. Does, in these rulings, the Court refer to the guidelines of the European Commission, and does the Court make it clear how it expects the Member States to use the guidelines?

A search for explicit references in the InfoCuria database reveals two preliminary rulings in which the 2009 Communication is mentioned.⁶⁵ In these rulings, the guidelines do not play a prominent role in the Court's reasoning.⁶⁶ In one of the rulings, the Court of Justice even makes it clear that it does not follow the interpretation given in the 2009 Communication. In the *SM* ruling of 26 March 2019, the Court rules that the an 'adopted child' under the *Kafala* system cannot be considered a 'direct descendent' of a Union Citizen.⁶⁷ The Court considers the interpretation, 'such as that which is apparent from point 2.1.2 of Communication COM(2009)313 final', whereby a child in legal guardianship is a 'direct descendent' of a Union citizen, a too broad interpretation of Article 2(2) of the Citizenship Directive.

Even when the Court's rulings do not explicitly refer to the FMP guidelines, the rulings may still 'silently' adopt or apply the Commission's guidelines. Such a 'linguistic similarity' can be found in the McCarthy ruling in relation to the investigation of alleged marriages of convenience.

⁶⁴ Interview 23 – National official F.

⁶⁵ CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248 (*SM*); CJEU 2 May 2018, C-331/16 and C-366/16, ECLI:EU:C:2018:296 (*K and H.F. v Belgium*). The search was conducted with the terms 2004/38 + 'COM(2009)313' and 2004/38 + Handbook (last search at 29 May 2019).

⁶⁶ In the case *K v Staatssecretaris van Veiligheid en Justitie*, the referring Court asks whether the factors spelled out in the guidelines should be taken into account in the context of a proportionality assessment of a declaration of undesirability. However, in its assessment of the case the Court of Justice does not refer back to these factors nor to the guidelines. See CJEU 2 May 2018, C-331/16 and C-366/16, ECLI:EU:C:2018:296 (*K and H.F. v Belgium*).

⁶⁷ CJEU 26 March 2019, C-129/18, ECLI:EU:2019:248, par. 55 (*SM*).

In this ruling, the Court of Justice considers that an individualistic approach should be taken when investigating a potential case of abuse, that systematic checks are prohibited and that the measures taken should not be automatic in nature.⁶⁸

This interpretation of Article 35 of the Citizenship Directive corresponds with the guidelines in the 2009 Communication. However, the McCarthy ruling does not explicitly refer to the Commission's guidelines. This is different in the case of the opinion of the Advocate General in the McCarthy case. In his opinion, the Advocate General considers that '[a]s the Commission correctly states in its guidelines', the Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse.⁶⁹

The opinion to the McCarthy case is not the only opinion that refers to the 2009 Communication. The search for explicit references revealed references to the 2009 Communication in five other opinions.⁷⁰ Thus, in contrast to the silence of the EU Court of Justice, the Advocate Generals seem more inclined to refer to the 2009 Communication of the European Commission.

7.3.3 Conclusion: soft pressures to act guidance-proof

From the above, it follows that neither the case law of the Court of Justice nor the monitoring practices of the European Commission reveal clear, explicit expectations as to how the FMP guidance documents should be used in national implementing practices. The most explicit expectations feature in the text of the guidance documents that repeatedly emphasise that the documents are not binding. In light of the practices at the EU level, it can thus be concluded that soft pressures are exerted to follow the FMP guidance documents when implementing EU law. The next section explores in what ways the FMP guidance documents are used in Dutch implementing practices. Do these practices, somehow, reflect the soft pressures exerted at the EU level?

68 CJEU 18 December 2014, C-202/13, ECLI:EU:C:2014:2450, par. 52, 55-57 (*McCarthy*).

69 Opinion to the judgment of the CJEU 20 May 2014, C-202/13, ECLI:EU:C:2014:345, par. 127 (*McCarthy*).

70 Opinion to the judgment of the CJEU 6 November 2013, C-423/12, ECLI:EU:C:2013:719 (*Reyes*); Opinion to the judgment of the CJEU 20 May 2014, C-202/13, ECLI:EU:C:2014:345, par. 127 (*McCarthy*); Opinion to the judgment of the CJEU 14 December 2017, C-331/16 and C-366/16, ECLI:EU:C:2017:973, (*K and H.F. v Belgium*); Opinion to the judgment of the CJEU 24 October 2017, C-316/16 and C-424/16, ECLI:EU:C:2017:797 (*Franco Vomero*); Opinion to the judgment of the CJEU 4 February 2016, C-165/14, ECLI:EU:C:2016:75 (*Alfredo Rendón Marín*).

7.4 THE IMPLEMENTATION OF THE CITIZENSHIP DIRECTIVE IN THE NETHERLANDS

Before studying the use of FMP guidance documents in Dutch implementing practices, this section sheds light on the political and legal context in which the implementation of the Citizenship Directive takes place. It sheds light on the restrictive character of Dutch immigration policy, outlines the legal framework that implements the Citizenship Directive and introduces the actors involved in the implementation process as well as the Dutch courts competent to review the implementing decisions.

7.4.1 A restrictive immigration policy

As in many other Member States, immigration policy in the Netherlands has become politicised.⁷¹ In the early 2000s the multicultural society and immigration became a new cleavage in the Dutch political landscape.⁷² Today immigration policy is still high on the political agenda and is characterised by its restrictive character.⁷³ The policy of pursuing a restrictive immigration policy has clashed with the EU rules on free movement and the ‘rights based approach taken by the Court of Justice’ on several occasions.⁷⁴ For instance, as already pointed out above, the *Metock* ruling raised much controversy among Dutch government and officials⁷⁵ and the fight against marriages of convenience is high on the political agenda.⁷⁶

In 2014, Langer and Schrauwen observe that the Citizenship Directive in the Netherlands is implemented in a restrictive manner:

‘The general picture that emerges is that policy makers are looking for the limits of the law; free movement of Union citizens remains as a starting point, but the focus is on strict enforcement of conditions for migration and on a strict interpretation of criteria for residence rights.’⁷⁷

In this respect, the Netherlands is no exception. In 2016, the study on the implementation of the Citizenship Directive concludes that the general tendency in the Member States is to ‘make the most of the permitted restrictions to the rights of entry and residence and to interpret the [Citizenship]

71 See on the politicisation of migration policies Van der Burg 2015; Goudappel & Hoeffenars September 2012.

72 See Pellikaan, Van der Meer & De Lange 2003, p. 24.

73 Zwaan et al. 2016, p. 25.

74 In Europeanisation literature this is denoted a policy misfit Börzel & Risse 2000, p. 5.

75 See above par. 7.1.4.

76 *Kamerstukken* 2015/2016, 32175, 62.

77 Introduction to the presentation of the Dutch FIDE report on Union Citizenship for the Amsterdam Centre for European Law and Governance on 18 February 2014. See <http://acelg.uva.nl/content/events/lectures/2014/02/nl-fide-report.html>. (Last accessed at 1 October 2019. For the report, see Langer & Schrauwen 2014, p. 18-19.

Directive in a restrictive manner'.⁷⁸ In brief, the restrictive character of Dutch immigration policy is part of the context in which the use of FMP guidance documents takes place.

