Guidance documents of the European Commission in the Dutch legal order

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9 Conclusion

9.1 Summary of research project

With the issuing of guidance documents the European Commission assists the Member States in the implementation of the EU legal framework at the national level. Whilst at the EU level the issuing of guidance documents has become part and parcel of the regulatory landscape, at the national level these non-legally binding documents find their way into national implementing processes as well as in judicial decision-making processes. Despite the growing importance of guidance documents, there is still much to be explored and discovered about their role and effects in the national legal order, as well as about their implications in light of the legal principles governing the implementation of EU law.

The research conducted in this book was guided by two aims. Firstly, this it was driven by the aim of providing insights into governance through guidance: the issuing of these documents at the EU level and their subsequent reception and role at the national level – in the Dutch legal order. The first part of this research provides insights into the roles of guidance documents at different stages of the implementation process, as well as in the role of guidance documents in judicial decision-making processes by national courts.

Secondly, this research was guided by the aim of identifying the implications of the use of guidance documents in light of the legal principles that govern the implementation of EU law. This aim is rooted in the view that despite their informal and non-binding character, the use of guidance documents should still, as much as possible, be in line with legal principles. The use of guidance documents in line with legal principles will enhance the legitimacy of guidance documents to serve as an 'implementation tool' in implementing practices and will contribute to the effectiveness of governance through guidance.

In order to provide insights into the process of governance through guidance, an in-depth analysis of the issuing and use of guidance documents was conducted in three different policy areas: the area of direct payments, the Habitats Directive and the Citizenship Directive. This empirical analysis set out at the EU level. The driving forces behind the issuing of guidance documents were identified, and different 'types' of guidance provisions were discerned in the various forms of guidance documents. It has been shown how the formulation of expectations at the EU level on the use of guidance documents by national authorities and courts, results in various forms of steering pressures to act guidance-proof. Subsequently the

analysis turned to the national level. It explored the roles of guidance documents in Dutch implementing and judicial decision-making processes using two lenses: 1) the different types of guidance and 2) the different perspectives on their binding character. These two lenses are presented below in Table 9-1.

Table 9-1 Two lenses to study the roles of guidance

Lens 1: different types of guidance

1) Guidelines in the form of interpretative rules (interpretative guidance); 2) Guidelines that explain the logic behind or purpose of legislative provisions (explanatory guidance); 3) Guidelines that provide for recommendations on the form of appropriate implementing measures and methods (implementing guidance); 4) Guidelines that provide for recommendations on the form of technical measures (technical guidance) and; 5) Guidelines that provide for good implementing practices developed in the Member States (the dissemination of good practices).

Lens 2: perspective on the binding character of guidance documents

1) The use of guidelines as binding rules or standards; 2) The use of guidelines as a mandatory implementation aid (comply or explain); 3) The use of guidelines as a voluntary implementation aid (cherry picking); 4) No use/ignorance or irrelevance of guidelines.

The second part of this research conducted the analysis of the use of Commission guidance in light of legal principles governing the implementation of EU law. To this end, it explored the effects of the use of guidance documents in light of the promises outlined in the second chapter of this book (section 2.5). These promises are the ideal effects that could be triggered by the use of guidance documents as an implementation tool in order to positively interact with the legal principles of legal certainty, consistency, transparency and legality. It was argued that in order to fulfill these promises, guidelines should be used in a transparent, predictable, consistent manner whilst respecting their non-legally binding character.

The previous chapter identified general trends that can be derived from the case studies in the three policy areas, related to the issuing, role and implications of guidance documents of the European Commission. It found a differentiated picture, with differences in the issuing, form and character of guidance documents, different uses in the national legal order and different implications in light of the four legal principles mentioned above.

This concluding chapter synthesises the findings on the use of Commission guidelines by national authorities and national courts and their ability to exert the ideal effects, or promises, in practice and answers the research question raised in the introduction:

In what ways do authorities and courts in the Netherlands use guidance documents that are issued by the European Commission and what are the implications in light of legal principles governing the implementation of EU law?

Finally, this chapter addresses the final question of this research: what insights does the analysis of the issuing, use and implications of Commission guidance give that should be taken into account when considering the question whether and how to regulate the issuing and use of Commission guidance in the national legal order?

9.2 The use of Commission guidance by national authorities: a gap between promise and practice?

Traces of different types of guidance have been found at different stages of the implementation process. This section explores how the use of different types of guidance relates to the four promises of predictability, transparency, consistency and non-bindingness. It discerns three different interactions: 1) the guidelines – through implementing practices – fulfil (some of) their promises in practice; 2) the use of the guidelines as an implementation aid puts the promises at risk; and 3) the guidelines are not used as an implementation aid and consequently do not fulfil their promises in practice. The first and second situation are not 'mutually exclusive'. It is possible that the use of guidance as an implementation aid in one way contributes to one or more promises, whilst in other ways detracts from the same and/or other promises.

9.2.1 Promoting promises through national implementing practices

In which implementing practices does the use of Commission guidelines positively interact with (some of) the four promises? This is the case where Commission guidelines are used as an aid to draft Dutch implementing rules or where the guidelines are transposed into implementing rules. These may be legally binding rules, the typical Dutch policy rules or a fixed policy line. The guidelines then serve as an aid to clarify the criteria that are used when implementing EU law, and are able to contribute to a more transparent, consistent and predictable implementation of EU law.

