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

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The three previous chapters of this book explored the role of guidance documents in three policy areas. This chapter brings the findings in the three policy areas together, and derives from these findings general trends or patterns in the issuing and use of guidance documents at the EU level and the use of guidance documents at the national level. It finds that at the EU level the issuing and use of guidance documents is governed by various dynamics (section 8.1), and that at the national level various roles of guidance as an implementation aid can be discerned (section 8.2). National courts act in a number of ways as facilitating or counterbalancing actors, reinforcing or downplaying the role of guidance documents in implementation processes (section 8.4).

The second part of this chapter analyses the findings on the use of guidance documents in implementing and judicial decision-making practices in light of the four promises outlined in the section 2.5 of this book. These four promises are the ‘ideal effects’ that the use of guidance documents should bring about in order to positively interact with legal principles governing the implementation of EU law.

Like the results of the research of the role of guidance documents, the analysis in light of the four promises reveals a differentiated picture. It identifies implementing practices that enable guidance documents to fulfill their promises in practice, but also reveals implementing practices that do not serve, or even actually detract from, the promises of guidance (section 8.5). Similarly, Dutch courts use guidance documents in ways that positively interact with the four promises. However, the analysis also finds situations where the use of guidance documents in judicial decision-making practices hampers the promises to be fulfilled in practice, giving rise to problems in light of the legal principles (section 8.5). The chapter concludes that a mixed picture arises, in relation to the roles of guidance as well as its legal implications in practice (section 8.6).

### 8.1 GUIDANCE AS AN INFORMAL REGULATORY TOOL: UNITED IN DIVERSITY

The first, ‘EU part’ of the three case studies, provides insights into the issuing and use of guidance documents at the EU level, with the aim of outlining the context in which the use of guidance documents at the national level is studied. What insights does this first part of the case studies provide on the issuing of guidance as an informal regulatory tool of the European Commission?

### 8.1.1 The frequency, form, issuing process and types of guidance

The analysis reveals differences as regards the frequency with which guidance documents are issued and revised, the form of guidance documents, the 'bottom-up' or 'top-down' issuing process, as well as the types of guidance included in these documents. This section outlines the main differences observed in relation to these four aspects.

#### *Frequency*

In the area of direct payments, the guidance documents are issued with high frequency. Particularly since the last reform in 2013, the issuing of direct payments guidance documents has become one of the core activities of the Commission services; their issuing, revision and amendment being a continuous process. In the area of the Habitats Directive, the issuing of guidance documents has also become common practice, although the core Habitat guidance documents are changed less often. For instance, the Managing Natura 2000 guidance document that was issued in 2000 was not updated until 2019. A different picture arises in the analysis on the guidance documents issued in relation to the Citizenship Directive. At the time of writing, this Directive has been complemented by only two guidance documents: the COM(2009)313 guidelines and the Handbook addressing the fight against marriages of convenience.

#### *Form of guidance*

The three case studies also reveal that the form of guidance documents varies in the different policy areas. The widest range of guidance documents was identified in the area of direct payments. The Commission's guidelines vary from letters, notes and working documents on specific questions, to more general guidance documents. In the area of the Habitats Directive, the two core guidance documents take the form of 'guidance documents' but are complemented by various other documents and good practices that do not follow the same format. The two guidance documents related to the Citizenship Directive are more formalised. The guidelines adopted in 2009 take the form of a Communication (COM(2009)313) which has been translated into 22 different languages. The Handbook addressing marriages of convenience is a Staff Working Document,<sup>1</sup> but is also accompanied by a Communication.<sup>2</sup>

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1 SWD(2014)284 final.

2 SWD(2014)284 final.

*Issuing process*

Thirdly, from the case studies a picture arises that the issuing of guidance documents is often governed by a 'bottom-up' process where Member States ask for guidance documents to be issued by the European Commission. The Member States requesting guidance has led to the two FMP guidance documents and is also common practice in the area of direct payments guidance documents. In relation to the Habitat guidance documents similar bottom-up trends have been identified. For instance, in the context of the Fitness check Member States, among which the Netherlands, have requested more and updated guidance documents. On the other hand, the issuing of guidance documents can also follow a 'top-down logic'. The Commission then issues guidance documents even when this has not been requested by the Member States. This 'proactive' issuing of guidance documents has been observed most clearly in the area of direct payments. The issuing of guidance documents on the initiative of the Commission seems to be part of a broader trend in which the Commission concentrates on assisting the Member States on 'good implementation' of Union law.<sup>3</sup>

*Types of guidance*

Differences have also been observed when it comes to the types of guidance that feature in Commission guidance documents. The greatest variety in types of guidance has – again – been found in the area of direct payments. Direct payments guidance documents include interpretative and explanatory guidance, provide an abundance of implementing and technical guidance *and* disseminate 'good implementing practices'. Some variety as to the types of guidance can also be found in relation to the Habitats Directive. The Natura 2000 guidance documents, in particular, also include other types than interpretative guidelines. The FMP guidelines that accompany the Citizenship Directive mostly have the character of interpretative guidance, but also provide implementing guidance where they spell out the appropriate methodology to detect alleged marriages of convenience. The more recently issued Handbook elaborates on the COM(2009)313 guidelines and disseminates good practices that have been developed in the Member States.

### 8.1.2 Driving forces and pressures to act guidance-proof

Once guidance documents have been issued, expectations are formulated in different ways at the EU level as to the use of guidance documents at the national level. These expectations are shaped by the driving forces behind

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3 SWD(2017)350 final, p. 33 and Better Regulation Toolbox accompanying SWD(2017)350, p. 281, 282.

the issuing of guidance documents and result in various forms of pressures to act 'guidance-proof'.

In the area of direct payments, the main rationale behind the issuing of guidance documents is the prevention of financial corrections. By issuing direct payments guidelines the DG AGRI services make clear how they expect direct payments regulations to be implemented at the national level. For the Commission, the guidelines are a means to prevent and reduce irregularities in implementation practices. By applying the Commission guidelines, Member States run less risk of corrective measures from the European Commission. What is more, direct payments guidelines often have a detailed and instructive wording: the guidelines give clear instructions to the Member States. This detailed character allows the Commission auditors to use the guidelines as a tool to supervise and monitor implementing practices of the Member States. As a result, direct payments guidelines exert strong steering pressures on the Member States to act guidance-proof.

In contrast, in the area of free movement of persons the issuing of guidance documents is governed by the rationale of enabling or enhancing a dialogue between the European Commission and the Member States – which is expected to be favourable to a smooth and correct implementation of the Citizenship Directive. This dialogic function of the FMP guidelines is also reflected in the wording of the guidelines, which is less compelling and instructive than the direct payments guidelines. This approach leads to soft pressures on the Member States to act guidance-proof.

Finally, the issuing of Habitat guidelines is governed by yet another rationale which is to address and respect heterogeneity in the implementation of the Habitats Directive at the level of the Member States. The guidelines are drafted with the aim of providing clarity and promoting a common understanding of Habitat provisions, whilst also respecting the discretionary powers of the Member States. In this area, the Commission guidelines explicitly leave room for manoeuvre to the Member States and emphasise that the guidelines should be used in a way that suits the environmental and geographical circumstances at the national level. Due to the 'active' role of the Commission as guardian of the Treaties in these areas, pressures are still exerted to act in conformity with the guidelines.

## 8.2 ROLES OF GUIDANCE AS IMPLEMENTATION AID

The previous section shows how, at the EU level, the issuing and use of guidance documents is governed by various dynamics. What happens at the next stage of the process of governance through guidance, when guidance is received in the national legal order? The analysis of the use of guidance in Dutch implementing practices reveals different roles of guidance. These roles become visible when studying guidance practices in light of two analytical lenses: the perspectives on their binding character

and different types of guidance. This section presents the roles of guidance that have been identified along both lines of the analytical framework, and shows how these roles are shaped by contextual factors rather than by a clear and common perspective on the role or status of guidance documents in implementing practices.

### 8.2.1 Perspectives on bindingness

The analysis of the use of Commission guidelines in the implementation process shows that the use of guidance documents is guided by different perspectives on their binding force. These perspectives range from the use of guidance as a 'binding rule' to the use of guidance as a 'voluntary implementation aid'. Interestingly, the perspectives on bindingness not only differ between different policy areas but can also differ between the different stages of the implementation process.

Commission guidelines exert the strongest 'binding effect' in the implementation of EU direct payments regulations. The findings of this research indicate that the guidelines are perceived and used as a binding rule throughout all stages of the implementation process. Moreover, this perspective of *de facto* bindingness encompasses nearly all types of guidance. Only the dissemination of good practices of other Member States does not exert the same binding, and thus steering, effect as the other types of guidance. Dutch officials noted repeatedly that the role of direct payments guidelines as a binding implementation aid is guided by the aim of preventing financial corrections. It is a response to the strong steering pressures exerted at the EU level. Nonetheless, it has been found that 'Dutch implementing objectives', such as promoting legal certainty, consistency, and feasibility also promote strict adherence to the Commission's direct payments guidelines.