7.4.2 A multi-layered legal framework

In the Netherlands, the Citizenship Directive is implemented via a multi-layered legal framework.⁷⁹ The formal legislative act that lays down the general rules governing Dutch immigration policy is the Aliens Act.⁸⁰ This act is complemented by the Aliens Decree – an instrument of delegated legislation adopted by the Dutch government.⁸¹ The Aliens Decree provides for the actual, detailed transposition of the provisions of the Citizenship Directive. The articles transposing the Citizenship Directive can be found in Articles 8.7-8.35 of the Aliens Decree and reflect, sometimes literally, the provisions of the Citizenship Directive.⁸² The third layer of the legal framework that implements the Citizenship Directive is the *Vreemdelingen-circulaire*, the Aliens Circular. The Aliens Circular contains policy rules for the application of the broad provisions of the Citizenship Directive in individualised decision-making practices.⁸³

Relevant to note is that in 2013 the Aliens Circular was amended in order to simplify the text of the Circular.⁸⁴ The Circular had become a document that was too complex and detailed: it included not only policy rules but also summarised applicable legislation and provided for extensive commentaries and instructions. The amending decision taken in 2013 revises the Aliens Circular so that it contains only policy rules, leaving out the other (explanatory) elements.⁸⁵ The policy rules now, according to the explanatory note on the amendment, are clearly formulated and always explicit about the underlying legal basis. This change of the Aliens Circular in 2013 is interesting since it shows that at the national level similar problems with the issuing of guidance documents are experienced as at the EU level. Similar developments concerning the clear formulation and presentation of guidance can be expected to surface at the EU level.⁸⁶

78 Ballesteros et al. 2016, p. 136.

79 See for an overview in English of the 'layered structure of hierarchical regulations', Klaassen 2015Klaassen 2015Klaassen 2015Klaassen 2015Klaassen 2015 p. 156-157; For a detailed overview in Dutch see Zwaan et al. 2016, p. 33-37.

80 In Dutch: *Vreemdelingenwet 2000*.

81 The Aliens Decree (*Vreemdelingen Besluit 2000*) is an *Algemene Maatregel van Bestuur*, an Order in Council that is established by Royal Decree. It is adopted after consultation of the Dutch Council of State.

82 For instance Article 8.7(4) of the Aliens Decree transposes Article 3(2)(b) of the Directive, using similar wording as the Directive to lay down the rule that the right of residence is extended to the partner with whom the EU citizen has a durable relationship.

83 See chapter B10 section 2 of the policy rules.

84 *Stcrt.* 2013, 8389, p. 108, 109.

85 *Stcrt.* 2018, 8389, p. 108, 109.

86 As is pointed out in the conclusion of this research. See section 9.6.2.

7.4.3 Actors: the Ministry and the Immigration and Naturalisation Service

As we have seen in the previous case studies, the implementation of EU legislation may be organised differently in different policy areas. Whilst in the case of EU subsidies the Netherlands Enterprise Agency, on behalf of the Ministry of Economic Affairs, is responsible for the application of the implementing legislation, the implementation of the Habitats Directive occurs, for a large part, at the level of the Dutch provinces. The implementation of the Citizenship Directive takes place in a more centralised manner that is similar to the case of EU subsidies.⁸⁷

The Ministry that is responsible for immigration policy is the Ministry of Justice and Security. Within that Ministry the State Secretary is responsible for the implementation of the Aliens Act. The State Secretary also has the right to initiate amendments to the Aliens Decree⁸⁸ and takes decisions on changes to the Aliens Circular. Thus, the State Secretary plays an important role in transposing and operationalising the Citizenship Directive and might at this stage use the FMP guidance documents.

The rules laid down in the Aliens Act, the Aliens Decree and the Aliens Circular eventually need to be applied in practice. Individualised decisions, such as the decisions to grant or refuse a residence permit, are taken by the Immigration and Naturalisation Service (*Immigratie- en Naturalisatie Dienst*, IND). The Immigration and Naturalisation Service is part of the Ministry of Justice and Security and acts on behalf of the State Secretary.⁸⁹ The offices of the IND, located at different places throughout the Netherlands, need to apply the same legal framework, policy rules and working instructions.

7.4.4 The competent courts

The two courts that are competent to review decisions on the refusal or termination of a right to residence in the Netherlands, are the District Court of The Hague and the Council of State.⁹⁰ The District Court of The Hague reviews administrative decisions in first instance, after which appeal is possible before the Council of State. The judicial review of decisions taken on immigration applications represent a considerable part of all cases dealt with by these two courts. According to Spijkerboer, almost two-thirds of the cases handled by the Judicial Division of the Council of State concern the review of immigration applications.⁹¹ As discussed, civil courts are competent to decide on direct actions against the lawfulness of legislative acts and

⁸⁷ Klaassen 2015, p. 156.

⁸⁸ The State Secretary also signs the amending acts, yet only after the Advisory Division of the Council of State must be consulted. When, in 2006, the Aliens Decree was amended in order to implement the Citizenship Directive it was the Minister who was responsible for immigration and who, therefore, initiated the amendment.

⁸⁹ Zwaan et al. 2016, p. 44.

⁹⁰ Zwaan et al. 2016, p. 46.

⁹¹ Spijkerboer 2014, p. 10, 11.

policy rules on the ground that the Dutch State committed a wrongful act.⁹² However, traces of FMP guidance documents have not been found in civil cases.

7.5 THE USE OF FMP GUIDANCE DOCUMENTS BY NATIONAL AUTHORITIES

Having outlined the Dutch political and legal context, the next step is to explore the use of the two FMP guidance documents in the implementation process. The analysis is structured along the lines of the different phases of the implementation process. The first two sections explore the role of FMP guidelines in relation to the Aliens Act and the Aliens Decree as well as in relation to the policy rules laid down in the Aliens Circular that complement these acts. The next sections seek to find out what role the guidelines play at a more 'practical' level, for the investigation of alleged marriages of convenience, and how the FMP guidance documents find their way into individualised decisions as well as in internal working instructions. The general trend observed throughout the different stages of the implementation process is that the use of FMP guidance documents is guided by a practice of cherry picking.

7.5.1 The Aliens Act and the Aliens Decree: a limited role for FMP guidance documents

As described above, the Aliens Act and the Aliens Decree lay down the legislative framework that implement the Citizenship Directive in the Dutch legal order. The Aliens Act is the formal legislative act. The Aliens Decree is a delegated act that actually transposes the provisions of the Citizenship Directive into legally binding rules. Both acts do not explicitly refer to the FMP guidance documents. References to FMP guidance documents in the explanatory notes that accompany amending decisions to the legislative acts, are not numerous either. Only in one of the amending decisions to the Aliens Decree was a trace of the Handbook addressing marriages of convenience found. The explanatory note in the amending decision explains that according to the Handbook, a distinction should be made between fraud on the one hand and abuse on the other hand, and cites the definition on abuse given in the Commission's Handbook.⁹³

Does this mean that, generally speaking, FMP guidance documents are not used for the drafting of legislative acts? Interviews with officials working at the Ministry of Justice and Security indeed point to the conclusion that there is only a minor role for FMP guidance documents at this first

92 See above section 4.3.

93 Decision *Stb.* 2016, 86 (p. 27) introduces abuse as one of the grounds on which lawful residence may be denied or terminated, amending Article 8.25 of the Aliens Decree and bringing the Article into line with Article 35 of the Citizenship Directive.

stage of the implementation process. The officials explain: 'In the case of guidelines we generally do not amend our legislation.' This is in contrast to Directives, 'in the case of which legislation must be (directly) amended'.⁹⁴ In a similar way and during a more recent interview, one of the officials indicated that in his view the role of the guidelines in relation to the adoption of the Aliens Act and Aliens Decree is 'non-existent' (in his words: *echt nihil*).⁹⁵ He noted that guidance documents are *not* used as in 'look what is written in the guidance documents; let's now change our policy accordingly'.⁹⁶

An explanation for the minor role of the FMP guidance documents is that the Aliens Decree often literally transposes the provisions of the Citizenship Directive. In other words, the Aliens Decree provides for the general rules that subsequently need to be applied in practice. Therefore, the FMP guidelines could become relevant at the subsequent stages of the implementation process. The next section explores what role FMP guidance documents play in relation to the Aliens Circular.