The type of guidance that is mostly translated into national rules are the guidelines with an interpretative character. Traces of the use of Commission guidelines as an interpretative rulemaking aid have been found in the three policy areas. In the area of direct payments, interpretative guidelines are used to draft provisions in the Ministerial Regulation that operationalises the EU direct payments regulations as well as provisions in the policy rules that accompany this regulation. Traces of the interpretative guidelines related to the Citizenship Directive feature in the policy rules in the Aliens Circular, and also serve as a basis for policy lines employed by the Immigration and Naturalisation Service. In the area of the Habitats Directive, interpretative guidelines have been translated into guidelines in the explanatory memorandum to the Nature Protection Act.

Implementing guidance and technical guidance may have considerable influence on implementing practices, yet their legal relevance is highly internal: these types of guidance generally find their way into internal guidelines. Nonetheless, in an indirect manner, these types of guidance can also generate an external effect, for instance where they are used for the methodology to investigate marriages of convenience or for the measurement method that is used to measure agricultural parcels. In these cases, when it is made clear whether and how these implementing and technical guidelines are used in implementing practices, then these types of guidance could also contribute to a more transparent, consistent and predictable implementation of EU law. This, however, is more wishful thinking than reality.

Explanatory guidance is generally used as a silent aid to understand the purpose and logic of legislative provisions. Nevertheless, as the example of the explanatory memorandum to the Nature Protection Act shows, this type of guidance can also be used as an aid to clarify and explain the purpose and logic of EU legislative provisions. In this way, the explanatory guidance contributes to transparent implementing processes, at least at the legislative stage.

Commission guidance documents that disseminate good implementing practices leave few traces in Dutch implementing practices. In any case, concrete traces of the use of this type of guidance have not been found in the three policy areas. Two factors have been identified that can explain the absence of traces of good implementing practices. First, Dutch officials indicated that good practices are considered to have the least normative force as this type of guidance does not represent how EU legislative provisions *should* be implemented according to the Commission. Second, in the Netherlands, practices or methods to implement legally binding Union rules have often been put in place or developed prior to the issuing of good practices by the Commission. The dissemination of good practices then comes too late. In any case, due to the limited presence of this type of guidance in implementing practices, there is also little interaction between these good practices and the promises they could potentially fulfil.

9.2.2 Using Commission guidance whilst putting the promises at risk

The use of Commission guidelines may also, or even at the same time, negatively interact with the promises identified in the introduction of this research. The analysis revealed several risks related to the use of Commission guidelines that hamper the fulfilment of the four promises of guidance in practice. Risks arise most clearly when national authorities use the Commission's interpretative guidelines as interpretation aid, as this type of guidance affects the rights and obligations of EU citizens most directly through implementing measures.

Firstly, the use of interpretative Commission guidelines as a substitute for legally binding Union rules, could challenge the promise of non-

bindingness. This occurs, for instance, where interpretative guidelines are used as a basis for provisions in implementing legislation, policy rules and/or individualised decisions that detract from or go beyond provisions in EU directives or regulations. This risk has been observed most clearly in relation to interpretative direct payments guidelines that in practice take the role of *de facto* binding rules. The Commission guidelines are used, for instance, as a basis to draft binding provisions in the Dutch Ministerial Regulation on direct payments. This, moreover, might lead to 'binding interpretations of EU law' which is not permitted by the Court of Justice. Legality concerns also arise in relation to the interpretative FMP guidelines that risk being used to seek the limits of the EU legislative provisions in the Citizenship Directive.

Secondly, when used in an inconsistent manner, the use of Commission guidelines could also endanger the promise of guidelines to promote consistency in implementing practices. The promise of consistency is challenged, for instance, where the use of Commission guidelines is guided by a cherry picking approach whilst not being translated into binding rules or policy rules. This risk has manifested itself in relation to the FMP guidelines: the application of the interpretative and implementing guidelines related to the investigation of marriages of convenience is a concrete example. Another factor that may jeopardise the consistency effect, is where the Commission guidelines or the Commission's interpretation of guidelines is frequently changed. This is the case, in particular, with the direct payments guidelines that are generally strictly followed and 'instantly' translated into national rules or practices.

Thirdly, the promise of Commission guidelines to enhance predictability in implementing practices is hampered by the uncertain status of Commission guidelines. The use of Commission guidance in Dutch implementing practices is not governed by a clear approach as to their binding effect. Instead, as the analysis has revealed, their use is guided by different approaches reflecting different perspectives on their binding character. Direct payments guidelines tend to be used as *de facto* binding rules and implementing standards. The interpretative Habitat guidelines seem to be governed, predominantly, by a perspective of authoritativeness. In the area of free movement of persons, the guidelines are used as a voluntary interpretation aid and guided by a cherry picking approach. The uncertainty of the status of guidelines is problematic even where the guidelines are transposed into Dutch policy rules or legislation. Indeed, when these rules need to be interpreted or assessed, it must be clear what the status is of these guidelines and whether national authorities – to any extent – are bound to take these guidelines into account.

Finally, and closely related to the other promises is the promise of transparency: it must be clear whether and how guidelines are used in implementing practices. The analysis has shown, however, that the use of Commission guidelines in the implementation process is surrounded by secrecy rather than by transparency. This is due to the fact that the use

of the guidelines often remains invisible to the outside world. Generally speaking, the use of guidelines is not made explicit in the text of implementing legislation or policy rules, nor does the use of guidelines transpire from the explanatory notes to these rules, individualised decisions or other implementing practices. An exception is the explanatory memorandum to the Nature Protection Act that is explicit about the use of Commission guidelines to give further guidance on the interpretation of the Habitat provisions.