In the area of free movement of persons, the use of the FMP Commission guidelines is characterised by a cherry picking approach. This use of guidance documents as an authoritative, but voluntary implementation aid has been detected at different stages of the implementation process. It encompasses, in particular, the interpretative and implementing guidelines laid down in the first FMP guidance document, COM(2009)313. The good practices that are disseminated in the Handbook addressing marriages of convenience seem to be considered less relevant as an implementation aid. The cherry picking approach observed in this policy area can be explained in light of the dialogic approach that governs the issuing of guidance documents as well as the 'soft' steering pressures to act in accordance with guidance documents exerted at the EU level. On the other hand, it also reflects the tendency to search for the limits of the EU free movement rules that is guided by the restrictive approach in Dutch immigration policies.

The Habitats Directive is a more difficult case when it comes to defining the perspective that guides the use of Habitat guidance documents. Here it seems – as follows from the various interviews conducted in this area – that

the interpretative guidelines are mostly perceived as an authoritative aid that in principle needs to be followed and that can only be deviated from in exceptional cases. Interestingly, this role of Habitat guidance as an authoritative and mandatory aid applies to interpretative guidance in particular. The interviews conducted with Dutch officials involved in the implementation of the Habitats Directive, indicate that the use of other types of Habitat guidance, such as implementing guidance and good practices, is guided by a more voluntary approach. To make the findings even more ‘puzzling’, the survey of the use of Habitat guidelines reveals little traces of the use of guidance at the provincial level, despite the ‘perspective of authoritative-ness’ of the Dutch provincial officials.

The various perspectives on the binding character of Commission guidelines have implications for the normative, steering effect of guidance provisions. The following sections describe how, driven by the perspectives outlined above, guidance documents take different roles in practice, and how these roles affect Dutch implementing practices at different stages of the implementation process.

### 8.2.2 Guidance as an aid to interpret provisions of EU law

The first role of guidance documents that has been observed in implementation practices is that of an aid to interpret the provisions of EU law. This role of guidance as an ‘interpretation aid’ manifests itself at different stages of the implementation process.

Traces of interpretative guidelines can, firstly, be found in *implementing legislation*. In the area of direct payments, the role of guidelines ‘as binding interpretation aid’ leads to a strong regulatory effect on the provisions of the Ministerial Regulation that transposes the EU direct payments regulations. The provisions sometimes literally transpose the Commission’s guidelines, without however explicitly referring to these guidelines.

Secondly, interpretative guidelines could also be used to draft *Dutch policy rules*. For instance, the Aliens Circular copies the FMP Commission’s guidelines on persistent petty criminality that accompany the Citizenship Directive – without however referring to the guidelines in the text of the policy rules. An even more ‘silent’ influence can be found in the area of direct payments. Article 5 of the Dutch policy rules that provides further rules on the young farmers payment scheme has been brought in line with guidelines given in unpublished *letters* sent by the DG AGRI services to the Dutch paying agency.

Thirdly, even when guidelines do not feature in the text of implementing legislation nor in policy rules, the guidelines may still be used to draft the *explanatory notes or memoranda* to these rules. The explanatory memorandum to the Nature Protection Act that transposes provisions of the Habitats Directive, uses the Commission’s interpretative and implementing guidelines to give further guidance to the Dutch provinces on the implementation of the Nature Protection Act. In the text of the explanatory



memorandum, Commission guidelines play a visible role: references to the Species guidance document and the Managing Natura 2000 guidance document feature in different parts of the memorandum.

Finally, interpretative guidelines are often used as an aid to apply provisions in implementing legislation and policy rules in individual cases. When used as a *decision-making aid*, interpretative guidelines may affect the outcome of individualised decisions. This is the case for guidelines that have a highly detailed character, in combination with strict adherence to these guidelines. For instance, the strict adherence by the Dutch paying agency to the Commission's fifty trees rule in the on-the-spot check working document, leads to the refusal of aid for parcels with more than fifty trees. On the other hand, interpretative guidelines that 'only' spell out decision-making criteria and factors, could more indirectly influence decision-making processes. The FMP guidelines on petty criminality, for instance, provide that account must be taken of the 'the nature of the offences; their frequency; damage or harm caused'.<sup>4</sup> The rulings on persistent petty criminality show that these guidelines influence the decision-making process rather than the outcome of individualised decisions.

### 8.2.3 Guidance as an aid to understand and explain EU law provisions

The second role that guidance documents could take in implementing practices is that of an 'explanatory aid'. Commission guidelines with a highly explanatory character are used as an aid to understand and explain EU legislative provisions.

Sometimes, the use of explanatory guidance leaves traces in implementing practices. For instance, parts of the Managing Natura 2000 guidance document seem to be reflected in the explanatory memorandum to the Nature Protection Act. Traces of explanatory guidance have also been found in explanatory notes to the policy rules that implement the young farmer provisions in EU direct payments regulations. And, some FMP explanatory guidelines on 'arranged marriages' are referred to in the (internal) working instructions of the Dutch Immigration and Naturalisation Service. Most often, though, explanatory guidance is used as a silent, invisible aid to understand EU legislative provisions. This is not surprising in light of the fact that explanatory guidance does not give concrete, hands-on guidance that could be used to draft implementing regulations, policy rules or individual decisions. Thus, explanatory guidelines could, visibly or invisibly, shape the understanding of EU law by the actors involved in the implementation process.

During interviews, Dutch officials indicated that they often consider Commission guidelines to be a useful explanatory aid to understand complex regulations, such as in the area of direct payments, or to explain

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

and interpret openly formulated provisions. However, the analysis also shows that explanatory guidelines risk being considered superfluous or unnecessary where the guidelines only repeat what is stated in legislation. What is more, explanatory guidance risks 'mystify' the line between 'guidance' on the one hand and 'legislative provisions' on the other hand.<sup>5</sup>

#### 8.2.4 Guidance as an aid to take decisions on implementing measures

The third role that guidance documents can take is that of an aid to decide on the appropriate form of implementing measures. Traces of the use of guidance as an 'implementing aid' have been identified in the three policy areas. The analysis has shown that this role is shaped by the different perspectives on the binding character of implementing guidance.

In the area of direct payments implementing guidance, the various implementing guidance documents are given a *de facto* binding role as implementation standard. The Commission's implementing guidelines are used as a template to design the integrated administration and control system that needs to be set up by the Member States. In these areas, implementing and technical guidelines are 'translated' into internal framework documents of the Dutch paying agency. The Habitat and FMP guidance documents, on the other hand, are not used as a blueprint to make choices on implementing measures. In these policy areas the implementing guidelines are used as a *voluntary* implementation aid. Implementing guidelines are used to pursue the preferred implementing practices and policies. For instance, the guidelines on detecting marriages of convenience have been used by the Immigration and Naturalisation Service to develop the methodology for conducting 'pilots' to effective and lawful identification of alleged marriages of convenience. It is another example of the cherry picking role Commission guidelines play in this policy area.

Nonetheless, implementing guidelines may remain unapplied if good implementing practices or methods have already been developed at the national level. Officials involved in the management of Natura 2000 sites indicated for instance that the implementing guidance related to the elaboration of management plans has had little consequence for Dutch implementing practices. The Netherlands had already developed its own – similar – methodology for these plans before the Commission guidelines were issued.

#### 8.2.5 Guidance as an aid to take decisions on the form of technical measures

Commission guidelines not only provide recommendations on the form of implementing measures, but also issue guidelines that have a highly

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5 See for instance the discussion of the sufficient resources rulings in section 7.6.2.

technical character. The issuing of technical guidance documents is common practice in the area of direct payments. Technical guidelines are issued by the DG AGRI Commission services as well as by the Joint Research Centre. The various technical guidance documents form an entire 'guidance species' that is adopted after discussions with technical experts in the Member States. In Dutch implementing practices the numerous technical direct payments guidelines play an important role. Dutch officials use and perceive technical guidelines as being a binding standard: by following technical guidelines, they will be on the safe side during audits carried out by the Commission services. The role of technical guidelines has become particularly important after the 'LPIS experience' in 2009 where, according to Dutch officials, the non-use of Commission technical guidelines resulted in financial corrections. After that, the technical guidelines were strictly followed and led to substantial changes in the design of the land parcel identification system. In brief, the Dutch paying agency uses the guidelines as instructions or templates to take decisions on the design and form of technical implementing measures.