7.5.2 Transposing FMP guidelines into Dutch policy rules

When looking at the text of the Aliens Circular, one can discern some 'glimpses' of the FMP guidelines. At some places, the text of the Aliens Circular shows similarities to the text of the FMP guidelines,⁹⁷ but the Aliens Circular does not explicitly refer to the FMP guidelines. A more explicit trace of FMP guidelines was found in two amending decisions to the Aliens Circular. These references feature in the decisions amending the policy rules on persistent petty criminality as well as on the concept of a durable relationship.⁹⁸ This section explores the traces of the FMP guidelines in the Dutch policy rules in more depth, and already reveals some first glimpses of the cherry picking approach.

Persistent petty criminality: a perfect fit?

Section B10/2.3 of the Aliens Circular lays down the rule that persistent petty criminality may represent a threat to public policy.⁹⁹ This rule on persistent petty criminality can be found in the exact same wording in the 2009 Communication.¹⁰⁰ The explanatory note to the amending decision to section B10/2.3 of the Aliens Circular clarifies that the Dutch policy rules indeed derive from the Commission's guidance on persistent petty criminality. The amending decision explains that 'in view of the Communication

94 Interview 8 – National officials H and I.

95 Interview 9 – National official H.

96 Interview 9 – National official H.

97 These linguistic similarities can be found in section B10 of the Aliens Circular.

98 See *Strct.* 2013, 8389, p. 120 and *Strct.* 2011, 23324, p. 24.

99 This policy rule in the Aliens Circular complements Article 27(2) of the Citizenship Directive that is transposed in Article 8.25 of the Aliens Decree.

100 COM(2009)313 final, p. 12.

of the European Commission' (...) 'persistent petty criminality may represent a threat to public policy'.¹⁰¹

Officials of the IND explained that the guidelines on persistent petty criminality have been included in the Dutch policy rules for the reason that the guidelines are in line with the preferred implementing policy of the Immigration and Naturalisation Service.¹⁰² In fact, the question whether consistent petty criminality may represent a threat to public policy was one of the questions¹⁰³ sent by Dutch officials to the Commission services prior to the issuing of the 2009 Communication:

'We raised the question about persistent criminality, which eventually was included [in the Communication]. The question was whether an individual who commits minor criminal offences represents a threat to public policy. For us it was helpful that it was included [in the 2009 Communication].'¹⁰⁴

The Commission guidance on persistent petty criminality thus form a perfect fit with the IND's interpretation of provision 27(2) of the Citizenship Directive. The introduction of the Commission guidelines into Dutch policy rules is in line with Dutch implementing preferences.

Defining abuse: a 'silent' use of Commission guidelines?

Section B10/2.3 of the Aliens Circular also defines the concept of abuse in line with the FMP guidelines of the Commission. According to the policy rules, as well as the Commission guidelines, abuse represents 'an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing the conditions laid down by Community law, does not comply with the purpose of those rules.'¹⁰⁵ In this case, however, the amending decision adopted in 2013 that introduces these policy rules does not refer to the Commission's guidelines.¹⁰⁶ Thus, whether the definition of abuse indeed derives from the guidelines remains uncertain.

Defining a durable relationship: an 'imposed' change of the Aliens Circular

The third, perhaps most interesting trace of FMP guidelines relates to features in section B10/2.2 of the Aliens Circular that indicates how the Dutch IND interprets and applies the concept of a durable relationship (laid down in Article 3(2)(b) of the Citizenship Directive). In this case, the

101 *Strct.* 2013, 8389, p. 120.

102 Interview 7 – National officials E, F, G.

103 See above section 7.1.3.

104 Interview 7 – National officials E, F, G.

105 See COM(2009)313 final, p. 12 and COM(2014)604 final, p. 8.

106 *Strct.* 2013, 8389.

Dutch policy rules were brought in line with the Commission guidelines as a response to the ruling of the Dutch Council of State of 6 September 2011.

In this ruling, the Council of State reviews the Minister's policy line that requires the durable character of a relationship to be evidenced with a declaration of registration in the local authority register for at least six months or with the birth of a child.¹⁰⁷ In support of this policy line, the Minister argued that the Commission's guidelines COM(2009)313 allow national rules to refer to a 'minimum amount of time' as criterion for whether a partnership can be considered as 'durable'. The Council of State acknowledges that the guidelines accept a minimum amount of time as criterion, yet also notes that in that case the guidelines require that the national rules foresee that other relevant aspects are taken into account.¹⁰⁸ Therefore, the Minister also has to accept other means of evidence. The Council of State concludes that the Minister's policy line adopts a too restrictive interpretation of the concept of a durable relationship.¹⁰⁹

The State Secretary subsequently changes the policy rules that now adopt a less restrictive interpretation of the concept of a durable relationship.¹¹⁰ The amended policy rules allow for other means of evidence than the municipality registration and the birth of a child, such as joint mortgage to buy a home.¹¹¹ According to the amending decision, 'the policy rules are now in line with the Commission's guidelines'.¹¹² As we will see, the ruling of 6 September is only one of many other rulings in which the Dutch Council of State assesses a contested decision in light of the guidelines laid down in the Commission's 2009 Communication.¹¹³

Conclusion: the guidelines as an aid to justify policy decisions

The above analysis does not point to the conclusion that the Commission's interpretative rules are always transposed into Dutch policy rules. In contrast, the analysis shows that the Commission's guidelines are used to justify policy rules that serve Dutch implementing objectives. This conclusion is in line with the insights provided by Dutch officials. Officials of the Ministry of Justice and Security clarified that '[with the guidance] it is possible to justify a policy decision' and that 'we do not feel bound by the guidelines'.¹¹⁴ They noted that generally the guidelines of the European Commission only lead to a change in the policy rules if this is in line with

107 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.3.1.

108 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.1.

109 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.2. The ruling is also discussed below in section 7.5.1

110 *Stcrt.* 2011, 23324, p. 24. See also COM(2009)313 final, p. 12.

111 See *Stcrt.* 2011, 23324, 15.

112 *Stcrt.* 2011, 23324, p. 24.

113 See section 7.6 below.

114 Interview 8 – National officials H and I; Interview 9 – National official H.

Dutch implementing practices: 'We are cherry picking, you take something when it is to your advantage'.¹¹⁵ Thus, it can be concluded that the FMP guidelines serve as an aid for the drafting of policy rules, but only in so far as this is in line with Dutch implementing policy decisions.

7.5.3 Implementing guidance and alleged marriages of convenience

FMP guidelines are not used only for the interpretation of provisions in the Citizenship Directive; the guidelines are also used as an aid to make decisions on the form of implementing measures. This becomes visible in the practices of the Immigration and Naturalisation Service to detect and investigate marriages of convenience.

Marriages of convenience are, as already explained above, a form of abuse. This follows from Article 35 of the Citizenship Directive that provides that in the case of marriages of convenience, Member States may adopt the necessary measures restricting the right to free movement. The Citizenship Directive does not give further rules on what methods could or should be used in order to detect and investigate alleged marriages of convenience. As discussed above, the 2009 Commission guidelines, as well as the Handbook, provide for extensive guidance on the methods that could be used in order to effectively detect marriages of convenience within the limits of the legal framework.¹¹⁶

The methodology used by the IND to detect marriages of convenience, has been inspired by the guidelines laid down in the 2009 Communication.¹¹⁷ In order to detect 'susceptible' marriages that could be concluded only with the aim of obtaining the right to free movement, the IND developed a methodology of using 'pilots'. These pilots select marriages with certain characteristics and subsequently investigate these marriages.¹¹⁸ Officials of the IND explain that the Commission guidelines given in the 2009 Communication were used as a 'reference point':¹¹⁹

'On the basis of the guidelines we developed the pilots. We needed an objective indication to start an investigation that could serve as a justification for further investigation. (...) The guidelines provided for indicators which we could use.'¹²⁰

115 Interview 7 – National officials E, F, G. Confirmed in Interview 9 – National official H.

116 See above sections 7.1.1 and 7.1.2

117 Interview 7 – National officials E, F, G.

118 This also follows from rulings of the District Court of The Hague. For instance, a ruling of 27 January 2011 makes clear that the IND uses the indicative criteria laid down in the guidelines for the selection of the group of marriages to be further investigated. See Rb. Den Haag 27 January 2011, ECLI:NL:RBSGR:2011:BQ2080, par. 2.7 and Rb. Den Haag 4 March 2014, ECLI:NL: RBDHA:2014:7818, par. 3.1.