9.2.3 No role for Commission guidance: the promises left unfulfilled

The above section outlined the situations where Commission guidelines are used, or at least taken into account, when implementing EU legislative provisions. The analysis of the use of Commission guidelines also reveals that – in many situations – Commission guidelines may remain unused in the sense that the national authorities consider the guidelines not to have any relevance as an implementation tool. These cases are of course hard to find, as this requires insight into the content of Commission guidelines and corresponding implementing practices.

Nevertheless, some general remarks can be made about reasons why guidelines are not used as an implementation tool. First, the non-use of guidance may be the result of the fact that the guidelines do not provide guidance on the question concerned. Second, the Commission guidelines may not be given a role as an implementation aid in the situation where they are outdated due to more recent case law of the Court of Justice. Third, Commission guidelines may be considered superfluous where they only 'repeat' what is already stated in the law – this risk arises in particular for explanatory guidance. And, fourth, the officials involved in implementing practices may simply not know of the existence of the guidelines; a risk that arises for instance when Commission guidelines are numerous or when guidelines are difficult to find.

9.3 National courts: bridging the gaps between promises and practice?

Traces of the use of guidance documents not only feature in implementing practices. Dutch courts also use the Commission guidelines as a judicial decision-making aid. The guidelines help national courts fulfil their role as guardians of the EU legal order, meaning that the courts need to ensure that EU legislative rules are implemented in line with the requirements and principles laid down in EU law. The question that arises is whether the way in which national courts use Commission guidelines contributes to the promises of these guidelines in implementing practices. Again, three different interactions can be discerned between the (non) use of guidelines by national courts and the promises of these guidelines.

9.3.1 Guidelines as a judicial decision-making aid: promoting promises

The first interaction establishes a positive relationship between the use of guidance documents in judicial decision-making practices and the promises of guidance documents. This positive interaction can be discerned in three situations, namely by the use of guidance as an interpretation aid, by the use of guidance as an assessment standard for appropriate implementing practices and finally, by giving instructions to national authorities on how to use Commission guidelines.

Guidelines as a judicial interpretation aid

The analysis of the three policy areas has shown that interpretative guidelines in particular can come to be used as a judicial interpretation aid. Where national courts use these guidelines as an interpretation aid in an explicit, transparent and consistent way, the courts clarify that the guidelines serve as a criterion for the interpretation of EU law provisions.

Interpretative guidelines that have a highly detailed character are most apt to serve as a judicial interpretation and to leave traces in the text of the rulings. This is illustrated by the detailed interpretative guidelines laid down in the Species guidance document that frequently feature in rulings of the Council of State as well as in rulings of lower Dutch courts. In contrast, interpretative guidelines with a less detailed interpretative character or explanatory guidelines are less likely to leave explicit traces as a judicial interpretation aid. These guidelines are less apt to provide for concrete decision-making criteria. This is the case, for instance, for the guidelines laid down in the Managing Natura 2000 guidance document related to Article 6 of the Habitats Directive. This document has a highly explanatory nature and although it is used by national courts to understand the logic behind Article 6, it is seldom explicitly referred to in the rulings of Dutch courts. This does not mean that explanatory guidance never leaves visible traces in judicial decision-making practice. An example is the extensive references that are made to the explanatory guidelines to interpret the active farmer provision.

When used as an interpretation aid, Commission guidelines become embedded in the judicial interpretation of Union acts in light of which the lawfulness of implementing practices is assessed. Consequently, and indirectly, the use of guidance as a judicial interpretation aid might also resonate in implementing practices of national authorities. What is more, by using the guidelines as a judicial interpretation aid, the courts might encourage national authorities to take account of Commission guidelines when implementing EU law. In this way, the courts could promote a role for guidance in implementing practices, enabling the guidelines to contribute to more consistent, transparent and predictable implementing practices.

Guidance as an assessment standard for appropriate implementing practices

The above uses of Commission guidelines relate to interpretative and explanatory guidelines. The other types of guidance – implementing guidance, technical guidelines and good practices – could come to be used as an aid or standard to assess whether the national authority has followed an appropriate or acceptable methodology when implementing EU legislative provisions. The Judicial Division of the Council of State, for instance, uses Commission implementing guidelines as a standard to assess the lawfulness of the methodology when investigating marriages of convenience. The Trade and Industry Appeals Tribunal, in contrast, does not use implementing or technical guidelines as an assessment standard (at least no indications have been found of this). The JRC rulings of the Tribunal only give a glimpse of the dissemination of good practices. In these rulings, the Tribunal refers to guidance of the Joint Research Centre stating that a two-dimensional measurement method is used by other Member States, and uses this as a supportive argument for the conclusion that this two-dimensional measurement method is appropriate and that the contested decision can therefore be upheld.

When assessing the appropriateness of implementing practices, national courts have a different role: they do not give interpretative rules but assess whether the national authorities have followed a method that remains within the limits set by the EU legislative rules. By using the guidelines as an assessment aid or standard, the courts should make clear or confirm whether the guidelines provide for an appropriate method that could or should be followed in implementing practices. This, as with interpretative guidelines, promotes and clarifies the role of these guidelines in judicial practices and promotes a transparent, consistent and predictable use of these guidelines in implementing practices.

Giving instructions to national authorities

Furthermore, national courts promote the guidelines' promises in a more direct manner where they require national authorities to use guidelines in such a way that they exert their ideal effects in practice. This is the case where courts require national authorities to use the interpretative guidelines in a consistent manner (promise of consistency); where national authorities are required to substantiate how they use Commission's guidelines (promise of transparency); where courts clarify how national authorities could or should use guidelines as an interpretation aid (promise of predictability); or when the courts require national authorities to take account of and act in line with underlying legislative provisions (promise of non-bindingness).