Technical guidance documents have not (yet) been issued in relation to the Habitats Directive or Citizenship Directive. In these policy areas, no traces have been found of the use of technical guidelines as implementing aid.

#### 8.2.6 Guidance as an aid to develop good implementing practices

The dissemination of good implementing practices is the most recently developed type of guidance. Good practices for instance are shared at workshops with experts from the Member States on the implementation of direct payments regulation, can be found in the form of a 'toolkit of hands-on guidance' in the Handbook addressing marriages of convenience, and are manifold in relation to the management of Natura 2000 areas.

However, the empirical analysis reveals few traces of the use of 'good practices' in implementing practices. From interviews with Dutch officials, it transpired that good practices are generally considered not to have the same binding or authoritative status as the other types of guidance. The good practices of other Member States do not have the same 'normative' force as this only concerns 'good practices'. These good practices do not reflect the Commission's normative view on how to best implement and interpret provisions in EU regulations and directives.

The finding that good practices disseminated by the Commission play little role in implementing processes, might need be seen in a 'Dutch context'. The Netherlands is one of the founding EU Member States and has much experience in implementing EU legislation. For the 'newer' Member States, the dissemination of the good practices of other Member States might be more useful and relevant. In these Member States, this type of guidance might play a more important role as a source of inspiration for developing good implementing practices.

### 8.3 NATIONAL COURTS AS FACILITATING OR COUNTERBALANCING ACTORS

Having outlined the roles of guidance in the implementation process, this section outlines what trends can be discerned as regards the use of guidance documents in judicial decision-making practices. In what ways do national courts use the Commission's guidelines and how does this use 'shape' the role of guidance documents in the implementation process? The three case studies show that – at least in the three policy areas included in this research – Dutch courts fulfil the role of a facilitating and counterbalancing actor, reinforcing or downplaying the role of guidance documents as an implementation aid. What role the courts play depends on:

- whether, and in what way, the courts use guidance documents in order to interpret or apply EU law provisions;
- whether the courts provide guidance to national authorities on how they should deal with guidance documents;
- the type of guidance concerned.

#### 8.3.1 National courts as a counterbalancing actor

National courts could have a counterbalancing role when they mitigate the binding effect of guidance documents for national authorities. In this research, the following three situations have been identified.

##### *No use as a binding rule*

The case study on the role of direct payments guidelines most clearly reveals a role for a national court as a counterbalancing actor. In several groups of rulings, the Trade and Industry Appeals Tribunal makes clear that the Dutch minister cannot use Commission guidance documents as binding rules or instructions. This follows not only from the fifty trees rulings in which the Tribunal considers that by using Commission guidelines as if they were 'a binding instruction', the Dutch paying agency disregards the guidelines' non-binding character. A similar picture emerges from the early obvious error rulings as well as the interpretative note rulings of the Tribunal. In those rulings, the Tribunal emphasises that the Commission guidelines do not have legally binding force. It is the responsibility of the paying agency to take account of the facts and circumstances of the case and to apply the guidelines within the limits of the EU legal framework.<sup>6</sup>

However, the fact that the Tribunal does not allow the paying agency to use Commission guidelines as binding rules, does not mean that the guidelines cannot play a role as an implementation aid. The Tribunal clarifies that it accepts the use of Commission guidelines as 'policy reference points'.<sup>7</sup>

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<sup>6</sup> See section 5.6.1.

<sup>7</sup> See section 5.6.1.

In the numerous obvious error rulings, it has become settled case law that the Tribunal considers it acceptable that the minister develops a policy line in light of the Commission guidelines.

Thus, the Tribunal counterbalances the general trend of the Dutch minister and paying agency to use Commission guidelines as binding rules, yet allows the use of Commission guidelines as an implementation aid. A similar, explicit counterbalancing role of the Dutch courts was not found in the two other policy areas studied for this research. This is not surprising as in these policy areas there is less indication that the Commission guidelines are used as *de facto* binding interpretative rules or standard. In these policy areas, as will be discussed below, the courts instead primarily play a role as facilitating actor.

### *Ignorance or irrelevance of Commission guidelines*

National courts also have a counterbalancing role in the situation where they consider Commission guidelines irrelevant or where they ignore Commission guidelines when interpreting or applying EU legislative rules. In that case, the courts do not promote or reinforce the role of guidelines as an implementation aid.

Although not manifold, some rulings were found in which the courts are *explicit* about the irrelevance of Commission guidelines as a judicial interpretation aid. Illustrative is the Overflying Natura 2000 ruling. In this ruling, the Council of State takes the view that the question on the scope and definition of the term 'project'<sup>8</sup> can be solved on the basis of the case law of the Court of Justice. The Council of State explicitly notes that the Managing Natura guidelines were issued prior to the relevant case law, from which it follows that the guidelines have become 'outdated'.<sup>9</sup> Another example is given by the rulings on breeding sites and resting places of birds. In these rulings, the Council of State and District Courts do not use the Species guidelines of the Commission as a reference point for the interpretation of the scope of *gruttos*' breeding sites, despite several attempts by the appellants who argue that on the basis of these guidelines, a broad interpretation of the term 'breeding sites' should be applied.<sup>10</sup> The Courts, instead, infer a more narrow interpretation of the term 'breeding sites' from the logic of the Species protection regime.

It is also possible that the text of a ruling ignores the mere existence of Commission guidelines on a specific question. An example is the *Briels* ruling of the Council of State which elaborates on the possibility of including mitigation measures in the appropriate assessment. The *Briels* ruling does not refer to the Managing Natura 2000 guidance documents,

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8 Article 6(3) of the Habitats Directive.

9 See section 6.6.1.

10 Section 6.6.2.

despite the fact that the concept of ‘mitigation measures’ is introduced in and elaborated on in the Commission guidelines.<sup>11</sup> Of course, it may still be possible that the Commission guidelines have played a ‘silent role’ in the reasoning of the court. But, when this does not transpire from the text of the ruling, no indication is given that the court attaches importance to the guidelines or that the guidelines are to be taken into account by national authorities when implementing EU law. The findings in this research do not reveal many rulings in which a Dutch court ignores Commission guidelines. Yet, the practice of ignoring Commission guidance might occur more often than the findings in this research suggest. Indeed, it is likely that these rulings will not be found by searching for explicit references to guidance documents in national courts’ rulings.

### *Commission guidelines overruled*

The third way in which courts act as a counterbalancing actor is by explicitly overruling or deviating from guidance documents. The most explicit and critical approach is reflected in rulings of the Trade and Industry Appeals Tribunal. For instance, in the permanent grassland rulings, the Tribunal takes the view that grassland on airports is not *per se* to be excluded from being eligible for aid.<sup>12</sup> The observation that the Commission takes a different view – which it also made clear during audit missions in the Netherlands – does not lead the Tribunal to a different conclusion. The fifty trees case provides another example. The Trade and Industry Appeals Tribunal deviates from the Commission guidelines by not using the fifty trees rule as an assessment standard. Nonetheless, the results of this research only reveal a small number of rulings where Dutch courts explicitly overrule or deviate from Commission’s guidance documents. The rulings where courts explicitly deviate from Commission guidelines thus seem to be the exception rather than the rule. It is however possible that rulings have not been included in the analysis where courts do deviate from guidelines without explicitly mentioning it.

### 8.3.2 National courts as a facilitating actor

The analysis of the use of guidance documents by national courts also shows that national courts can play a role as a facilitating actor. National courts then interact with Commission guidelines in a way that reinforces their role in implementing practices. This section outlines how national courts play a facilitating role by using guidelines as an interpretation or explanatory aid to assess the lawfulness of (technical) implementing practices, and by recognising a self-binding effect for national authorities.

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11 Section 6.6.1.

12 Section 5.6.4.

*Guidance as an interpretation aid*

The use of guidance as an interpretation aid was observed in all three policy areas. The Habitat guidelines – and in particular the Species guidelines – serve as an interpretation aid in rulings of the Council of State as well as in rulings of several District Courts. The Council of State and the District Court of The Hague refer to the Commission's FMP guidelines to interpret concepts such as a 'durable relationship', 'a sufficient serious threat' or the notion of 'abuse'. Most of the rulings that refer to Commission guidelines as an interpretation aid were handed down by The Trade and Industry Appeals Tribunal, of which the large majority refers to the obvious error working document. The Tribunal takes account of Commission direct payments guidelines to interpret EU direct payments provisions and assesses the minister's practice in light of these.