119 Interview 7 – National officials E, F, G.

120 Interview 7 – National officials E, F, G.

The officials clarify that the use of the guidelines on the investigation of marriages of convenience is guided by a practice of cherry picking:

'I think it again boils down to cherry picking. (...) We used the part of the guidelines which provides that it is possible to investigate cases when relying on a profound analysis. We only filtered those parts that are useful for our implementing practice'.¹²¹

Traces of this cherry picking approach can also be found in rulings of the Dutch Council of State. For instance, the ruling of July 2016 the Dutch Council of State refers to a letter of the State Secretary from which the Council infers that the State Secretary does not apply section 4.2 of the guidelines as a 'policy line' and that, as a consequence, the State Secretary does not consider himself bound by the Commission guidelines.¹²²

A limited role for the operational measures laid down in the Handbook

From the above it follows that the Commission guidelines in the Communication adopted in 2009 have been used to detect and investigate marriages of convenience. The question remains whether the guidance given in the Handbook, adopted in 2014, has also influenced Dutch investigation practices. This Handbook, as stated above, provides for 'operational tools' derived from good practices developed in the Member States.

The role of this Handbook in the IND's investigation practices and techniques seems more limited than the role of the 2009 Commission guidelines. The officials indicated, in the first place, that the methodology spelled out in the Handbook largely reflects practices that in the Netherlands were already common practice before the Handbook was issued.¹²³ In their view, the Dutch methodology to detect marriages of convenience influenced the guidance laid down in the Handbook rather than the other way round.¹²⁴

Secondly, officials of both the Ministry and the IND remarked that the limited usefulness of the Handbook is related to the fact that the guidelines laid down in the Handbook were made public. By making the Handbook accessible to the public, 'it risks becoming a handbook for citizens on how to successfully conclude a marriage of convenience without being caught, instead of a handbook on how to successfully fight marriages of convenience'.¹²⁵ Due to the publication of the Handbook it was not possible to include in the book useful, but secretive, information on how to address

121 Interview 7 – National officials E, F, G.

122 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.2; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

123 Interview 7 – National officials E, F, G; Interview 10 – National official F.

124 Interview 8 – National officials H and I; Interview 9 – National official H.

125 Interview 8 – National officials H and I; Interview 7 – National officials E, F, G.

marriages of convenience.¹²⁶ This second remark shows how transparency might actually hamper the effectiveness of guidance documents as an implementation aid.

7.5.4 The 2009 guidelines as an aid to justify individualised decisions

The above sections show that the Dutch Aliens Circular reflects traces of interpretative Commission guidelines and that implementing guidelines have influenced the method to detect alleged marriages of convenience. This section turns to the final stage of the implementation process when individualised decisions are taken.

According to officials of the Immigration and Naturalisation Service, it is not common practice to apply the guidelines of the European Commission in individualised decision-making practices.¹²⁷ In contrast, the use of the guidelines as a decision-making aid differs from one case to the other, and whether the guidelines are explicitly referred to in the text of the decision varies as well: 'the individual motivation differs from one decision maker to the other'.¹²⁸ This varied use of the Commission guidelines is the consequence of the fact that tailored decision making (*maatwerk*) is being encouraged.¹²⁹ In the words of the interviewee:

'Tailored decision making cannot be standardised (...). 'In an organisation with thousands of decision makers who are encouraged to make tailored decisions, you cannot prevent that individual factors are weighed and applied in the exact same manner'.¹³⁰

A varied use of the guidelines also transpires from rulings of the Council of State. In some groups of rulings, it is made explicit that the guidelines have been used as a decision-making aid.¹³¹ In other rulings no reference is made of the guidelines as a decision-making aid for the contested decision. The Council of State also notices this occasional use of guidance documents. In a ruling that reviews a decision that there is a genuine, present and sufficiently serious threat to public policy, the Minister argues that he is not bound by the Commission guidelines. The Council of State nevertheless takes account of the guidelines, and remarks that: 'also the Minister himself occasionally refers to them [the guidelines] in order to justify policy decisions'.¹³²

126 Interview 8 – National officials H and I; Interview 7 – National officials E, F, G.

127 Interview 7 – National officials E, F, G; Interview 10 – National official F.

128 Interview 10 – National official F.

129 Interview 10 – National official F.

130 Interview 10 – National official F.

131 Such as the rulings on marriages of conveniences (see section 7.5.3 below).

132 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. This ruling is discussed in section 7.5.1.

7.5.5 FMP guidelines in working instructions

The policy rules in the Aliens Circular are complemented by the IND's working instructions.¹³³ The most recent version of the working instruction 2018/4, adopted in March 2018, refers to the Commission's guidelines at several places. Section 3.2.1.1 that elaborates on the definition of 'the spouse', gives a glimpse of the explanatory guidelines in COM(2009)3131. Whilst referring to the Commission's guidelines, the working instructions explain that arranged marriages are not the same as forced marriages and that the latter are not protected by Union law.

Particularly interesting, though, is section 5.6.2.3 on a 'genuine and present threat'. This section notes that 'although the guidelines are not legally binding, they can still be used as an aid to explain the so-called criterion of public policy in Union law'.¹³⁴ Here, the working instructions refers to the ruling (to be discussed below) in which the Council of State acknowledges this role of the guidelines as an interpretation aid for the first time.¹³⁵ The same section summarises the 2009 Commission guidelines on whether the individual poses a threat to public policy or public security. This part of the Commission guidelines has become embedded in Dutch case law, as will be discussed below in section 7.6.2.

The working instructions thus show how rulings of the Council of State that refer to Commission guidelines, may in turn influence administrative and decision-making practices. It is a first indication of the 'facilitating role' the Council of State plays in reinforcing the role of the FMP guidelines in the IND's decision-making practices.

7.5.6 Conclusion: a practice of 'cherry picking'

The above analysis reveals that FMP guidance documents leave traces at different stages of the implementation process. What conclusions can be drawn on the use of FMP guidance in light of the two lenses: the types of guidance and the perspective on their binding force?

First, the traces of the FMP guidelines mostly relate to two types of guidance: interpretative guidance and implementing guidance. Interpretative FMP guidelines leave their imprints in the policy rules in the Aliens Circular, as well as in individualised decision-making processes of the Dutch Immigration and Naturalisation Service. Traces of implementing guidance have been found in the context of addressing alleged marriages of convenience. The Commission's implementing recommendations have

133 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 1. (accessible at <https://ind.nl/over-ind/Cijfers-publicaties/Paginas/Werkinstructies.aspx>).

134 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 32.

135 IND Werkindstructie 2018/4 'Het recht van de Europese Unie', p. 32, footnote 156 refers to ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584. This ruling is discussed in section 7.6.1

inspired the 'Dutch method' to detect and investigate marriages of convenience. Explanatory guidance and guidance in the form of good practices play a less prominent, or in any case a less visible role, in the implementation process.