Examples of such cases have been found in the analysis of the rulings that refer to the guidelines related to the Citizenship Directive. Firstly, the District Court of The Hague and the Council of State require national

authorities to substantiate decisions in light of the guidelines on persistent petty criminality, thus enhancing the promise of transparency. Secondly, these courts also promote a consistent use of the guidelines in implementing practices by recognising a certain self-binding effect of the FMP guidelines on the State Secretary. Thirdly the Council of State clarifies the 'legal status' of the Commission's guidelines, at least to a certain extent. The guidelines are considered to serve as an interpretation aid and to have 'some significance'. Yet, it remains uncertain whether this means that as a general rule, the guidelines have to be taken into account during implementing practices. Finally, the Trade and Industry Appeals Tribunal most clearly 'guards' that Commission's direct payment guidelines are used in a way that respects their non-legally binding character. The Tribunal requires the responsible minister to not use the guidelines as a binding instruction, and to stay within the legal limits provided by the EU legislative rules.

9.3.2 Guidelines in judicial practice: promises at risk

Dutch courts not only use guidelines in a way that is transparent, predictable, consistent and legality-proof. The analysis also reveals ways in which the use of Commission guidelines as a judicial decision-making aid detracts from the guidelines' promises.

The first risk is that Dutch courts do not always use Commission guidelines in a transparent manner. Various cases have been found where the courts are not transparent about the role the guidelines play or have played in the judicial decision-making process. Illustrative is the 'silent' use of the Managing Natura 2000 guidelines to the Habitats Directive. These guidelines are only in exceptional cases referred to in the text of the rulings of Dutch courts. Yet, in practice, the guidelines play an important but silent role as a judicial interpretation aid, as was indicated during interviews with officials and State Councillors of the Council of State. What is more, problems of transparency also, obviously, arise if Commission guidelines that have not been published are used as a decision-making aid. In this case, the guidelines provide for decision-making criteria of which their source however cannot be retraced.

The second risk that has been observed in the analysis of rulings of Dutch courts, is that Commission guidelines could be used in an inconsistent manner. Due to their non-legally binding character, courts are not 'bound' to take the guidelines into account, nor to explicitly refer to the guidelines. As a consequence, the risk arises that a specific guidance provision is used differently in cases that deal with similar questions. An example is provided by the divergent use of the Species guidelines in a civil case on the measures to be taken by the Dutch State for the protection of the Dutch otter. In first instance, the District Court of The Hague refers to the Species guidelines extensively in order to determine the scope of the obligation to set up a system of Species protection. In contrast, the ruling in appeal in the same case issued by the Court of Appeal of The Hague, does

not even mention the guidelines, nor does the ruling give the guidelines an explicit role as an interpretation aid.

Third, the rulings of Dutch courts analysed in the context of this research do not depict a clear status or role of Commission guidelines in implementing and judicial decision-making practices. Although the courts have given some indications as to the role of Commission guidelines, such as that the guidelines are not legally binding and that the guidelines have 'some significance', the courts first and foremost leave questions open. It remains unclear whether and to what extent the courts regard themselves bound by the guidelines of the European Commission. Furthermore, the courts also do not shed clear light on whether the guidelines are binding on national authorities. From interviews with Councillors of State it follows that in practice, the guidelines are considered to be an authoritative interpretation aid that in principle should be taken into account, and from which deviation is only possible when reasons are given for doing so. This 'comply-or-explain' approach applies, in their view, to both national authorities and courts. Nonetheless, whether this perspective is shared by other (lower) courts can be doubted. Instead, it is more likely that the use and perception of the binding force of Commission guidelines differs not only between courts but also between judges.

Last but not least, the use of Commission guidelines as a judicial decision-making aid also inevitably raises questions of legality – challenging the promise of non-bindingness of Commission guidelines. Formally, national courts only apply EU law provisions and the Court of Justice has the final say on the interpretation of EU law. In practice, national courts are also involved in the interpretation of EU law and Commission guidelines provide a helpful interpretation aid for that. This might, however, lead to an interpretation that is not evidently in line with the case law of the Court of Justice, or to an interpretation on a question that the Court has not yet clarified. What is more, the findings in this research indicate that in practice the use of Commission guidelines as an interpretation aid might be more appealing than making a reference to the Court of Justice.

9.3.3 No role for guidelines in judicial practice: increasing the gap

The above two sections outline uses of Commission guidelines where the promises are positively or negatively affected. There is, however, a third scenario. Indeed, in many rulings Commission guidelines are not given a role, or at least not explicitly, in the judicial decision- making process whilst the court adjudicates on a question for which guidance has been issued. These rulings are difficult to find. Indeed: even when guidelines are mentioned in the text of a ruling, the guidelines might still have played a role as a judicial decision-making aid. An example is the *Briels* ruling of the Judicial Division of the Council of State. In this ruling, the Council of State reflects on the possibility of including mitigation measures – a concept that has been introduced in Commission guidance documents. There is no

explicit role for Commission guidelines in this ruling. This, however, does not mean that the Managing Natura guidance documents have not been of any relevance as a judicial decision-making aid.

Obviously, when guidance documents are not given a visible role as judicial decision- making aid, the guidelines also do not fulfil a role in rendering the judicial decision-making process more transparent, consistent or predictable. Instead, it is more likely that no use, or a silent use of Commission guidelines raises even more questions on the status of the guidelines.

