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Guidance documents of the European Commission in the Dutch legal order

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Annex

The main aim of this research is to explore the use of guidance documents by authorities and courts in the Netherlands, and to assess the implications in light of legal principles. In order to be able to identify the use of guidance documents at the different stages of the implementation process, an empirical approach is taken. The following sections provide a more detailed account of the study that was conducted to search for traces of the use of Commission guidance documents in the three policy areas included in this research.

Section 1.1 elaborates on the empirical approach taken in this study and on how various obstacles and challenges were addressed. Section 1.2 provides an insight into the search for explicit references in implementing legislation and policy rules. Section 1.3 outlines the search for explicit references of guidance documents in rulings of Dutch courts. Section 1.4 provides an overview of the formal interviews that were conducted and that provided additional insights into the use of guidance documents in the Dutch legal order.

1.1 TAKING AN EMPIRICAL APPROACH

By merely studying the text of guidance documents, their roles and effects in implementing practices does not become visible. Therefore, in order to be able to shed light on the role of guidance documents, insights into the actual effects of the recourse to Commission guidance is needed. Taking an empirical approach to study the role and implications of guidance documents, this research goes beyond studying law in the books.¹ In doing so, it takes an external perspective to the law – or in this case to guidance – by studying how guidance finds its way into implementing and judicial practices.² This research assumes that context matters in relation to how guidance documents are issued, used and perceived. So it is interested in the dynamics that shape the issuing and use of guidance.³

One important consequence of studying ‘guidance-in-action’ is that the collection of empirical data requires using different empirical research

1 Thus studying law-in-action, see Seron & Silbey 2004, p. 33, 35.

2 See for an explanation of (and encouragement) to think outside the legal box: Van der Woude 2016.

3 Van der Woude 2016.

methods that go beyond the classic research methods used in the field of law. This study draws not only on literature and case law research, but also on document analysis and formal and informal interviews with officials, judges and experts. The research methods that have been used to conduct the empirical research were introduced in section 1.7 of this thesis.

In order to be able to identify the use of guidance documents at different stages of the implementation process, a two-step approach was followed. First, a search for explicit references to guidance documents was conducted in implementing documents as well as in rulings of Dutch courts. Traces of guidance documents are considered explicit when they refer directly to a particular guidance document. Subsequently, a qualitative, textual analysis was conducted to study these explicit references in more depth in order to find out what role these documents actually play in implementation processes. This in-depth analysis also included a search for traces of guidance documents in the form of 'linguistic similarities'.⁴ In that case the traces in the implementing document or ruling only resemble the text or wording used in guidance documents, but do not explicitly refer to a guidance document. The insights gained from the search for traces of the use of guidance documents in implementing documents and rulings were supplemented with information acquired through interviews.

The aim of this research is not to give an exhaustive overview or account of the use of guidance documents by national authorities and national courts. This is not needed in light of the aim of this research which is to provide insights into the various roles guidance documents take in implementation processes. In order to be able to identify these roles that guidance documents take, as well as possible factors that influence these rules, it suffices to discern general trends or patterns that indicate how guidance documents are used. Besides, giving an exhaustive overview of the use of guidance documents in Dutch implementing and judicial processes is fairly impossible for two reasons. First, the use of guidance documents is often merely practice and thus highly 'invisible' to the outside world. Second, the issuing and use of guidance documents is subject to continuous change. The Commission revises guidance documents and/or issues new guidance documents. On the other hand, the implementing measures and practices of national authorities are also not static objects and are often subject to revision and change.