Second, the analysis shows that the use of FMP guidelines is best described as a 'practice of cherry picking'.¹³⁶ This practice of cherry picking entails that the guidelines are used in so far as this is supportive of, or in line with, Dutch implementing policy and practices.¹³⁷ According to Dutch officials interviewed for this research, the guidelines represent a voluntary implementation aid that is taken into account but from which deviation is possible.¹³⁸ Nonetheless, these days a deviation from the guidelines is more motivated than when the guidelines had just been issued. The main reason for this 'motivated use of guidance documents' is that this is required by the Council of State. In the words of one of the officials: 'The Council of State considers that you cannot simply disregard the Commission's guidelines; they are authoritative'.¹³⁹ This final remark leads us to the next section that explores the use of the FMP guidelines in the rulings of Dutch Courts.

7.6 THE USE OF FMP GUIDANCE DOCUMENTS BY NATIONAL COURTS

Having explored the role of FMP guidelines in the implementation process, this section sheds light on the use of the FMP guidance documents in judicial practices. In what ways do Dutch courts use the FMP guidelines as a judicial decision-making aid? And, do the courts allow, or even expect, the Minister and IND to take account of the guidelines?

In order to find an answer to these questions, this section takes as a starting point the rulings that were found with the search for explicit references to the FMP guidance documents. This search reveals a total number of 91 rulings handed down by the Judicial Division of the Council of State (28 rulings) and the District Court of The Hague (63 rulings).¹⁴⁰

The vast majority of 88 rulings refers to the Communication COM(2009)313 that was issued in 2009. Only three rulings refer to the Handbook on marriages of convenience issued in 2014. Within this relatively high number of rulings that refer to only two guidance documents, different groups of rulings can be identified. These groups of rulings are presented in table Table 7-1. As transpires from this table, some rulings

136 Interview 7 – National officials E, F, G; Interview 10- National official F.

137 From a Europeanisation perspective, this comes close to the effect of 'absorption', the lowest degree of domestic change, See Börzel & Risse 2000, p. 10.

138 Interview 10- National official F.

139 Interview 10- National official F.

140 See Annex par. 1.3.3.

refer to the guidelines in relation to the Family Reunification Directive, thus showing the spill-over effect that was expected above in section 7.2.3.¹⁴¹

The analysis in this section sets out with a discussion of the two ‘2011 rulings’ and subsequently analyses how these rulings have shaped the use of the FMP guidelines in later rulings of the Council of State and of the District Court. It subsequently shows how, through the Courts’ rulings, the guidelines acquire a certain (self) binding effect for the State Secretary. Finally, it is concluded that in this area the Dutch courts take a role as ‘facilitating actor’, promoting the use of the FMP guidelines in the IND’s decision-making practices.

Table 7-1 Groups of rulings that refer to FMP guidance documents

Group	Issue	No. of rulings
Group 1	Rulings that refer to the concept of a durable relationship (section 2.1.1 of COM(2009)313)	8 rulings
Group 2	Rulings that refer to the concept of sufficient resources (section. 2.3.1. of COM(2009)313)	9 rulings
Group 3	Rulings that refer to the concept of genuine, present and sufficient serious threat (section 3.2 of COM(2009)313)	24 rulings
Group 4	Rulings that refer to the definition/investigation of a marriage of convenience (section. 4.2 of COM(2009)313)	28 rulings
Group 5	Rulings that refer to the concepts of fraud and abuse (section 4 of COM(2009)313); other than marriages of convenience	9 rulings
Group 6	Rulings that refer to the Handbook addressing marriages of convenience (SWD(2014)284)	3 rulings
Group 7	Rulings that refer to the guidelines in the context of the family reunification directive	6 rulings

7.6.1 The 2011 rulings: setting the scene

The first 2011 ruling

In the first 2011 ruling of 6 September 2011, the Commission guidelines come to play a role in relation to the question whether a relationship can be considered as ‘durable’.¹⁴² In this case, the guidelines are referred to by the Minister in support of his policy line that a ‘durable relationship’ can only be demonstrated by the birth of a child or by a shared household for at least six months, evidenced with a formal ‘registration’ at the municipalities. The Minister takes the view that this ‘six months criterion’ is not in violation with the Citizenship Directive and refers to the COM(2009)313

141 For instance Rb. Den Haag 9 January 2019, ECLI:NL:RBDHA:2019:155, par. 4.5; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2492, par. 19.

142 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.2.2. This case was already mentioned above in section 7.6.1.

guidelines. These guidelines, he argues, ‘explicitly allow for national rules to set a minimum amount of time as criterion for whether a partnership can be considered as durable’ (see section 2.1.1. of the guidelines).¹⁴³

The Council of State subjects the Minister’s policy line to a test of ‘reasonableness’.¹⁴⁴ First, the Council notes that the concept of a durable relationship is not defined by the Citizenship Directive and that therefore the Minister has a certain margin for manoeuvre in the assessment whether a durable relationship exists.¹⁴⁵ Subsequently, the Council of State reflects on the role of the guidelines as an interpretation aid:

“Although the guidelines that are referred to by the Minister are not binding in themselves, the guidelines serve as *an aid to the interpretation of the provisions of the Directive*. In this regard, the guidelines *cannot be considered to not to have any effect, the more since the Minister himself refers to the guidelines as a justification for his policy decisions*”.¹⁴⁶ [Emphasis added]

This phrase of the Council of State includes three elements that shed light on how the Council views the role of the Commission’s guidelines. From this paragraph it follows that: 1) the guidelines are an interpretation aid; 2) that the guidelines exert a certain legal effect; and 3) that the Council considers it relevant that the Minister himself refers to the guidelines in support of his policy line. This third element points to a self-binding effect of the use of the guidelines on the Dutch Minister.

Finally, the Council of State concludes that the Minister employs a too restrictive approach, and finds support for this conclusion in the Commission’s guidelines. In response to this ruling by the Council of State, the Minister changes his policy rules laid down in the Aliens Circular – bringing the policy rules more in line with the Commission guidelines (see above section 7.5.2).

The second 2011 ruling

The second 2011 ruling, which can be considered a follow-up on the first 2011 ruling, is handed down a few months later, in December 2011. In this ruling, the Council of State again refers to the guidelines as an interpretation aid, but now in the situation where the minister does not refer to the

143 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.3.

144 The policy rules are reviewed in an indirect manner (a so called test of ‘reasonableness’). See for a critical discussion of the exclusion of direct review of policy rules as well as of generally binding rules Voermans 2017, see also above section 4.1.

145 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.

146 ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.1. In Dutch : ‘*Hoewel de door de Minister aangehaalde richtsnoeren op zichzelf niet bindend zijn, bieden zij een handvat bij de interpretatie van bepalingen in de richtlijn. Gelet hierop kan, temeer nu de Minister de richtsnoeren aanhaalt ter rechtvaardiging van zijn beleid, aan de richtsnoeren niet elke werking worden onttrokken*’.

FMP guidelines. The Minister, instead, complains that in first instance, the District Court of The Hague mistakenly ‘attributed binding force’ to the 2009 Commission guidelines.¹⁴⁷ In first instance, the District Court considered ‘also in light of the Commission’s guidelines’ the contested decision insufficiently substantiated.¹⁴⁸

In response to the Minister’s argument, the Council of State reiterates that despite their lack of legally binding force, the guidelines still serve as an aid to interpret the provisions of the Citizenship Directive. The Council of State reiterates the formula used in the above discussed 2011 ruling. Paragraph 2.4.1. of the ruling reads as follows:

“Despite the fact that the guidelines are not binding in themselves, they serve as an aid to the interpretation of the provisions of the Directive. In this respect, the guidelines are not deprived of any significance. The Minister himself also occasionally refers to the 2009 Commission guidelines as a justification for his policy decisions (see for instance the ruling of 6 September 2011 (...) [the first 2011 ruling]).”¹⁴⁹

Subsequently, the Council of State considers that the District Court based its decision partly, though not solely on the guidelines without taking account of the relevant case law of the Court of Justice. Furthermore, the Minister has not made clear how the District Court by using the guidelines disregarded the case law of the Court of Justice.¹⁵⁰ Therefore, the Minister’s argument fails.