The possible reasons for national courts to disregard or ignore Commission guidelines are manifold. The courts might not be familiar with the relevant guidance documents or hesitant in giving a role to these non-binding documents in judicial practice. Furthermore, national courts might not have access to the relevant guidance documents. This is the case in the area of direct payments, where many Commission guidelines are made available only to national authorities, but not to the general public or national courts. Thirdly, guidelines could be given no role as a judicial decision-making aid where they have become outdated and are overruled by the case law of the Court of Justice (see for instance the Overflying Natura 2000 ruling)[1] or where they have become overruled by case law of a national highest administrative court (as is the case in the rulings on breeding sites and resting places of certain bird species).[2]

9.4 Three answers to the research question

The above two sections present a synthesis of the findings on the relationship between the use of Commission guidelines in Dutch implementing and judicial practices and the promises of Commission guidance formulated in section 2.5. When combining the insights for national authorities and national courts, three different interactions can be discerned that each provide an answer to the central question in this research.

1) **A positive interaction** between guidelines and legal principles**:** National authorities and/or national courts use guidelines as an implementation aid or as a judicial decision-making in a way that serves the promises of these guidelines and where, consequently, there is a positive interaction with legal principles.
   - National authorities: Commission guidelines positively interact with their promises where the guidelines, indirectly or directly, find their way into national implementing rules or guidelines. These rules can take various forms, such as legally binding rules (e.g. a Ministerial Regulation), policy rules or even a line of conduct. In this

1 See section 6.6.1.
2 See section 6.6.2.

situation, Commission guidelines indirectly exert consistency, transparency and predictability through their effects in the national rulemaking practices. The type of guidance that mostly finds its way into such rules are the Commission guidelines with an interpretative character.

- National courts: When assessing implementing practices, national courts contribute to the fulfilment of the promises of Commission guidelines in three ways: 1) by clarifying the role of guidelines when interpreting EU law provisions; 2) by clarifying the role of guidelines when assessing the appropriateness of implementing practices; and 3) by being clear and explicit about how national authorities are expected to use guidelines in a way that is in line with legal principles.

2) **A negative interaction** between guidelines and legal principles: national authorities and national courts use Commission guidelines as an implementation aid or as a judicial decision-making aid in a way that detracts from, rather than that contributes to, the fulfilment of guidance's promises, resulting in a negative interaction with legal principles. The negative interaction between the use of Commission guidance and its promises may occur in situations even where the guidelines have been laid down in national rulemaking practices. Thus, the positive and negative interaction of guidelines with legal principles is not mutually exclusive but may occur simultaneously.
   - National authorities: The use of guidelines by national authorities negatively interacts with the promises of these guidelines in the situation where: 1) the use of the guidelines is silent or invisible or the content of the guidelines is inaccessible; 2) the guidelines are not used consistently; 3) the role and status of the guidelines remains uncertain; and 4) the use of the guidelines does not respect or goes beyond the underlying EU legislative provisions.
   - National courts: When guidelines come to be used in judicial decision-making practices, problems in light of legal principles may arise in the situation where: 1) the Courts use guidelines in an invisible manner or the content of the guidelines is inaccessible; 2) guidelines are used in an inconsistent manner; 3) courts remain silent about or do not clarify the status of guidance; and 4) the guidelines are used in a way that detracts from or goes beyond the underlying EU legislative provisions and/or the case law of the Court of Justice.

3) **No interaction** between guidelines and legal principles. The guidelines are not used in implementing practices and/or in judicial practices and, consequently, do not fulfil their promises in practice: there is no interaction with legal principles.
   - National authorities: In implementing practices, Commission guidelines may be left unapplied for various reasons such as: 1) there is

not a good fit between the guidelines and national implementing practices; 2) the guidelines remain unnoticed (for instance due to limited resources and/or the high number of the guidelines); 3) the guidelines have become outdated or overruled by the case law of the EU Court of Justice or of a national court.

- National courts: The non-use of guidelines by national courts also has various, mostly similar reasons: 1) The guidelines could be inaccessible for national courts (guidelines may only be accessible for the national authorities); 2) the guidelines have remained unnoticed by the courts; 3) the guidelines have become outdated or overruled by case law of the Court of Justice or by the case law of national courts.

These three interactions each give a different answer to the research question. Together, the interactions show that at the national level, in implementing practices as well as in judicial practices, the use of Commission guidelines might give rise to problems in light of legal principles that govern the implementation of EU law. The ability of guidelines to fulfil their promises at the national level is not guaranteed: at the national level there is a risk that guidance documents will start taking on a life of their own.

The various uses and roles of guidance documents in the Dutch legal order that lead to different implications in light of legal principles, are the consequence of the unregulated character of the issuing and use of guidance documents which, in turn, is a consequence of informality. The use and role of guidance documents is governed and shaped by contextual factors, both at the EU level and at the national level. Whether and how guidance documents are used depends on factors such as the type of guidance, the steering pressures formulated at the EU level, the characteristics of the policy areas, the legal principles and administrative culture at the national level, and possibly the (legal) background of officials and judges who eventually decide whether or not to use the guidance documents.

9.5 The legitimacy of governance through guidance at risk

This research has shed light on the consequences of the issuing of guidance documents in the Dutch legal order. As concluded above, it is found that in the three policy areas included in this research, guidance documents give rise to problems in light of legal principles that govern the implementation of EU law. The use of guidance documents is not governed by a coherent approach or common perspective on the role and status of guidance documents. This leads to an unpredictable and inconsistent use of guidance documents, as well as a lack of transparency – the use of guidance documents often remains invisible to the outside world. Last but not least, in practice guidance documents could take over the role of EU hard law where the documents serve as a basis for implementing decisions.