1.2 THE SEARCH FOR EXPLICIT REFERENCES IN IMPLEMENTING LEGISLATION AND POLICY RULES

The search for traces of the use of Commission guidance documents in Dutch implementing practices sets out with a study of various implementing documents that could possibly provide information on the use of guidance

4 Compare Sadl 2015.

documents. The search for explicit references or traces of guidance documents was confined to the study of documents that are published and accessible to the author. For instance, individualised decisions in the three policy areas (*beschikkingen*) are not published and therefore could not be studied. Similarly, internal framework documents that transpose Commission guidance documents (e.g. in the area of direct payments) could not be consulted. The documents that have been studied can be divided into three groups:

- Legislation and policy rules: A search for traces of the use of guidance was conducted in the text of legislative acts implementing the EU legislative instruments involved in this study. This study includes primary and secondary legislation, as well as, in the case of the Habitats Directive, rulemaking practices of the Dutch provinces (Dutch provincial regulations and policy rules).
- Explanatory memoranda or notes: traces of the use of guidance were also searched for in the text of explanatory memoranda or notes to the proposals for implementing regulations or policy rules or amendments to these regulations and policy rules.
- Other governmental documents or policy documents: these documents were studied where, via other sources, it became clear that these documents could provide information on the use of Commission guidelines.

When studying these implementing documents, I followed the two-step approach outlined above. First, I read through the documents whilst searching for explicit references to Commission guidance documents. Subsequently, I conducted an in-depth analysis of the use of Commission guidelines by conducting a textual analysis of these documents in which references were found.

The next sections concentrate on the most important implementing documents that provided information on the use of guidance documents: implementing legislation and policy rules as well as explanatory memoranda and related notes.

1.2.1 Direct payments

The search for explicit references was conducted in relation to the Ministerial Regulation⁵ and policy rules⁶ that implement the EU direct payments legal framework adopted after the 2013 reform. This means that previous Ministerial Regulations and policy rules that operationalised former EU direct payments schemes, have not been included in this search. The reason for not including these previous acts in the search for explicit references is:

5 Uitvoeringsregeling rechtstreekse betalingen GLB.

6 Beleidsregel uitvoeringsregeling rechtstreekse betalingen GLB.

1) this is not strictly necessary for the purpose of this research (which is to provide some general insights into the role direct payments guidance documents play in present-day implementing practices); and 2) the search for explicit references appeared to be time-consuming and also for this reason has been limited to studying the Regulation and policy rules currently into force.

The search for explicit references was conducted in three steps. The first step consists of a search for explicit references to direct payments guidance documents in the text of the Ministerial Regulation and the related policy rules. This search did not reveal explicit references to direct payments guidance documents.

The second step consists of a search for traces in the form of linguistic similarities to the text of direct payments guidance documents. When reading through the text of the Ministerial Regulation and the policy rules, I identified three linguistic similarities. First, Article 1.1 on the definition of light tillage, and second, Article 2.14 on the allowance of light tillage on sensitive permanent grassland, both reflect guidelines laid down in document DS/EGDP/2015/02/FINAL (the permanent grassland guidance).⁷ A third linguistic similarity can be found in Article 2.17(6) which provides that a five metres bufferzone is allowed for landscape features, as is provided for in the EFA layer guidance.⁸

These linguistic similarities were identified by scanning through the text of the Ministerial Regulation and policy rules. The linguistic similarities were identified by the author on the basis of her knowledge of the text of direct payments guidance documents. In this respect, it should be noted that these three linguistic similarities may not provide the full picture since the text of the Ministerial Regulation and the policy rules may include more of such textual similarities with Commission guidance documents. In view of the large number of direct payments guidance documents it is difficult, if not impossible, to identify all such possible linguistic similarities.

The third step consists of a search for explicit references to direct payments guidance documents in amending decisions to the Ministerial Regulation and the policy rules. This search was conducted using search terms from which I expected that they could possibly reveal traces to direct payments guidance documents. The following search terms were used: *guidance, richtsnoeren, werkdocument, Europese Commissie, brief, richtsnoer*. The amending decisions included in this search and the results of this search are presented in 'Annex Table 1' and 'Annex Table 2'.

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

8 *Stcrt.* 2015, 46132, p. 7.