Where national courts use Commission guidelines as an interpretation aid, the guidelines to a larger or lesser degree influence the interpretation of EU legislative provisions in light of which the implementing practices will be assessed. The question, however, is whether the courts also consider the interpretative guidelines as having an authoritative, or even binding effect on the national courts in general (not only in the specific cases where guidelines are used as an interpretation aid).<sup>13</sup>

In most of the rulings, the courts do not motivate why they take account of Commission guidelines. This is the case in particular for the rulings that refer to guidance documents related to the Habitats Directive and the EU direct payments regulations. A more explicit approach is taken by the Dutch Council of State in the rulings that refer to the COM(2009)313 guidelines to the Citizenship Directive. In the '2011 rulings' the Dutch Council of State considers that these guidelines 'serve as an aid for the interpretation of the Directive' and that the guidelines 'cannot be regarded as not having any significance'.<sup>14</sup> The analysis in section 7.6.2 has shown that this has become settled case law.

*Other types of guidance as a decision-making aid*

From the above it follows that Dutch courts, in all three policy areas, mostly refer to guidelines having an *interpretative* character. Although other types than interpretative guidance feature less frequently in the rulings of the courts, the analysis has shown that these types of guidance may also come to play a role as a decision-making aid.

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13 The question whether and to what extent national courts clarify the legal status of Commission guidelines is discussed below in section 8.5.1.

14 See section 7.6.1.

Some rulings have been found that refer to guidelines with a highly explanatory character. The sufficient resources rulings of the District Court of The Hague<sup>15</sup> and the active farmer rulings of the Trade and Industry Appeals Tribunal<sup>16</sup> both refer to explanatory guidance documents in order to define the purpose and context of legislative provisions. These rulings show that even explanatory guidelines might 'steer' the interpretation adopted by the courts.

Traces of the use of implementing guidance documents as a decision-making aid feature most clearly in rulings that assess the method that is followed when investigating the marriages of convenience. In these rulings, the method proposed in the guidelines is considered an appropriate investigation method and used by the courts to assess whether the minister's decision can be upheld.<sup>17</sup> It is remarkable, though, that these types of implementing and technical guidance leave no traces in the rulings in the area of direct payments. Indeed, in this area these types of guidance play an important role in implementation processes. Only the JRC rulings reveal some glimpses of technical guidance as well as of good practices. These rulings show that good practices of other Member States can be used by the Tribunal as an additional argument in favour of the 'appropriateness' of the measurement method used by the Dutch paying agency.<sup>18</sup>

#### *A 'self-binding' effect for national authorities?*

From the analysis, a picture emerges that Dutch courts acknowledge and accept that national authorities use Commission guidelines as an interpretation aid or as a decision-making aid. This is made explicitly clear in several groups of rulings by the Trade and Industry Appeals Tribunal. The Tribunal considers it acceptable that a Dutch paying agency develops a policy line on the basis of the Commission's obvious error guidelines and that it uses the on-the-spot check working document as an interpretation aid.<sup>19</sup> The Council of State takes a similar view. For instance, in the rulings on marriages of convenience the Council acknowledges the fact that the minister has followed the method of investigation as spelled out in the Commission guidelines.<sup>20</sup> And in the incidental killing ruling, the Council considers that the minister is allowed to attach importance to the Species guidelines.<sup>21</sup> Yet, it should be remarked that in this ruling the Council also refers to the fact that in the 'wolf hunting case' the Court of Justice also uses these guidelines as an interpretation aid.

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15 Section 7.6.2.

16 Section 5.6.3.

17 Section 7.6.3.

18 Section 5.6.3.

19 Section and 5.6.1.

20 Section 7.6.3.

21 Section 6.6.2.



What is more, the rulings of Dutch courts also indicate that the use of the guidelines as a decision-making aid at the implementation stage can generate a self-binding effect of the guidelines on the minister. This self-binding effect becomes visible in the rulings of the Council of State related to the Citizenship Directive. In the 2011 rulings, for instance, the Council of State states that it will take account of the guidelines 'all the more since the minister himself also occasionally uses the guidelines as justification for policy decisions'.<sup>22</sup> Signs of a certain self-binding effect are also given in the most recent 'direct payments rulings' on the concept of obvious error. The Tribunal indicates that it will take account of the obvious error guidelines as an interpretation aid, as these guidelines are issued by an authoritative institution *and* for the reason that the minister himself also refers to the guidelines.

In brief, it seems that the courts acknowledge a certain self-binding effect of the guidelines on national authorities. However, the courts do not elaborate on the reasons for recognising such a self-binding effect of the guidelines. Could a parallel be drawn with the self-binding effect of national policy lines via legal principles such as legal certainty and legitimate expectations?

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22 Section 7.6.1.

Table 8-1 Use of guidance as an implementation aid: perspectives on bindingness

Degree of bindingness  Type of guidance	Use as an interpretation aid	Use as an aid to understand and explain EU law provisions	Use as an aid to take implementing measures	Use as an aid to take technical measures	Use as an aid to develop or find inspiration for good implementing practices
Use of guidance as a de facto binding rule	Interpretative direct payments guidelines	Explanatory direct payments guidelines		Most technical direct payments guidelines	
Use of guidance as an authoritative, mandatory implementation aid, comply or explain practice	Habitat guidelines, in particular Species guidelines	Habitat guidelines, in particular Natura 2000 guidelines	Habitat guidelines, in particular Natura 2000 guidelines		
Use of guidance as a voluntary implementation aid, practice of cherry picking	FMP guidelines COM(2009)313, when there is a good fit with national implementing policy	FMP guidelines COM(2009)313 guidelines, when there is a good fit with national implementing policy	FMP guidelines COM(2009)313 guidelines, when there is a good fit with national implementing practices		
No use as an implementation aid, e.g. due to irrelevance or outdated, the existence of guidance unknown	Interpretative guidelines that remain unknown to national authorities, e.g. letters			Technical direct payments guidelines (exceptional, when too costly and bad fit)	Good practices on the implementation of direct payments guidelines, Habitat guidelines as well as free movement of persons

Table 8-2 Uses of guidance in implementing measures

Type of guidance	Interpretative guidance	Implementing guidance	Technical guidance	Explanatory guidance	Dissemination of good practices
<b>Direct payments: Responsible Ministry and paying agency</b>	Basis for provisions in Ministerial Regulation, policy rules, and individualised decisions	Standard setting for practical implementing measures integrated administration and control system	Standard for the form and design of technical measures (e.g. land parcel and identification system)	Use as an aid to understand the complex direct payments provisions, sometimes referred to in explanatory notes	No traces found of use in implementing measures
<b>Habitats Directive: responsible Ministry</b>	Translation in text of the explanatory memorandum to Natura protection act	Justification aid for choice of management plans in explanatory memorandum to Nature Protection Act	x	Use as an aid giving explanatory guidance in the explanatory memorandum to the Natura Protection Act	Use of good practices of other MS to explain choice for management plans in explanatory memorandum
<b>Habitats Directive: Dutch provinces</b>	Provinces: (silent) interpretation aid when making individualised decisions	Provinces: Little use for design of management plan and appropriate assessments	x	Little/ no indication of use in provincial practices	Little indications of use of good practices, little influence on methodology of management plans
<b>Citizenship Directive</b>	Transposition into policy rules in the Aliens Circular and working instructions, when good fit with national policy and practices	Use as reference point for the methodology to detect and investigate marriages of convenience, good fit with national implementing policy	x	Traces of guidelines on marriages of convenience in working instructions	No indication of the use good practices to tackle marriages of convenience on the ground: overlap with existing practices

Table 8-3 *Uses of guidance by Dutch courts: degree of bindingness*

Type of guidance	Interpretative guidance	Implementing guidance	Technical guidance	Explanatory guidance	Dissemination of good practices
<b>Direct payments: Trade and Industry Appeals Tribunal</b>	Use as a judicial interpretation aid, but no allowance of use as binding rules by paying agency	No indication of use of implementing guidance as a judicial decision-making aid	No indication of use of technical guidance as judicial decision-making aid	Use as aid to explain the logic of active farmer provision	Good practices of other Member States as 'supportive argument' for appropriateness of measurement method
<b>Habitats Directive: Council of State, Courts of Appeal and District Courts</b>	Use as a judicial interpretation aid (no clear perspective)	No indication of use of implementing guidance as a judicial decision-making aid	x	Use as of guidance in MN000 guidance documents as 'silent' explanatory aid (no references in rulings)	No indication of the use of good practices as a judicial decision-making aid
<b>Citizenship Directive: Council of State and District Court of The Hague</b>	Use as a judicial interpretation aid 'that is not deprived of any significance'	Use as standard to assess lawfulness of methodology to detect and investigate marriages of convenience	x	Use of explanatory guidance to explain and interpret the concept of sufficient resources	No indication of the use of good practices in Handbook as a judicial decision-making aid

#### 8.4 GUIDANCE AS AN IMPLEMENTATION TOOL: THE PROMISES FULFILLED?

The first part of this chapter distinguished between different uses of guidance documents in Dutch implementing processes as well as in judicial decision-making processes. The second part of the analysis explores the relationship between the use of guidance and legal principles governing the implementation of EU law. To this end, it examines whether and how the use (or non-use) of guidance documents achieves their promises in practice. The promises (see section 2.5) can be summarised as the ideal situation where guidance documents contribute to predictability, consistency and transparency in the implementation process, whilst respecting the primacy of EU hard law. It was presumed that in order to positively interact with legal principles, guidance documents should be used in a 'predictable, transparent and consistent manner whilst taking account of their non-legally binding character'.