These findings show that the discourse and belief concerning the positive effects that guidance documents are considered to generate vis-à-vis legal principles may not meet reality. The various and unpredictable uses of guidelines at the national level jeopardise legal principles and affect the legitimacy of guidance documents as a governance tool. Indeed, as argued in this research, despite the informal and non-binding character of guidance documents it is of utmost importance that the use of guidance documents respects and even promotes legal principles in implementation processes. By jeopardising instead of serving legal principles the issuing and use of guidance documents challenges the rule of law that is so fundamental to the European Union legal order.

Despite these risks that the issuing of guidance documents entail, it is expected that in the coming years guidance documents will continue to play an important role in implementing practices as well as in judicial decision-making processes. The issuing of guidance documents is still on the rise, which is witnessed by new forms of guidance such as 'implementation plans' introduced in the better regulation guidelines.[3] Moreover, in view of the importance the Commission attaches to 'good implementation on the ground',[4] guidance documents are likely to remain a prominent compliance tool of the Commission services.

In light of the expected increasing importance of guidance documents, it is unlikely that the problems arising in the national legal order will ebb away. Instead, the problems and questions that surround the issuing and use of guidance are likely to become more pertinent in the coming years. Therefore, it is time to rethink governance through guidance and to envisage possibilities on how to regulate governance through guidance so that it is actually able to exert the effects that serve legal principles.

When thinking about the possibilities to regulate guidance, it needs to be kept in mind that measures that regulate the issuing and use of guidance documents, to a certain extent detract from the informal character of guidance documents. This might affect the effectiveness of governance through guidance. Indeed, the features of informality, as has been argued in this research, enable guidance documents to effectively address implementing problems and questions at the national level, thus promoting smooth and effective implementation processes. As stated in the introduction, the ideal situation to aim for is where there is room for informality whilst legal principles are respected. In reality, however, choices need to be made and the question is where the right balance can be found.

This 'balance' is currently tilted to one side: the issuing and use of guidance documents is governed by the logic of giving room to features of informality, flexibility and effectiveness. This leaves room for Commission guidelines to not play by the rules and principles imposed by the rule

3 SWD(2017)350 final, p. 35.
4 SWD(2017)350 final, p. 33.

of law. From the viewpoint taken in this research – namely that the use of guidance should respect legal principles governing the implementation of EU law – the problems that the Commission's informal rules generate in the national legal order cannot be downplayed or denied. The findings point to the conclusion that a new balance must be found, that a more 'principled approach' to the issuing and use of guidance documents is needed. The next section outlines what routes could contribute to such a principled approach by bringing the use of guidance in line with legal principles.

9.6 Towards a principled approach: 'Guidance for Guidance'?

9.6.1 Giving guidance a legal basis: too much formalisation?

The first possible route is to clarify the legal status of guidance documents in EU primary or secondary legislation. These legislative rules could also regulate the issuing process of guidance documents, prescribe what form guidance documents should take and provide for an obligation to publish Commission guidelines. The advantage of giving Commission guidance an explicit basis in EU law is that it would enhance transparency, clarity and certainty related to the issuing and use of Commission guidance documents for which the legal basis is provided. This could take away many of the problems related to uncertainty that are currently experienced at the national level.

The Dutch policy rules that have been given a basis in the Dutch GALA could serve as a source of inspiration.[5] These policy rules, as stated in the GALA, should be published, and in principle followed by national authorities unless exceptional circumstances demand otherwise. However, the rules concerning these policy rules could not be 'copy-pasted' to the EU level. The Dutch policy rules are issued by national authorities in order to fulfil their own competences, whereas the Commission guidelines are addressed to national authorities in the Member States. When formalising Commission guidelines, account should be taken of the particularities of the system of shared administration.

Furthermore, it needs to be kept in mind that regulating the issuing process and defining the legal effects of Commission guidelines in law, detracts from the features of informality of guidance documents. This would mean that the guidelines lose some of their advantages related to the features of informality that not only make guidance documents a flexible implementation tool, but also an appealing and acceptable implementation tool for both the European Commission and the Member States. Therefore,

5 See for an overview of comparative law insights on soft administrative rule-making that could inspire regulatory action at the EU level for soft-rulemaking of the Commission Senden & Van den Brink 2012, p. 73-77.

giving Commission guidelines a legal basis in the Treaties risks contributing to an even more, in the words of Christiansen, Føllesdal and Piattoni, 'complex and cumbersome' EU regulatory system.[6]

Even with a legal basis for Commission guidelines, the need for room for informality remains. The Commission and the Member States might find other ways to issue informal rules and guidance that do not fall within the regulated category of guidance in the EU Treaties. Therefore, in my view, it seems appropriate to look for other, softer approaches to regulate the issuing and use of guidance documents. These regulatory measures could take the form of 'guidance for guidance' for the Commission services, national authorities as well as national courts.

9.6.2 The Commission: guidelines for guidance and managing EU expectations

The 'guidance for guidance' could, in the first place, encompass guidelines adopted by the Commission for the issuing and use of guidance documents by the various Directorate Generals.

A first step in the direction of 'guidelines for guidance' has already been taken. In 2017, the Commission included in the better regulation guidelines a toolbox on guidelines for the issuing of 'interpretative guidance documents' by the Commission services.[7] Documents that give a 'legal interpretation of significant importance that result in new or modified policy developments' need to be endorsed by the College of Commissioners, take the form of a Communication or Notice and should be published in the C series of the Official Journal. Guidance documents that are part of the Commission's 'normal administrative operations' do not fall within the scope of this toolbox.[8]

With this toolbox, a first step towards a more formalised approach on the issuing of guidance is being taken. The toolbox creates a distinction between the more formal guidance documents in the form of a Communication or Notice and other guidance documents. This research has shown, however, that the most 'informal' forms of guidance, such as letters and notes, can create problems and questions in practice too. In order to address these problems, there is a need for guidelines that spell out principles for the adoption of all forms of guidance.