7.6.2 The FMP guidelines as a judicial interpretation aid: settled case law

The formula first introduced in the 2011 rulings by which the Council of State acknowledges the role of the 2009 guidelines as an interpretation aid, opens the door for the courts to refer to the guidelines. Later rulings reiterate that despite the lack of legally binding force, the guidelines serve as an aid to interpret the provisions of the Citizenship Directive. A search at www.rechtspraak.nl reveals 17 rulings that reiterate or refer to the ‘2011 formula’. Some rulings even go so far as to say that it has become ‘settled’ case law that the guidelines serve as an interpretation aid.¹⁵¹ However, not all rulings explicitly reiterate or refer to the ‘2011 formula’. Most of the rulings ‘just’

147 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.

148 Rb. Den Haag 13 January 2011, ECLI:NL:RBSGR:2011:BP2584, par. 25.

149 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. In Dutch: ‘*Hoewel de minister terecht erop wijst dat de richtsnoeren op zichzelf niet bindend zijn, bieden zij een handvat bij de interpretatie van bepalingen in de richtlijn. Gelet hierop kan aan de richtsnoeren niet elke betekenis worden ontleend. Ook de minister zelf haalt in voorkomend geval deze aan ter rechtvaardiging van zijn beleid*’.

150 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1.

151 See for instance ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1.

use the Commission's guidelines as an interpretation aid, without explicitly mentioning the role of the guidelines as an interpretation aid.¹⁵²

The 2011 rulings thus mark the beginning of several lines of case law by which the use of the 2009 guidelines as a decision-making aid becomes embedded in the case law of the Council of State and the District Court. This section and the next section discuss these lines of case law and show that although the guidelines are referred to as an interpretation aid, the courts also refer to guidelines with an explanatory character as well as to implementing guidelines.

A sufficient serious threat? Commission guidelines as an interpretation aid

In the first group of 24 rulings, the Commission guidelines fulfil their role as an interpretation aid for the question whether the personal conduct of the individual concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.¹⁵³

These rulings continue the line set out in the second 2011 ruling. The Commission guidelines are referred to for different 'sub-questions', such as whether the threat must be present,¹⁵⁴ whether a previous criminal conviction can be taken into account¹⁵⁵ and whether the decision is based on an assessment of the future conduct of the individual concerned.¹⁵⁶ Most cited is section 3.2 of the guidelines on 'persistent criminality'.¹⁵⁷ The courts take the approach in line with the guidelines that persistent petty criminality may under certain circumstances represent a threat to public policy.¹⁵⁸ The courts also apply the factors that according to the guidelines should be taken into account in order to assess whether there is persistent petty criminality.¹⁵⁹ For instance, the Council of State considers:

'According to section 3.2. of the guidelines in certain circumstances persistent petty criminality may represent a threat to public policy (...). National authorities must show this and in their assessment take into account the nature of the offences, their frequency and the damage or harm caused.'¹⁶⁰

152 See for instance Rb. Den Haag 14 August 2017, ECLI:NL:RBDHA:2017:9297, par. 14, par. 15.2; ABRvS 25 July 2017, ECLI:NL:RVS:2017:2031, par. 2.1.

153 Article 27 of the Citizenship Directive provides that on this ground the right to free movement may be restricted.

154 Rb. Den Haag 11 June 2015, ECLI:RBDHA:2015:11329, par. 3.4.

155 Rb. Den Haag 9 December 2011, ECLI:NL:RBSGR:2011:BU8209, par. 2.10.

156 Rb. Den Haag 24 January 2014, ECLI:NL:RBDHA:2014:8681. Par. 5.5.

157 COM(2009)313 final, p. 11.

158 See for instance Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 2.3; Rb. Den Haag 15 February 2013, ECLI:NL:RBDHA:2013:CA1559, par. 3.6; ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.3; ABRvS 14 November 2017, ECLI:NL:RVS:2017:3163, par. 2.2.

159 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV3857, par. 2.17; Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 5.1.

160 ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.3.

Thus, the rulings show how, also after the second 2011 ruling, the guidelines continue to be used as an interpretation aid and also serve as an aid to assess the Minister's practices. In several rulings, the courts consider the contested decision of the Minister insufficiently substantiated in light of the factors and guidelines laid down in the 2009 Communication.¹⁶¹

Defining a durable relationship: the silent influence of Commission guidelines

Like the second 2011 ruling, the first 2011 ruling also leaves traces in the subsequent case law of the Council of State. In the first 2011 ruling discussed above, the Council of State applies the 2009 guidelines in order to review the policy line of the Minister to assess whether there is a durable relationship.¹⁶² In light of the 2009 guidelines, the Council of State concludes that the Minister adopted a too restrictive interpretation of the concept of a durable relationship.

The 2009 guidelines on the interpretation of the concept of a durable relationship continue to be reflected in the case law of the District Court of The Hague. In two rulings, the District Court explicitly refers to the 2009 guidelines and uses the guidelines as an aid for the interpretation of the concept of a durable relationship.¹⁶³ In other rulings, the reasoning of the Council of State as set out the first 2011 ruling is 'copied', without referring to the Commission guidelines.¹⁶⁴ The District Court only refers to the first 2011 rulings and concludes that the Minister employs a too restrictive interpretation by (apparently, again) applying the criterion that there can only be a durable relationship in the case of a shared household for six months.

Thus, these rulings by the District Court 'silently' reflect the interpretation on the concept of a durable relationship as derived from the guidelines in the first 2011 ruling. A similar silent influence of the Commission guidelines on judicial discourse became visible in the foraging area rulings in the Habitats Directive.¹⁶⁵

161 Rb. Den Haag 12 March 2012, ECLI:NL:RBSGR:2012:BV8686, par. 2.29; Rb. Den Haag 13 March 2013, ECLI:NL:RBDHA:2013:BZ6327, par. 5.1; Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV3857, par. 2.17; ABRvS 18 June 2013, ECLI:NL:RVS:2013:62, par. 3.7.

162 This first 2011 ruling (ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678) is discussed in the section 7.6.1.

163 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627, par. 2.24; Rb. Den Haag 11 February 2015 ECLI:RBDHA:2015:1506, par. 3.2-3.4.

164 Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627, par. 2.17; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7317, par. 8.3; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7323, par. 8.5; ABRvS 26 October 2011, ECLI:NL:RVS:2011:BU3404; Rb. Den Haag 7 March 2013, ECLI:NL:RBDHA:2013:13760; Rb. Den Haag 6 October 2016, ECLI:NL:RBDHA:2016:16812.

165 See section 6.6.2.

What are sufficient resources? Explanatory guidelines as an interpretation aid

According to Article 7 of the Citizenship Directive, students and inactive Union citizens must have sufficient resources in order to not become a burden on the social assistance system of the host Member States. The Dutch courts use section 2.3.1 of the 2009 guidelines in order to decide whether the Union citizen concerned has 'sufficient resources'.