Annex Table 1 – Amending decisions to the Ministerial Regulation on direct payments

Amending decisions to the Ministerial Regulation⁹ included in the search:¹⁰

Stcrt. 2015, 8489; *Stcrt.* 2015, 16150; *Stcrt.* 2015, 46132; *Stcrt.* 2016, 16496, *Stcrt.* 2016, 34648; *Stcrt.* 2016, 55791; *Stcrt.* 2016, 68986; *Stcrt.* 2016, 13791, *Stcrt.* 2017, 55331; *Stcrt.* 2017, 70783; *Stcrt.* 2018, 10737; *Stcrt.* 2018, 16840.

Results:

- 1) Three explicit references to a guidance document of the European Commission. These references were found in the amendments *Stcrt.* 2016, 16496 and *Stcrt.* 2016, 13791 to the Ministerial Regulation. The references refer to document DS/EGDP/2015/02/FINAL (the permanent grassland guidance) and to a ‘working document of the European Commission’.
- 2) The search also revealed five implicit references. In these cases, the amending decisions do not refer to a specific guidance document. The amending decisions more generally refer to the ‘opinion’, ‘the view’, ‘the interpretation’ or ‘requirements’ of the European Commission. These references were found with the search term ‘Europeese Commissie’.

Annex Table 2 – Amending decisions to the policy rules on direct payments

Amending decisions to the policy rules¹¹ included in the search:¹²

Stcrt. 2015, 19605, *Stcrt.* 2015, 46127, *Stcrt.* 2016, 23378, *Stcrt.* 2017, 13798; *Stcrt.* 2018, 10752.

Results:

One explicit reference to a guidance document of the European Commission was found in amending decision *Stcrt.* 2015, 19605, which refers to a ‘working document on missing ear tags in the context of cross compliance’.

1.2.2 The Habitats Directive

The search for traces of Habitat guidance documents set out with a search for explicit references in relation to the Nature Protection Act that entered into force in 2017. This formal legislative act currently transposes the Habitats Directive. The two previous legislative acts that transposed the Habitats Directive, the Natura Protection Act 1998 and the Flora and Fauna Act, have also been included in the search for explicit references. I expected that including these former legislative acts could give insight into whether the ‘new’ Nature Protection Act refers more often or less often to the Habitat guidance documents than its predecessors. The search for explicit references also includes regulations and policy rules adopted by the Dutch provinces. Indeed, with the entering into force of the new Nature Protection Act, the Dutch provinces play a prominent role in the implementation process.

9 Uitvoeringsregeling rechtstreekse betalingen GLB.

10 These are amending decisions to the Minister Regulation displayed at www.overheid.nl. Last search at 14 July 2018.

11 Beleidsregel uitvoeringsregeling rechtstreekse betalingen GLB.

12 These are the amending decisions to the Minister Regulation displayed at www.overheid.nl. Last search at 14 July 2018.

This section first describes the process and findings of the search for explicit references in relation to the Nature Protection Act, the Nature Protection Act 1998 and the Flora and Fauna Act. Subsequently, it describes the process and findings of the search for explicit references in the provincial regulations and policy rules.

The Nature Protection Act, the Nature Protection Act 1998 and the Flora and Fauna Act

The search for explicit references in relation the Nature Protection Act adopted in 2017, the Nature Protection Act 1998 and the Flora and Fauna Act was conducted in three steps. First, it was examined whether the text of the Nature Protection Act refers to the text in Habitat guidance documents. This is not the case: no explicit references were found. The absence of references can be explained in light of the fact that this act aims to directly transpose the provisions in the Habitats Directive.

The second step searched for explicit references in the explanatory memorandum to the Nature Protection Act that entered into force in 2017. When reading through the explanatory memorandum to this Act, I came across the words *guidance document*, *leidraad* and *richtsnoer*, and noted that these words are used to refer to the Managing Natura 2000 guidance document and to the Species guidance document.

The third step looked at explanatory memoranda to the previous legislative acts. To this end, I selected: 1) the explanatory memorandum to the Flora and Fauna Act; and 2) the explanatory memorandum to the amending act of 2005 to the Nature Protection Act of 1998. The reason for including the amending act of 2005 and not the explanatory memorandum to the initial version of the Nature Protection Act, is that this amending act transposed the Natura 2000 regime into the Nature Protection Act 1998.