The better regulation toolbox could therefore be complemented with guidelines that promote the use of Commission guidelines in line with the promises formulated in this research. These guidelines could spell out some principles for the drafting and issuing of guidance documents in a way that promotes a transparent, consistent, predictable and legality-proof use of

6 Christiansen, Follesdal & Piattoni 2003, p. 5. as also cited in the introduction of this book.
7 SWD(2017)350 final, p. 43.
8 Better Regulation Toolbox accompanying SWD(2017)350, p. 295/296.

the guidelines at the national level. Table 9-2 proposes some guidelines that could be included in the 'guide for guidance'.

This research has also shown that the role that Commission guidelines play as a monitoring tool have consequences for the way in which guidelines are used and perceived at the national level. Therefore, the second part of the guide for guidance could manage expectations of the Member States by clarifying how the Commission services use the different types of guidelines when monitoring the implementation of EU law in the Member States. Table 9-3 proposes a template for clarifying the roles of guidance documents as a monitoring tool.

Table 9-2 Better regulation principles for the issuing of guidance

***Promis*e**	***Guidelines***
Predictability	Guidance documents are drafted in a clear, not too complex, manner and clarify what types of guidance are included in the guidance documents. It is clarified where the guidance documents only summarise or give an overview of EU legislative provisions (and thus takes the form of explanatory guidance).
Consistency	A frequent change or revision of the guidelines should be avoided as this could give rise to problems of consistency at the national level. The guidance given in the document is consistent with other guidance documents (it is to be avoided that guidance documents give contradictory information on the implementation of legislative provisions).
Transparency	The guidelines should be published and be accessible to national authorities, national courts as well as to EU citizens. In the case of a large number of guidance documents, a (thematic) classification of the documents could enhance their accessibility.
EU legality-proof	The introduction of the guidance document clarifies that the document is not legally binding and that the guidelines of the Commission do not replace the authoritative interpretation given by the EU Court of Justice. When drafting the guidelines account is taken of the underlying EU legislative provisions and relevant case law of the CJEU, so as to prevent legality questions and problems. The purpose and the role of Commission guidance should not go beyond clarifying the interpretation of legal provisions. Guidance documents cannot be used to impose new obligations on Member States that have not been provided for by the Treaty or by secondary legislation.

Table 9-3 Types and EU expectations

Type of guidance	***The use of guidance documents in monitoring practices of the European Commission***
Interpretative guidance	Serves as an interpretation aid when monitoring implementing practices as it represents the Commission's view as to how EU law is to be interpreted, it is not used as a substitute for EU legislative rules.
Explanatory guidance	Serves as an explanatory aid when monitoring implementing practices as it represents the Commission's view as to how EU law is to be explained.
Implementing guidance	Gives recommendations on how requirements in EU legislative provisions can be best achieved in practice. Member States can choose an alternative path, provided that the legislative requirements are met.
Technical guidance	Provides for the best technical modalities; whilst leaving it to the Member States whether to opt for these technical modalities or not.
Dissemination of good practices	Gives an overview of good practices developed in the Member States, whilst leaving to the Member States whether to choose for a good practice or not.

9.6.3 The Court of Justice: clarifying guidance's legal status

As the highest EU Court, the Court of Justice provides the authoritative interpretation of guidance documents. As discussed in this research, in several rulings the Court elaborates on the legal effects of guidance documents for national authorities and national courts. Especially from a perspective of legal certainty, it is desirable that the Court of Justice further clarifies the status of guidance documents for national authorities and courts. The meaning and scope of the *Grimaldi* case law, in particular, could be further defined. What does the 'formula' mean that national courts are bound to take recommendations into consideration? Does the *Grimaldi* case law only encompass recommendations, or also other forms of guidance documents?

In brief, the Court of Justice could provide the national authorities and national courts with further judicial guidance on the use of Commission guidance documents. At the same time, however, it needs to be kept in mind that the Court of Justice is not the EU legislature. The Court of Justice has to respect the room for discretion of the Member States and must act within the limits set by the EU legislation.

9.6.4 National authorities: taking a principled approach

The main actors that give shape to the role of guidance documents in practice are the national authorities. In order to promote a principled use of guidance documents by national authorities (both legislative and administrative authorities), a 'guide for guidance' could outline principles and rules to be taken into account. Table 9-4 provides an overview of rules that could be included in this guide for guidance.