Particularly interesting are two rulings that show how guidelines with a highly explanatory character may become embedded in Dutch judicial discourse.¹⁶⁶ The District Court refers to the guidelines to explain the concept of sufficient resources: 'according to the guidelines the concept of sufficient resources must be interpreted in light of the aim of the Citizenship Directive'.¹⁶⁷ The Court also recalls that *the guidelines* mention that Article 8(4) of the Citizenship Directive prohibits Member States from setting a fixed amount as sufficient resources; national authorities instead need to take account of the personal situation of the individual concerned.¹⁶⁸

Here, the guidelines are referred to in order to reiterate the rule laid down in the Citizenship Directive. The risk arises that it is unclear what is laid down in the guidelines, and what is 'binding EU law'. This risk clearly arises, as the same paragraph subsequently cites an interpretative rule that is *not* included in the Citizenship Directive (which is not made explicit in the text of the ruling). The Court derives from the Commission's guidelines that if necessary national authorities may 'undertake checks as to the existence of the resources, their lawfulness, amount and availability' as well as that the means of evidence to prove sufficient resources cannot be limited.¹⁶⁹

The guidelines again feature in the concluding paragraphs. 'In light of the guidelines', the Court concludes, the Minister has not sufficiently investigated¹⁷⁰ and not sufficiently substantiated¹⁷¹ that the applicant has sufficient resources. The Minister should not have applied a fixed amount as a standard for sufficient resources and has not shown that account has been taken of the personal circumstances of the individual.¹⁷² The Court thus again refers to the guidelines, whilst in fact applying the rule laid down in Article 8(4) of the Citizenship Directive.

166 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 8; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 11.

167 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

168 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

169 Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 9; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 12.

170 The Court concludes that there is a violation of Article 3:2 GALA. See Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 15.

171 The court concludes that there is a violation of Article 7:12(1) GALA. Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 12.

172 Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638, par. 14; Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661, par. 11.

From the above it follows that the text of the ruling suggests that the guidelines play an important, interpretative, role in the reasoning and conclusion of the court. When looking more closely at the part of the ruling that refers to the guidelines, it becomes clear that the guidelines for a large part just recall the rule laid down in the guidelines. The interpretative role that the guidelines are suggested to play, is at least partly an explanatory one.

7.6.3 Reviewing the method of investigating marriages of convenience: beyond interpretation

The above section shows how the FMP guidelines in COM(2009)313 play a role as a judicial interpretation aid. However, as discussed before, the FMP guidelines not only take the form of interpretative or explanatory rules. The guidelines also give guidance on the appropriate methodology to detect and investigate alleged marriages of convenience. Section 7.4.3 already discussed that with the help of the 2009 guidelines, the Dutch IND developed pilots to detect and investigate marriages where there is a well-founded suspicion of abuse.

Relevant for this section is that the Commission guidelines on marriages of convenience also play a prominent and visible role in rulings of the Council of State and of the District Court of The Hague. The courts refer to the guidelines, first, for the *interpretation* of the framework within which the assessment of whether there is abuse of EU law must take place. It is noted, for instance, that from the guidelines it follows that ‘the Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse, yet that systematic checks are prohibited’.¹⁷³ Other rulings refer to the guideline that the burden of proof lies on the authorities of the Member States¹⁷⁴ or to the guidelines that give a definition on marriages of convenience.¹⁷⁵

Second, the rulings on marriages of convenience not only refer to the Commission’s interpretative guidelines but also to the *implementing* guidelines. The courts use the guidelines in order to assess whether the State Secretary has lawfully detected and investigated suspicious cases.¹⁷⁶ The courts follow the approach – as set out in the guidelines – that the State Secretary can use indicative criteria to detect cases for further investigation. However, the indicators must sufficiently rely on previous analyses and

173 See for instance Rb. Den Haag 27 February 2014, ECLI:NL:RBDHA:2014:4388, par. 3.3; ABRvS 28 June 2012, ECLI:NL:RVS:2012:BX0615; Rb. Den Haag 27 January 2011, ECLI:NL:RBSGR:2011:BQ2080, par. 2.6.

174 See for instance Rb. Den Haag 25 July 2012, ECLI:NL:RBSGR:2012:BX4356.

175 See for instance Rb. Den Haag 21 October 2010, ECLI:NL:RBSGR:2010:BO2122; Rb. Den Haag 14 August 2017, ECLI:RBDHA:2017:9297.

176 See for instance Rb. Den Haag 27 February 2014, ECLI:NL:RBDHA:2014:4388, par. 4.1; Rb. Den Haag 4 March 2014, ECLI:NL:RBDHA:2014:7818; par. 3.1- 3.3. ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.2 and 3.3.

experience, thus showing a correlation between proven cases of abuse and certain characteristics of such cases.¹⁷⁷ Once it is established that a suspicious marriage has been lawfully detected, the guidelines are used to assess the lawfulness of investigation techniques. The District Court of The Hague, for instance, considers the practice mentioned in the guidelines for holding a separate interview with each of the two spouses ‘an appropriate method’ to investigate whether a marriage is one of convenience.¹⁷⁸

Despite the formula introduced in the 2011 rulings that the guidelines serve as an interpretation aid, these rulings show that Commission guidelines may also serve as assessment standard to examine the lawfulness of the method that is followed to detect and investigate alleged marriages of convenience.

Finally, it is remarkable though that in the rulings little traces can be found of the ‘operational tools’ and good practices included in the Handbook on marriages of convenience. Is this the consequence of the minor role of the Handbook in decision-making practices (see above section 7.4.3)? Are judges not acquainted with this Handbook? The role of good practices in the reasoning of Dutch courts remains, as also in the other two policy areas, uncertain.

7.6.4 A (self) binding effect? Courts as facilitating actor

The above groups of rulings show how interpretative, explanatory and implementing FMP guidelines fulfil a role as a judicial decision-making aid. The courts use the Commission’s guidelines for the interpretation of legislative provisions and as a standard of assessment. This section explores whether the rulings also provide insight into the Courts’ *perspective(s)* on the binding character of the guidelines (the second ‘lens’ or axis of the analytical framework).

No binding rule...

In the 2011 rulings, the Council of State introduces the 2009 guidelines as an interpretation aid, and considers that the guidelines have ‘some significance’ (see section 7.6.1). The question now is what this role of the guidelines as an interpretation aid entails: does it mean that the courts, to some extent, consider the guidelines a binding interpretation aid for themselves and/or for national authorities?

As a starting point, it can be noted that from the court’s rulings the picture emerges that the Commission guidelines are not perceived or used as binding rules that need to be followed and from which deviation is not

177 COM(2009)313 final, p. 16, 17.

178 Rb. Den Haag 23 August 2013, ECLI:NL:RBDHA:2013:11310; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 3.1; See also ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.2.

possible. This already becomes clear in the second 2011 ruling in which the Council of State considers that the District Court had not based its conclusion solely on the guidelines and that there was no indication that the Court had not taken account of the relevant case law of the Court of Justice. Therefore, the District Court had not attached binding force to the guidelines, as the Minister argued in this case.¹⁷⁹ These considerations indicate that in the Council's view, the guidelines may be used as an interpretation aid, but that the case law of the Court of Justice, and not the guidelines, provide for the authoritative interpretation of the Directive.

Further indications that point in the same direction can be found in rulings of the District Court of The Hague. The District Court remarks that the guidelines 'only give an indication of how the Citizenship Directive may be interpreted' in one of the rulings that refers to the guidelines on the concept of sufficient resources.¹⁸⁰ More explicit about the non-binding character of the guidelines is a ruling handed down in 2013.¹⁸¹ In this ruling, the guidelines are invoked by the appellant, who argues that the guidelines have binding force and therefore should be followed by the Court.¹⁸² The District Court makes clear that this view is incorrect and considers that the guidelines 'instead are an *aid* for the interpretation of provisions in the Citizenship Directive' [Emphasis added]. To this end, the District Court refers to the first 2011 ruling that for the first time referred to the 2009 guidelines as an interpretation aid.¹⁸³

...But a (self) binding effect for the State Secretary?

From the above it follows that the Council of State and the District Court do not use the guidelines as binding rules of EU law. Still, the way in which the Dutch courts use the Commission guidelines gives these guidelines a certain binding effect on the State Secretary or IND.