This section analyses the implications of the use of guidance in implementing practices. Does the use (or non-use) of guidance documents as an implementation aid contribute to the fulfilment of the promises in practice? And, if possible, what circumstances or factors can be discerned that contribute to, or perhaps hamper, the use of guidance documents in line with the promises? The next section then proceeds to explore the use of guidance documents by national courts.

##### 8.4.1 Enhancing (un)certainty in the implementation of EU legislation?

The first 'promise' of guidance documents is to enhance predictability in the implementation of EU law. As outlined in the introduction, in order for this promise to be fulfilled, guidance documents should be used in a 'predictable manner': there should be clarity as to the role that guidelines fulfil in implementation processes.

From the analysis, a picture emerges that the role of Commission guidance documents in the three policy areas remains largely uncertain. There is no common understanding or policy line as to how guidance documents are treated in Dutch implementing practices. Instead, the role of the guidelines differs according to different policy areas, ranging from that of a *de facto* binding rule or standard in the area of direct payments, an authoritative interpretation aid in relation to the implementation of the Habitats Directive, to a voluntary implementation aid in the area of free movement of persons. Furthermore, the empirical analysis also indicates that the authoritativeness of guidance documents differs along the lines of the different types of guidance. For instance, in the area of the Habitats Directive interpretative guidelines are considered to be highly authoritative whilst other types of guidance (such as implementing guidance and good practices) seem to be perceived and used as a voluntary implementation aid.<sup>23</sup>

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23 As discussed above in section 8.2.1.

Even if the role of the guidelines is uncertain, limited ‘predictability effects’ can still arise when the Commission’s guidelines are used to draft implementing legislation or policy rules. The guidelines then indirectly generate predictability effects through Dutch rulemaking instruments. Such a predictability effect is most visible in the area of direct payments, where the interpretative guidelines are used as a basis to draft provisions in the Ministerial Regulation and the policy rules. Predictability effects have also been found in relation to the Citizenship Directive: interpretative FMP guidelines are used as an aid to draft the policy rules in the Aliens Circular.

However, also in the situation where guidelines are used as an aid to draft Dutch binding regulations or policy rules, the uncertain binding effect of the guidelines remains problematic. Indeed, the guidelines might still be used by national authorities as an aid to take individualised decisions on the basis of the implementing rules. What is more, the guidelines’ binding effect also becomes relevant when decisions taken on the basis of the implementing rules are challenged. What weight will or must be given to the guidelines by national authorities?

From the above it can be concluded that the ability of guidance documents to contribute to a predictable implementation of EU law is limited, due to the fact that the perceived binding effect of Commission guidelines in implementing practices is highly uncertain.

This raises the question how this divergence and uncertainty in the role of Commission guidelines can be explained. In the first place, this can be linked to the plethora of expectations on the use of guidance documents formulated at the EU level. The different types of steering pressures exerted by the Commission on the Member States to act guidance-proof, seem to be reflected in national implementing practices. On the other hand, uncertainty in the role of guidance may be further increased by a lack of knowledge or by multiple interpretations of the expectations formulated at the EU level by national officials involved in implementing practices. This uncertainty might further be related to the fact that national courts are not always clear about their view on the role of guidance documents.<sup>24</sup>

#### 8.4.2 Promoting (in)consistency in the implementation of EU law?

The second promise of guidance documents is that – when used at the national level – the guidelines could promote consistency in the implementation of EU law. This effect of consistency arises when Commission guidelines are applied in a consistent manner when interpreting and applying provisions of EU law. Has this effect been observed in the study of the use of guidance documents in the three policy areas?

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24 As will be discussed below in section 8.5.1.

The greatest ‘consistency effect’ can be observed in the area of direct payments, where the guidance documents are used as a binding rule and are strictly followed. This leads, as said, to the transposition of these guidelines into the Dutch Ministerial Regulation and policy rules. The guidelines then generate consistency through the application of the Dutch implementing rules. But also in the situation where the direct payments guidelines are not transposed into implementing legislation, they are still applied as binding rules, and as a consequence are strictly followed in decision-making practices.

The analysis, however, also reveals a factor that may jeopardise the ability of direct payments guidance documents to promote a consistent implementation of direct payments regulations. This is the high frequency with which guidance documents are issued as well as the changing nature of direct payments guidance documents and the changing views of the Commission on the interpretation of its guidelines. These changes usually resonate throughout implementing rules and practices at the national level. The Ministerial Regulation and policy rules are regularly amended in response to the adoption or revision of guidance documents.<sup>25</sup>

Whilst direct payments guidelines – despite their changing character – promote consistency in implementing practices, the cherry picking approach that guides the use of FMP guidelines leads to a different conclusion. This cherry picking approach could give rise to the risk of an inconsistent or arbitrary implementation of the provisions Citizenship Directive. The use of the guidelines then depends on whether the ‘individual decision maker’ considers guidelines a useful aid to support or justify the policy decision in question. This risk might arise, for instance, in relation to the use of the guidelines on marriages of convenience. The guidelines on marriages of convenience are not used as a policy line nor does the State Secretary consider himself bound by the guidelines. This is made clear in a letter from the Dutch State Secretary that is referred to in a ruling of the Council of State in July 2016.<sup>26</sup>

The risk of inconsistency related to a cherry picking approach is mitigated in the situation where the FMP guidelines are transposed into the policy rules laid down in the Aliens Circular.<sup>27</sup> Indeed, these policy rules must, in principle, be followed by the Immigration and Naturalisation Service in decision-making practices. The Aliens Circular for instance trans-

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25 An example is provided by the criteria that are adopted to define the maintenance obligation in section 2.2. of the Ministerial Regulation and the revision of the Ministerial Regulation in response to the change of the EFA layer guidance document. See above section 5.5.1.

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

27 According to Article 4:84 GALA deviation from policy rules is only possible if due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purpose of the policy rule. See section 4.2.2.

poses the guidelines on persistent petty criminality which spell out criteria or factors that can be taken into account. Via the Dutch policy rules, the guidelines then promote a consistent effect on the decision-making process, rather than directly influencing the outcome of the decisions taken by the Immigration and Naturalisation Service.

Finally, the least consistency effects have been observed in the area of the Habitats Directive. In this area, a consistent implementation of the Dutch Nature Protection Act is encouraged in the explanatory memorandum which also adopts the Commission guidelines to give guidance to the Dutch provinces. However, no indications of a consistent use of Habitat guidelines have been identified at the level of the Dutch provinces. The guidelines have not been transposed into decentralised provincial regulations or provincial policy rules, nor have traces been found of a consistent application of the guidelines in individualised decision-making practices.

#### 8.4.3 Giving rise to problems of transparency in the implementation of EU law?

The third promise of guidance documents is to enhance transparency of decisions made during the implementation processes and of the decision-making criteria that are applied when implementing general provisions of EU law. This promise is considered to be fulfilled, as outlined in section 2.5.6. if it is communicated and made explicit whether and how Habitat guidance documents are used, or not used, when implementing provisions of EU law. In brief: guidance documents should be used in a transparent manner.

The above analysis of the use of guidance documents in implementation processes does not radiate transparency. In fact, from the analysis a picture emerges that, generally speaking, the use of guidance documents remains highly invisible. This invisibility encompasses all types of guidance and runs throughout the different stages of the implementation process.

The interpretative guidelines that are used for the drafting of implementing regulations or policy rules generally remain invisible in the text of the regulatory acts. In the area of direct payments, the explanatory notes to the Ministerial Regulation and policy rules only exceptionally reveal some traces of direct payments guidelines. A more transparent approach, and thus an exception to the rule, or trend, is the explicit approach that is taken in the explanatory memorandum that complements the Nature Protection Act. Here, the guidelines are explicitly referred to and used to give further guidance to the interpretation of Habitat provisions as transposed into the Nature Protection Act.

Similarly, from the analysis, a picture arises that the use of guidance documents is generally not mentioned in the text of individualised decisions. In all three policy areas, the explicit mention of guidance documents in individualised decisions appears to be the exception, rather than the



rule.<sup>28</sup> Interestingly, however, when individualised decisions need to be defended at the objection stage or in court, it is much more likely that traces of Commission guidelines will feature in the statements of defence. The guidelines then serve as an aid to justify decisions that have been taken.