An overview of the number of references to the Habitat guidance documents in the explanatory memoranda is presented in Annex Table 3 below. As this table, references to the Habitat guidance documents feature in the explanatory memorandum to the Nature Protection Act 2017 and in the explanatory note to the amending act of 2005 to the Nature Protection Act 1998. The absence of explicit references to Commission guidelines in the explanatory memorandum to the Flora and Fauna Act can be explained in light of the fact that the legislative proposal was adopted some years before the Commission issued the Species guidance document in 2007.

Annex Table 3 – Number of explicit references in explanatory memoranda

Guidance document	Explanatory memoranda to Flora and Fauna act ¹³	Explanatory memorandum to Nature Protection Act (1998) ¹⁴	Explanatory memorandum to Nature Protection Act (2017) ¹⁵
Species guidance document	-	-	21
Managing Natura 2000 guidance document	-	10	27

Provincial regulations and policy rules

As mentioned above, the search for explicit references to Habitat guidance documents also includes the provincial regulations and policy rules that were adopted in order to implement the Nature Protection Act of 2017. The first step of this research exercise was to find the provincial policy rules and regulations. To this end, I searched the database of the website www.overheid.nl as well as the websites of the individual provinces. The Provincial regulations (*verordeningen*) and policy rules (*beleidsregels*) that were included in this research are presented in Annex Table 4.

The second step was to search for explicit references to the Habitat guidance documents in the selected provincial regulations and policy rules. This search set out with the four search terms with which the explicit references in the legislative acts and the explanatory memoranda were identified: *guidance*, *leidraad*, *richtsnoer*, *handleiding*. To these key words I added the words ‘*Europese Commissie*’ (European Commission), and for the Dutch title of the MN2000 guidance document ‘*Beheer van Natura 2000-gebieden*’.

The search using these search terms in provincial regulations and policy rules revealed one reference to the Species guidance document in the explanatory note to the policy rules of Province Noord-Holland.¹⁶ The explanatory note to the policy rule refers to the Species guidance document in relation to the concept of serious damage (Article 16(1)(b) of the Habitats Directive).

13 *Kamerstukken II*, 1992/93, 23147, 3; *Kamerstukken II*, 1995/96, 23147, 7.
14 *Kamerstukken II*, 2001/02, 28171, 3.
15 *Kamerstukken II*, 2011/12, 33348, 3.
16 Beleidsregel natuurbescherming Noord-Holland, 6 September 2016, PB. 2016, 103, p. 15.

Annex Table 4 – Provincial regulations and policy rules

Drenthe	Beleidsregels Wet natuurbescherming provincie Drenthe 23 december 2016, PB. 2016, 6940.
Flevoland	Verordening uitvoering Wet natuurbescherming Flevoland 1 november 2016 PB. 2016, 5854.
Fryslân	Verordening Wet natuurbescherming Fryslân 2017, 7 december 2016, PB. 2016, 6515; Beleidsregel wet natuurbescherming Fryslân 2018, PB. 2018,5518.
Gelderland	Wijziging Omgevingsverordening Gelderland vanwege vaststelling Natuurparagraaf 2 februari 2017, PB. 435.
Groningen	Verordening natuurbescherming provincie Groningen 27 december 2016, PB. 2016, 6952.
Limburg	Omgevingsverordening Limburg 2015 29 maart 2017, PB. 2017, 1365; Wijzigingsverordening Hoofdstuk 3 Natuur van de Omgevingsverordening Limburg 2015 30 december 2016, PB. 2016, 6983.
Noord-Brabant	Verordening natuurbescherming Noord-Brabant 23 december 2016, PB. 6933; Beleidsregel natuurbescherming Noord-Brabant 28 december 2016, PB. 2016, 7021.
Noord-Holland	Verordening Natura 2000 gebieden Noord-Holland, 3 oktober 2016, PB. 2016, 106; Verordening vrijstellingen soorten Noord-Holland, 3 oktober 2016, PB. 2016, 109; Beleidsregel natuurbescherming Noord-Holland, 6 september 2016, PB. 2016, 103.
Overijssel	Vaststelling hoofdstuk 7 Omgevingsverordening Overijssel 2009, 30 december 2016. PB. 2016, 7082; Vaststelling beleidsregel natuur Overijssel 2017, 30 december 2016, PB. 2016, 7018.
Utrecht	Verordening Natuur en Landschap provincie Utrecht 2017 30 december 2016, PB. 2016, 7054; Beleidsregels natuur en landschap provincie Utrecht 2017 30 december 2017, PB. 2016, 7058.
Zeeland	Zeeland: Verordening Wet natuurbescherming Zeeland 2017 9 november 2016, PB. 2016, 5992.
Zuid-Holland	Verordening uitvoering Wet natuurbescherming Zuid-Holland 20 december 2016, PB. 2016, 6788; Beleidsregel uitvoering Wet natuurbescherming Zuid-Holland 20 december 2016, PB. 2016, 6787.