The guidelines can acquire a binding effect, in the first place, where the Courts use the guidelines as an interpretation aid or as a standard to assess the Minister's practices. For instance, from the rulings on whether the individual represents a threat to public policy it follows that the courts require the Minister to take account of the interpretative rules and of the factors laid down in the guidelines, and to substantiate the decision in light of these guidelines. Similarly, the courts also use the guidelines to assess whether the Minister applied the correct method to investigate suspected marriages of convenience, whether the Minister correctly interpreted the concept of sufficient resources and whether the Minister sufficiently took account of

179 ABRvS 13 December 2011, ECLI:NL:RVS:2011:BV3584, par. 2.4.1. See section 7.6.1. above.

180 Rb. Den Haag 22 December 2016, ECLI:RBDHA:2016:17144, par. 5.4.

181 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326.

182 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326, par. 5 and par. 5.2.

183 Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326, par. 5.2.

the individual circumstances of the case when assessing the durability of a relationship.

Secondly, the courts acknowledge a binding effect of the guidelines in the situation where the State Secretary uses the guidelines as an aid to justify implementing decisions. Such a self-binding effect already transpires in the first 2011 ruling, where the Council of state considers that the guidelines have some significance *all the more* since the Minister himself used the guidelines as a justification aid.¹⁸⁴ In two rulings handed down in 2016, the Council of State again, explicitly, recognises a self-binding effect of the guidelines.¹⁸⁵ Before the Court, the Minister argues that section 4.2 of the guidelines on marriages of convenience is not used as a policy line, and that therefore the State Secretary does not consider himself bound by the guidelines.¹⁸⁶ The Council of State does not accept this argument. The Council considers that: '[s]ince the State Secretary used the section concerned for his own decision-making process in this case, the Council will also take account of this part of the guidelines for its assessment of the case in appeal'.¹⁸⁷

What is more, it cannot be ruled out that the binding effect of the guidelines reaches beyond the situation where the guidelines have been used by the State Secretary. The ruling of the Council of State of 7 November 2018 points in this direction. In this ruling, the Council of State annuls the contested decision of the State Secretary that the applicant had become an unreasonable burden to the Dutch social assistance system. Subsequently, the Council of State makes clear that the 'new' decision should take account of the factors that are spelled out in the 6th recital of the Directive as well in the guidelines in document COM(2009)313.¹⁸⁸

Beyond explicit references: an obligation to 'comply or explain'?

The interviews with State Councillors also point in the direction of a more general obligation for national authorities to take account of the FMP guidelines. The State Councillors interviewed for this research, explain that the guidelines have an authoritative character and cannot be set aside by the State Secretary without, convincingly, giving reasons for doing so.¹⁸⁹ 'We assume that the administrative authorities also take account of the document when taking a decision that concerns a question that is addressed in these documents'.¹⁹⁰

184 See above section 7.6.1.

185 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120.

186 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1.

187 ABRvS 20 July 2016, ECLI:NL:RVS:2016:2006, par. 4.1; ABRvS 20 July 2016, ECLI:NL:RVS:2016:2120, par. 3.1.

188 ABRvS 7 November 2018, ECLI:NL:RVS:2018:3584, par. 5.

189 Interview 26 – State Councillor C and D; Interview 28 – State Councillor C.

190 Interview 28 – State Councillor C.

What is more, officials and judges of the Council of State also take account of the guidelines when interpretative questions arise. The guidelines then serve as a judicial interpretation aid. Deviation from the guidelines is the exception rather than the rule: there should be a good reason to do so.¹⁹¹ This, however, does not mean that the guidelines are (to be) used as a binding rule: 'we do not blindly follow the guidelines, but take them very seriously. They are an additional interpretational instrument'.¹⁹²

In brief, the role of the guidelines comes close to that of a 'mandatory interpretation aid', both for national courts *and* for the Minister. The Commission guidelines should in principle be followed, whilst deviation from the guidelines should be well reasoned. In other words: comply, or explain.

Courts as facilitating actors

From the analysis of the rulings of the Council of State and the District Court of The Hague, the general picture emerges that in this policy area the Courts act as 'facilitating actors'. The courts promote the use of the guidelines as an interpretation aid or implementation aid in several ways: 1) by using the guidelines as an interpretation aid or assessment standard; 2) by recognising a certain self-binding effect of the guidelines on the State Secretary (and IND); and 3) in a more general manner, by expecting administrative authorities to take account of the guidelines (although this expectation is not (yet) explicitly reflected in the case law).

The question now is whether, and to what extent, this facilitating role of Dutch courts 'influences' Dutch implementing practices which are generally guided by a 'cherry picking approach'. As already mentioned,¹⁹³ one of the officials of the IND indicated that over the years the IND's approach towards guidelines has changed slightly. Individualised decision makers now tend to explain (more) why Commission guidelines are used or are deviated from in a specific case.¹⁹⁴ This is due to the case law of the Council of State, which – in the words of the interviewee – 'sometimes requires the IND to take account of the Commission guidelines'. 'In this way', the official remarked, 'the guidelines have a positive effect: difficult questions are discussed more thoroughly and in a more nuanced way. It [the guidelines] forces you to think and explain why you made a certain choice or decision.'¹⁹⁵ Still, the official considers the guidelines a voluntary interpretation aid rather than a mandatory interpretation aid.¹⁹⁶

191 Interview 24 – Official A at Council of State; Interview 28 – State Councillor C.

192 Interview 28 – State Councillor C.

193 See section 7.5.6.

194 Interview 10- National official F.

195 Interview 10- National official F.

196 Interview 10- National official F.

7.7 CONCLUSION

This chapter shows that the issuing and use of FMP guidance documents is governed by a 'dialogical approach'. The two FMP guidance documents that accompany the Citizenship Directive were requested by the Member States and seek to address the Member States' concerns that had arisen after the Court of Justice handed down the *Metock* ruling. The Member States feared loss of discretionary control and an increase in the number of third country nationals entering the national legal order. The guidance documents do not seem to play a prominent role in the monitoring practices of the Commission, nor do they frequently feature in the case law of the Court of Justice. This has resulted in the exertion of 'soft pressures' to act guidance-proof.

These soft pressures, in combination with the tendency to implement the Citizenship Directive in a restrictive manner, has led to a use of the guidelines that is characterised by a 'cherry picking approach'. The Dutch State Secretary as well as the Immigration and Naturalisation Service use the FMP guidance documents as an aid to justify and support decisions, choices and practices that suit Dutch implementing preferences. Traces of the FMP guidelines have been found in Dutch policy rules, in the IND's working instructions, in the methods and practices to investigate marriages of convenience and finally, in individualised decisions.

The role of FMP guidelines as a 'voluntary aid' in the implementation process contrasts with the approach that is taken by the Dutch courts. The two competent courts, the Council of State and the District Court of The Hague, do not shy away from taking account of the guidelines. The courts use the guidelines as an interpretation aid or as a 'standard' to review the practices of the Dutch State Secretary. The rulings of Dutch courts also show that the guidelines have acquired a certain self-binding effect on the State Secretary. Since the State Secretary uses the guidelines to justify (policy) decisions, the Council of State also uses the same guidelines to review the implementing practices.

Interviews with State Councillors clarified that the binding effect of the guidelines even goes beyond that of a self-binding effect. The use of the guidelines as a judicial interpretation aid is guided by a perspective of guidance as a mandatory interpretation aid. According to this perspective, not only national courts but also the Minister is in principle expected to take account of the Commission guidelines. Deviation from these guidelines is only possible when this is explained and duly justified: the Dutch authorities need to either comply, or explain. The Dutch courts thus reinforce the role of the FMP guidelines in implementing practices, and require a more transparent and substantiated approach when Commission guidelines are used as an implementation tool.