The situations outlined above concern, in particular, the use of *interpretative* guidelines in rulemaking practices and in individualised decision-making practices. The analysis reveals that the use of other types of guidance remains even more implicit or invisible. This is remarkable since the analysis has also shown that implementing and technical guidance documents can play an important role as an implementation aid. For instance, in the area of direct payments guidance where implementing guidance and technical guidance play an important role for the setting up and the design of the integrated administration and control system.<sup>29</sup> Here, the guidelines are used to draft internal framework documents which as their name suggests are *internal* and not accessible to the general public.

Finally, the lack of transparency that surrounds the use and effects of Commission guidelines is further reinforced by the fact that Commission guidance documents are often not published or in any case not made accessible to the general public. This, again, is particularly true in the area of direct payments where the largest part of numerous guidance documents is not made accessible or published. Only some of the guidance documents can be found on the Wikicap website of the Joint Research Centre.

Thus, the general conclusion is that in many respects the promise of transparency of guidance documents remains largely unfulfilled in the three policy areas. It could even be said that the 'invisible use' of the guidelines gives rise to problems of transparency, instead of enhancing transparency in implementation processes.

#### 8.4.4 Challenging the promise of non-bindingness: legality at risk?

The fourth promise of the Commission guidance documents is 'the promise of non-bindingness'. This promise entails that due to their non-legally binding character guidance documents can only fulfil their role as an implementation aid complementary to EU law: the guidelines should be used in such a way that respects the primacy of Union law. Guidance documents cannot be used to create rights and obligations that go beyond, detract from or change EU legislative rules: implementing measures should always, eventually have a basis in and be in line with EU legislative rules.<sup>30</sup> What

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28 An exceptional 'explicit use' of guidance document can be found for instance in decisions on the concept of obvious error laid down in direct payment regulations. See section 5.5.4.

29 See section 5.5.3. Another example is the use of the COM(2009)313 guidelines for the methodology to investigate and detect marriages of convenience which does not transpire from the IND's working instructions, see section 7.5.3.

30 See section 2.5.7.

does the analysis of the use of guidance documents in the three policy areas tell us about this promise of non-bindingness? The analysis shows that this promise is challenged at various stages of the implementation process.

### *Guidelines as a basis for implementing legislation*

In the first place, legality concerns arise in the situation where direct payments guidelines are used as a basis to draft provisions of implementing legislation. The analysis reveals that the Dutch Ministerial Regulation on direct payments is brought in line with the *de facto* binding direct payments guidelines. Due to the strict adherence to the guidelines and their detailed character, direct payments guidelines risk becoming used as a basis for obligations laid down in Dutch binding rules that cannot be traced back to, or that deviate from, underlying EU direct payments rules.

The ‘famous’ fifty trees cases are illustrative, as they show that the transposition of the fifty trees rule into the former Dutch Ministerial Regulation is problematic in light of the underlying EU direct payments regulation. By transposing the fifty trees rule into a legally binding act, the Dutch paying agency risks refusing aid for parcels with more than fifty trees whilst, on the basis of the EU regulation aid, it could in fact have been granted.<sup>31</sup> The fifty trees rule is not the only provision that raises questions in light of the underlying direct payments provisions. Examples can also be found in the Ministerial Regulation that is currently in force. Article 2.15(3) of the Ministerial Regulation, for instance, transposes the Commission’s guideline that light tillage is allowed on sensitive permanent grassland. It is questionable whether this is in accordance with Article 45(1) of Regulation 1307/2013, which imposes a ban on ploughing on sensitive grassland.<sup>32</sup>

Finally, the transposition of direct payments guidelines into implementing legislation can also be problematic in light of the ‘procedural rules’ formulated by the Court of Justice that define the conditions within which EU regulations can be ‘operationalised’.<sup>33</sup> In particular, the legislative provisions may risk giving ‘binding interpretations’ of EU regulations, which according to the Court’s case law is not permitted.<sup>34</sup>

### *Policy rules and policy lines*

Legality concerns also arise at later stages of the implementation process. Just as for implementing legislation, guidelines could be used as a basis for policy rules or lines that give rise to questions in light of legally binding provisions in EU laws. The analysis reveals the trend that when Commis-

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31 See section 5.5.1.

32 See section 5.5.1.

33 These procedural requirements were discussed in section 2.5.7.

34 CJEU 31 January 1978, C-94/77, ECLI:EU:C:1978:17, par. 27 (*Fratelli Zerbone*).

sion guidelines are used to develop a policy rule or line, guidelines tend to be strictly or rigidly adhered to by Dutch administrative authorities.

This trend has been observed most clearly in the area of free movement of persons. The Commission's guidelines are used as an aid to develop policy rules or policy lines that fit with Dutch restrictive implementing objectives. An example of a use of the guidelines that in the eyes of Dutch courts leads to a too restrictive interpretation of the Citizenship Directive, is the policy line that adopts a too restrictive interpretation of a durable relationship.<sup>35</sup> Another example is the application of the policy rule in the Dutch Aliens Circular that transposes the Commission guidelines on persistent petty criminality in individualised decisions. When applied in practice, these guidelines tend to be interpreted and applied in a restrictive manner whilst the facts and circumstances of the individual case are not sufficiently taken into account. This follows from the rulings of the District Court of The Hague and the Council of State.<sup>36</sup>

A similar risk arises where direct payments guidelines are translated into policy rules or policy lines. For instance, the policy line developed by a Dutch paying agency on the basis of the obvious error guidelines takes a systematic, not sufficiently individualized approach, when assessing whether aid applications contain an obvious error. According to the Trade and Industry Appeals Tribunal, the paying agency does not sufficiently take account of the facts and circumstances, whilst this is required by the same obvious error guidelines.<sup>37</sup>

### *Individualised decisions*

Finally, legality questions could arise where guidelines are used as a basis or aid for taking individualised decisions. In fact, such questions generally come to the fore at this final stage of the implementation process, since it is only the individualised decisions that can be directly challenged before Dutch administrative courts. The use of guidelines is problematic when decisions are based on the Commission's rules, whilst no account is taken of the legally binding Union rules. In that case, as the early fifty trees rulings show, the guidelines cannot uphold a decision that is not in accordance with underlying Union rules. Problems also arise when guidelines are used as an aid to justify decisions that 'search for the limits of the law'. These cases have been identified in the area of free movement of persons, where guidelines are used to support 'restrictive' implementing decisions.

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35 See section 7.6.1.

36 See section 7.6.2.

37 See section 5.6.1.

## 8.5 NATIONAL COURTS: PROMOTING THE PROMISES OF GUIDANCE?

National courts not only play a role in shaping the role of guidance documents in national implementing practices as a facilitating or counterbalancing actor. The way in which national courts use Commission guidelines also influences the ability of guidance documents to exert their promises in the implementation process. This section explores whether from the analysis of the use of guidance in judicial processes, a picture emerges that Dutch courts act as the guardian of legal principles. Do Dutch courts use guidance documents in a way that promotes or hampers the ability of guidance documents to fulfil their promises in practice?

### 8.5.1 Clarifying or mystifying the status of Commission guidelines?

Section 8.4.1 concluded that the role of direct payments guidelines in implementing practices is governed by uncertainty. The guidelines take different roles in practice that are shaped by contextual factors rather than by a shared, common perspective on the role of guidelines as an implementation tool. The question now is whether Dutch courts play a role in clarifying the role that guidance documents could or should play in implementing practices.

The analysis of the use of guidance documents in judicial practice reveals that in most rulings in the three policy areas, the courts do not examine the legal effects of the guidelines. Only as an exception do the courts' rulings explicitly elaborate on the role of the Commission guidelines as an implementation aid and as a judicial decision-making aid.

The Council of State takes the most explicit approach in the 2011 rulings. In these rulings the Council refers to the FMP guidelines as 'an interpretation aid that is not deprived of any significance' and considers this all the more so, 'since the Minister himself also occasionally refers to the guidelines as a justification for his policy decisions'.<sup>38</sup> The Trade and Industry Appeals Tribunal takes a similar approach, as the Tribunal considers that Commission guidelines can be used as a 'policy reference point' when interpreting and applying the provisions of direct payments regulations. What is more, in recent obvious error rulings the Tribunal reasons that it will take account of the Commission guidelines 'since the guidelines are issued by an authoritative institution', as well as in light of the fact that the minister himself uses the obvious error guidelines.<sup>39</sup> On the other hand, as already discussed above, the Trade and Industry Appeals Tribunal does not accept the use of the guidelines as if they were binding rules.