Table 9-4 Guidelines for a principled use of guidance by national authorities

Promise	***Guidelines***
Predictability	The guidelines of the European Commission are used in a predictable manner. The transposition of Commission guidelines into national implementing legislation, policy rules or other guidelines contributes to a predictable implementation of EU law. The role of guidelines in implementation processes is clarified. E.g. the guidelines could be used following the practice of 'comply-or-explain'.
Consistency	The guidelines of the European Commission are used in a consistent manner in individual cases. The transposition of Commission guidelines into national implementing legislation, policy rules or other guidelines contributes to a consistent implementation of EU law. Frequent changes of national legislation, policy rules or guidelines as a consequence of changes of Commission guidelines should be avoided.
Transparency	The guidelines of the European Commission are used in a transparent manner. This transparency requirement entails being explicit about the role that guidelines play in: – Legislative practices: Include explicit references in the text of the legislative rule or in the explanatory memorandum when guidelines are taken into account for drafting implementing legislation (formal legislation as well as delegated legislation or decentralised legislation). – Policy rules and other guidelines: Include explicit references in the text of the policy rule/guidelines or in explanatory notes when guidelines are taken into account for drafting the policy rules/guidelines. – Individualised decisions: Include explicit references in the text of the individualised decision when the guidelines are taken into account in the decision-making process, and/or explain a deviation from Commission guidelines. The webpage of the competent authority publishes the guidelines of the Commission or includes a link to the website where the guidelines are published. (If the guidelines are not published this affects the transparency of the implementation process).
EU Legality-proof	The guidelines of the Commission are used in a way that is in line with underlying EU legislative provisions as well as the case law of the CJEU. The guidelines of the Commission are not to be followed blindly; the implementation of Union law is the responsibility of the Member States (Article 291 TFEU). Account should be taken of the rules laid down in secondary legislation as well as judgments of the Court of Justice that prescribe how national authorities should use guidelines of the European Commission. Guidelines of the European Commission cannot be used to adopt legislative provisions that give a binding interpretation of EU law.

9.6.5 National courts as guardians of legal principles

This research shows that Dutch courts play an important role in shaping the role of guidance documents in implementation processes. Within the limits of their competences, national courts should take their regulatory role seriously. A 'guide to a principled use of Commission guidance by national courts' could spell out guidelines to be taken into account by national courts when using guidance documents of the European Commission. Table 9-5 gives guidelines for such a principled used of guidance documents by national courts.

Table 9-5 A principled use of guidance by national courts

Promise	***Guidelines***
Predictability	National courts use Commission guidance in a predictable manner as an aid for the interpretation and application of EU legislative provisions. The courts clarify the approach or perspective as to the (binding) legal effects of guidance documents in line with the case law of the CJEU. The courts make clear whether national authorities are expected to take account of Commission guidelines in regulatory and or decision-making practices. When uncertainty arises as to the legal status of Commission guidelines, courts refer questions to the CJEU. Nonetheless, even within the 'boundaries' of the judicial guidance given by the CJEU, national courts still play an important role in clarifying the status of guidelines in proceedings before national courts.
Consistency	National courts use Commission guidance in a consistent manner for the interpretation and application of EU legislative provisions. he courts ensure that national authorities use guidelines consistently, recognising a self-binding effect of the guidelines on the national authorities through general principles of law (e.g. legitimate expectations, equality, legal certainty).
Transparency	National courts use guidance in a transparent manner. The courts are more transparent about the role guidelines play in judicial decision-making processes and are explicit about a deviation from the guidelines. Within the limits of their competences, national courts assess whether national authorities have used guidance documents in a sufficiently transparent manner.
EU legality proof	National courts use guidance documents as an aid, not a substitute, to interpret and apply the EU legislative rules. The courts take a (positive) critical approach towards Commission guidelines and refer questions to the Court of Justice on the interpretation of EU legislative provisions. The courts ensure that the guidelines are not used by national authorities as though they were binding rules or lead to decisions that go beyond the requirements laid down in EU law.

9.6.6 Further research

The above sections outline various routes to bring the use of guidance documents at the national level in line with legal principles that govern the implementation of EU law. These routes and recommendations are based on the findings in this research which explored the use of guidance documents in three policy areas and in one Member State. These findings show that the use of guidance documents in Dutch implementing and judicial decision-making practices gives rise to problems in light of legal principles governing the implementation of EU law.

The findings in this research not only reveal the problematic consequences that the abundance of guidance documents may have; it also points out that further research on the role and effects of guidance documents is needed. The question arises, firstly, whether a similar 'varied' use of guidance documents can be observed in other Member States, and whether in those Member States similar risks arise in light of legal principles. Secondly, this research explored the use of 'unregulated guidance' in the sense that it studied guidance documents that were issued 'spontaneously' by the European Commission. For those guidance documents, EU secondary legislation does not provide a specific obligation for the Commission to adopt guidance documents and/or for national authorities to take the Commission's documents into account. It would be interesting to explore the role and consequences of guidance documents that in contrast to the documents studied in this research, have a basis in secondary legislation. What is the role of those 'regulated' guidance documents in national implementing practices? Thirdly, guidelines are issued not only by the Commission services but also by agencies of the European Commission, such as the guidelines issued by the European Securities and Markets Authority. These guidelines may also come to play an important role in implementing practices,[9] and should therefore also be taken into account when further exploring how to regulate the issuing and use of guidance documents.

Furthermore, not only could research be conducted on other forms of guidance and on the use of guidance in other Member States, the scope of the research could also be expanded. Indeed, the issuing of guidance documents fits in a broader trend in which the European Commission more actively assists the competent authorities in implementing Union law. This assistance is provided not only through written guidance documents but also in the form of other practices. The better regulation toolbox outlines a number of 'support actions', such as the organisation of bilateral or multilateral meetings with Member States, training for national officials and the setting up of networks to exchange information on implementing practices.[10] This development raises the question whether and how these forms of 'unwritten guidance' affect the implementation of Union law.

9 See Van Rijsbergen 2018, p. 154-181.
10 SWD(2017)350 final, p. 281.

Do they contribute to an effective and 'principled' implementation of Union law?

In brief, in the coming years informality is likely to continue to play an important role in the system of shared administration. The need to explore the role and implications of informality is increasingly topical, whilst the question remains where the right balance between informality and legality can be found.