These 'formulas' give some indication as to the role and status of guidance documents, but also leave questions open. What does it mean that guidance documents can be used as an interpretation aid? Are the

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<sup>38</sup> See section 7.6.1.

<sup>39</sup> See section 5.6.2.

guidelines binding to a certain extent on national authorities or not? Do the national courts derive their formulas from the *Grimaldi* case law of the Court of Justice? Is the use of the guidelines by the Court of Justice relevant for the question whether national authorities are allowed to use the guidelines, as the incidental killing ruling suggests?<sup>40</sup> And, if guidance documents can be used as an interpretation aid, what about other types of guidance?

Interviews with State Councillors at the Judicial Division of the Council of State provided further insights and answer into these questions.<sup>41</sup> The State Councillors clarified that in their view, Commission guidelines are an authoritative source of interpretation. This means that if a question arises for which Commission guidelines give relevant guidance, the guidelines in principle need to be taken into account. The guidelines cannot be set aside or disregarded without good reason or a justification. This ‘perspective of authoritativeness’, giving guidelines the role of a mandatory implementation aid, applies to both national courts and the minister. This perspective of authoritativeness is thus considered to be the main approach that guides the use of Commission guidelines at the Dutch Council of State. It is, however, uncertain whether this perspective is shared by other (lower) courts as well as the Trade and Industry Appeals Tribunal. This could be explored in further research.

The conclusion that can be drawn from the findings of this research is that national courts only play a limited role in clarifying the status of Commission guidelines. The role of guidance documents as an implementation aid as well as a judicial decision-making aid thus remains largely uncertain.

### 8.5.2 Promoting an (in)consistent use of Commission guidelines?

The analysis of the use of Commission guidelines in implementing practices reveals a mixed picture when it comes to the promise of the guidelines to contribute to consistency in implementing practices.<sup>42</sup> In the area of direct payments the application of the, often detailed, guidelines leads to a high degree of consistency in implementing practices, whilst the cherry picking approach that guides the FMP guidelines risks resulting in an inconsistent use of Commission guidelines in decision-making practices. The Habitat guidelines have the least ‘consistency effects’, due to the limited role of the guidelines at the level of the Dutch provinces.

The question now is how the ‘guidance practices’ of Dutch courts relate to this promise of consistency. On the basis of the rulings of Dutch courts, practices can be identified that promote the promise of consistency, as well as practices that detract from the promise of consistency.

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40 The incidental killing ruling is discussed in section 6.6.2.

41 Interview 26 – State Councillor C and D; Interview 28 – State Councillor C. See also section 6.6.3.

42 Section 8.4.2.

In the first place, a consistent use of the guidelines is promoted in cases where the courts, in an explicit manner, require the minister to use Commission guidelines in a consistent manner. This is the case where Dutch courts recognise a certain self-binding effect of the guidelines on the administrative authority.<sup>43</sup> Such a self-binding effect transpires most clearly from rulings that refer to the FMP guidelines.<sup>44</sup> Illustrative are the two rulings issued in 2006 concerning the use guidelines on marriages of convenience. In these rulings, the minister argues that the guidelines are not used as a fixed policy line and therefore are not binding. The Council of State, instead, considers that it will nevertheless assess the minister's practices in light of the guidelines since the minister himself used the guidelines as a decision-making aid.<sup>45</sup>

Secondly, the courts promote consistency, where they use Commission guidelines as a judicial interpretation aid and/or as an aid to assess implementing practices in a consistent manner. Several groups of rulings have been identified, in all three areas, where the courts, it seems, consistently refer to similar parts of the Commission guidelines. A first example are the foraging area rulings where the Council of State and lower courts refer to the Species guidelines to interpret the scope of breeding sites and resting places of bats.<sup>46</sup> In the area of direct payments, the numerous rulings on the concept of obvious error show that over a period of almost twenty years, the Tribunal refers to the obvious error guidelines as an interpretation aid. Similarly, the different groups of rulings of the District Court of The Hague and Council of State also show how the FMP guidelines are referred to – it seems on a regular basis – to assess the contested implementing decisions.<sup>47</sup>

Vice versa, by referring to guidelines in an inconsistent manner, the courts leave room for the inconsistent use of guidelines in implementing practices. One example can be found in the area of the Habitats Directive where the District Court of The Hague and the Court of Appeal of The Hague take a different stance towards the Species guidelines.<sup>48</sup> In the ruling of the District Court the Species guidelines play a prominent, visible role as an interpretation aid, whilst in the ruling of the Court of Appeal the guidelines are not referred to even once. These different approaches not only give rise to uncertainty as to the role and status of the guidelines, they do not encourage national authorities to refer to and use the Species guidelines in a consistent manner either.

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43 Thus acting as a 'facilitating actor' as described in section 8.3.2.

44 See section 7.6.4.

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

46 This group of rulings also is an example of where – after a while – the interpretation given in the Species guidelines becomes silently in embedded in the discourse of the courts. See section 6.6.2.

47 See section 7.6.2.

48 See section 6.6.2.

Furthermore, national courts can also interact with the Commission's guidelines in a way that mitigates the consistency effect of the use of guidelines in implementing practices. This is the case where national courts require national authorities to not apply Commission guidelines in a too strict manner and to pay more attention to the facts and circumstances of the case. Such an individualised approach is likely to lead to more variety in the outcome of individualised decisions. This mitigating effect can be found in rulings that refer to the FMP guidelines. For instance, in the rulings on persistent petty criminality, the Council of State requires the minister to substantiate his decision in light of the factors laid down in the Commission's guidelines.<sup>49</sup>

Other examples can be found in the area of direct payments rulings. The Trade and Industry Appeals Tribunal guards that when using direct payment guidelines, the minister takes account of the individual circumstances of the case if this is required by the EU legislative rules or by Commission's guidelines. For instance, in the fifty trees rulings, the Tribunal requires in light of the underlying EU regulation, that the minister assesses whether agricultural activities are possible, despite the presence of more than fifty trees per hectare on the agricultural parcel. In the obvious error rulings the Tribunal reasons that the Dutch paying agency should take account of the facts and circumstances of the case as this is one of the principles outlined in the Commission's obvious error guidelines.<sup>50</sup>

To conclude, the analysis of the rulings of Dutch courts reveals a mixed picture. The courts on the one hand contribute to a consistent use of Commission guidelines by using the guidelines as a judicial interpretation aid and assessments standard, as well as by recognising a certain self-binding effect of the guidelines on the minister. On the other hand, the courts hamper a consistency effect by using guidelines in an inconsistent manner or mitigate a consistency effect by requiring the minister to take a more individualised approach.

### 8.5.3 Promoting (a lack of) transparency through Commission guidelines?

In the implementation process the use of guidance documents is often surrounded by secrecy, rather than transparency. This is the conclusion of section 8.4.3 which analyses the role of guidance documents in the implementation process in light of the promise of transparency. The question is whether, and to what extent, national courts promote a more transparent role of guidance documents in the implementation process.

The analysis of the use of guidance documents in judicial practices reveals two ways in which the courts positively interact with the promise of transparency. This is the case, first, in rulings where the courts use Commis-

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49 See section 7.6.2.

50 See section 5.6.1.

sion guidelines as an aid to interpret and apply the provisions laid down in EU legislative rules and where this is explicitly mentioned in the text of the rulings. The use of Commission guidelines then promotes the transparency effects of those guidance documents: the courts indicate whether the guidelines are expected to be used as a decision-making standard in the implementation of the EU law provisions. Examples of the use of Commission guidelines as an aid to interpret and apply provisions of EU law have been found across the three policy areas and – as previously remarked<sup>51</sup> – mostly relate to interpretative guidelines.

The second way in which the use of the Commission guidelines positively interacts with the promise of transparency, is where the courts require national authorities to be explicit about the use of guidance documents in implementing practices. Examples can be found in rulings that refer to the FMP guidelines. In this area, the Council of State as well as the District Court of The Hague not only use Commission guidelines to interpret provisions of the Citizenship Directive. The Court also uses Commission guidelines to assess the contested decision in light of the guidelines. For instance, in rulings on persistent petty criminality, the courts assess the contested decisions in light of the factors spelled out in the Communication COM(2009)313. Decisions that have not been sufficiently substantiated in light of these factors are being annulled. As a consequence, in these cases the Courts in fact require the minister to be transparent about the role of Commission guidelines as a decision-making aid.

From the above, it follows that Dutch courts promote a transparent role of Commission guidelines in two ways: by using the guidelines as a judicial decision-making aid in a transparent manner; and by requiring the minister to be explicit about the role of Commission guidelines in individualised decisions.

In most rulings, however, the role of Commission guidelines remains invisible and, as a consequence, uncertain. Often, the courts do not clarify whether and how guidelines should be used as criterion or standard when implementing EU law provisions.<sup>52</sup> The invisibility of guidelines may be the consequence of the silent adoption of an interpretation that has already been derived from Commission guidelines in another, previous, ruling. Illustrative are the foraging area rulings, where the Habitat guidelines are explicitly referred to in the first rulings. The follow-up rulings silently adopt the interpretation based on the guidelines, without this becoming visible in the text of the rulings.<sup>53</sup>

There are many reasons that can explain the lack of transparency surrounding the silent use of Commission guidelines in judicial decision-making practices. For instance, guidelines may be considered not relevant

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51 See section 8.4.3.

52 Such as is the case in the *Briels* ruling discussed in section 6.6.1.

53 See section 6.6.2.



for the outcome of the case; the guidelines may simply not be known by the courts; or the guidelines may be inaccessible to the courts (as is the case for many direct payments guidelines). Another possible reason that was mentioned during interviews, is that judges might also purposefully not refer to Commission guidelines. The judges might be uncertain as to the status of the guidelines or have the intention not to attach too much (legal) weight to the guidelines.

These factors, and possibly there are many more, hamper a transparent role for Commission guidelines in judicial decision-making practices. A lack of transparency is problematic for many reasons. It not only jeopardises a role for these guidelines in enhancing the transparency of implementation processes, it also interacts with other promises, increasing the risk of an uncertain and inconsistent role for Commission guidelines in both implementing and judicial decision-making practices.

#### 8.5.4 Promoting a legality-proof use of guidance or challenging the promise of non-bindingness?

The role of national courts is to ensure that Union law is correctly applied and implemented at the national level, whilst the Court of Justice has the final say on the interpretation of EU law. National courts have the power (or duty when no appeal is possible) to refer questions on the interpretation and validity of Union acts, including Commission guidelines, to the Court of Justice.<sup>54</sup> As a consequence, national courts should use the guidance documents in a way that respects the non-legally binding character of these documents and ensure that this promise of non-bindingness is respected when guidance documents are used as an implementation aid.<sup>55</sup> Now, what does the analysis of the use of guidelines tell us about the role of national courts in relation to this fourth promise of guidance documents?

The analysis shows, in the first place, that Dutch courts acknowledge the non-legally binding character of guidance documents of the European Commission. This is the case, most clearly, in the area of direct payments where the Trade and Industry Appeals Tribunal acts as a counterbalancing actor and 'guards' that national authorities do not use guidance as a binding rule. The Tribunal emphasises in several groups of rulings that the Commission's guidelines are not legally binding and that the minister should also act accordingly. This means, according to the Tribunal, that the minister has a responsibility to take account of the facts and circumstances if this is required by EU law, and that the use of the guidelines should be in line with the framework of EU direct payments legislation.<sup>56</sup>

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54 See above section 3.4.4.

55 See section 2.5.7.

56 This follows from the interpretative note rulings and the obvious error rulings discussed in section 5.6.1. See also section 8.3.1.

The non-legally binding character of FMP guidance documents is also explicitly recognised in rulings of the Council of State. In the 2011 rulings the Council of State considers that the guidelines 'have some significance', but also emphasises that the guidelines are not legally binding. In other rulings the Council of State recognises the complementary role of guidance in a more indirect manner. For instance, in the Overflying Natura 200 ruling the Council of State interprets the notion of 'project' in light of judicial guidance given by the Court of Justice. The Council of state thus acknowledges the primacy of the case law of the Court of Justice over Commission guidance.

Even though in several rulings Dutch courts emphasise and acknowledge the non-legally binding character of guidance documents, Dutch courts generally do not take a very critical stance towards the Commission's guidelines. From the analysis a picture emerges that, generally speaking, the courts are inclined to follow the Commission's guidelines. The rulings where the courts deviate from the guidelines (such as the breeding sites rulings<sup>57</sup> or the permanent grassland rulings<sup>58</sup>) seem to be the exception rather than the rule.

Furthermore, the Courts also do not frequently refer questions on the interpretation or validity of guidance documents to the Court of Justice. This is remarkable as in certain cases where guidelines are used as an interpretation aid, it can be questioned whether the highest administrative courts should not have referred a question to the Court of Justice. For instance, does the Council of State take a too lenient approach by applying the Commission guidelines on persistent petty criminality?<sup>59</sup> Is the interpretation derived from Natura 2000 guidelines in the *Blankenburg* ruling on compensatory measures legality-proof?<sup>60</sup> Is the individualised approach as required by the Trade and Industry Appeals Tribunal on the basis of obvious error guidelines indeed in line with the interpretation of this concept as required by the Court of Justice?<sup>61</sup>

In other rulings, the question arises whether the Dutch courts should not have referred a question on the validity of guidance documents. This question arises in particular in cases where Commission guidelines are 'overruled'. The Court then in fact gives a sign as to the possible invalidity of Commission guidelines. An example are the fifty trees rulings in which the Tribunal in fact requires the minister to not apply the fifty trees rule as laid down in the guidelines of the European Commission. The opposite may also be the case, where a national court assumes the validity of Commission guidelines. Illustrative is the ruling of the District Court of The Hague on the protection of the otter. The Species guidelines are considered to be 'a

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57 See section 6.6.2.

58 See section 5.6.4.

59 See section 7.6.2.

60 See section 6.6.1.

61 See section 5.6.1.

source of interpretation' and to be 'within the legal framework' of the Habitats Directive.<sup>62</sup> These judicial practices raise questions from an EU legality perspective. Indeed, by assuming the validity or invalidity of Commission guidance documents, Dutch courts risk not acting in a legality-proof manner, as it is only the Court of Justice who can decide on the validity of Union acts.<sup>63</sup>

The above observations lead to the conclusion that tension exists between the use of Commission guidelines as an interpretation aid and the 'interpretative monopoly' of the Court of Justice.<sup>64</sup> By using guidelines as an interpretation aid, national courts risk challenging the promise of non-bindingness, which in fact is also a promise of non-authoritativeness: the use of guidance must respect the prerogative of the Court of Justice to give the authoritative interpretation of EU law. This research shows that in practice, when using Commission guidelines as an interpretation aid, Dutch courts often take part in the exercise of the interpreting of EU law provisions.<sup>65</sup>

## 8.6 CONCLUSION

The first part of this chapter discerned trends on the basis of the case studies that traces the issuing process of guidance documents and their subsequent roles in the implementing and judicial decision-making process. The analysis reveals a differentiated picture. Within the three policy areas, guidance documents are issued more or less frequently, follow different issuing processes, take different forms and include different types. Once received into the Dutch legal order, the guidance documents take on different roles as an implementation aid. These roles have been identified along the lines of the different types of guidance and different perspectives on their binding force. The analysis also provides insight into the important role of national courts in facilitating, or counterbalancing, the role of guidance documents in implementing practices.

The second part of this chapter analysed to what extent guidance documents are able to fulfil their promises in Dutch implementing practices. This part of the analysis, just as the first part, also shows a differentiated picture. The promises of consistency, predictability and transparency are fulfilled, in any case to a large extent, where guidelines are translated into national regulations, policy rules or adopted as a policy line when making

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62 See section 6.6.2.

63 See section 2.2.2 and CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452, par. 9 (*Foto-Frost v Hauptzollamt Lübeck-Ost*).

64 See on the notion of shared judicial authority between the CJEU and national courts Van Harten 2014.

65 Jans, Prechal & Widdershoven 2015, p. 356 consider an 'open secret' that national courts do not refer all questions to the Court of Justice 'that qualify for a reference'.

individualised decisions. Yet, in several ways, the use of the guidelines risks being inconsistent (for instance due to a cherry picking approach), non-transparent (when the origin of the implementing practices remains mystified) or uncertain (due to the uncertain status of Commission guidelines). From a legality perspective, it is problematic when Commission guidelines are used as a substitute for EU legislative rules or as an aid to search for the limits of Union law.

National courts, again, play an important role when it comes to the ability of guidance documents to fulfil their promises in practice. In a direct or indirect manner, courts could promote the use of guidance in a way that is 'promises-proof'. The courts act as 'guardians of legal principles' for instance by requiring national authorities to substantiate a decision in light of Commission guidelines (thus enhancing transparency), by promoting consistency through a self-binding effect of the guidelines, or by counterbalancing the use of guidelines as though they were binding rules. In other ways, however, national courts do not take on their role as guardian. In judicial practices, guidelines are not always used in a consistent and transparent manner, their status remains largely uncertain and their use is not always 'legality-proof'.

To conclude, although guidelines can have strong, regulatory effect on implementing practices, their use or non-use in implementing as well as in judicial decision-making processes may raise concerns in light of legal principles that govern the implementation of EU law.