1.2.3 The Citizenship Directive

The European Commission issued two guidance documents that complement the Citizenship Directive:

The 2009 Communication

- Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2009)313 final).¹⁷

The Handbook addressing marriages of convenience

- Communication from the Commission to the European Parliament and the Council. Helping national authorities fight abuses of the right to free movement. Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens (COM(2014)604 final).¹⁸
- Commission Staff Working Document. Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens (SWD(2014)284 final).¹⁹

Search terms

On the basis of the titles of the FMP guidance documents, I formulated search terms that could guide the analysis for explicit references in legislation, policy rules, explanatory notes and in the case law of Dutch courts. I used search terms that could reasonably be expected to be used in order to refer to one of the FMP guidance documents. Since both the 2009 Communication and the Communication announcing the Handbook have been translated into Dutch, I included both English and Dutch terms in the list (see below).

- *Europese Commissie*
- *Handboek*
- *Mededeling*
- *Richtsnoeren*
- *Communication*
- *Guidance*
- *Handbook*

17 This document is accessible at the eur-lex website in 22 languages (Dutch included).

18 This document is accessible at the eur-lex website in 23 languages (Dutch included).

19 This document is accessible at the eur-lex website only in the English language.

Legislative acts transposing the Citizenship Directive

The search for explicit references in the legislative acts transposing the Citizenship Directive focuses on the Aliens Act, the main act governing immigration policy in the Netherlands, and the Aliens Decree, the delegated legislative act (*AmvB*) that transposes the provisions of the Citizenship Directive. In order to find possible references to the guidance documents in the text of the legislative acts I first read through the text of the acts transposing the Citizenship Directive. Secondly, I searched for explicit references in the explanatory memoranda to the amending acts that transposed the Citizenship provisions into these acts.²⁰

Both the Aliens Act and the Aliens Decree contain no explicit references to the FMP guidance documents; nor can explicit references be found in the explanatory notes to the amending acts that brought the Aliens Act as well as the Aliens Decree in line with the Citizenship Directive.²¹ The absence of traces of the Habitat guidance documents in the amending acts can be explained in light of the fact that the amendments were adopted in 2006, thus three years before the first FMP guidance documents were issued. Subsequent amendments to the articles of the Aliens Decree that transpose the Citizenship Directive²² include one explicit reference to the Handbook addressing marriages of convenience. The reference is included in the amending act *Stb.* 2016, 86.²³

Annex Table 5 – Amending decisions to the Aliens Act

Amending decisions to the Aliens Act included in the search:

Stb. 2010, 307; *Stb.* 2011, 652; *Stb.* 2012, 159; *Stb.* 2013, 181; *Stb.* 2014, 268; *Stb.* 2016, 86.

Results:

One explicit reference to Handbook addressing marriages of convenience (*Stb.* 2016, 86).

The Aliens Circular and explanatory notes

The Aliens Act and the Aliens Decree are complemented by the Aliens Circular that lays down policy rules for the Immigration and Naturalisation Service. Section B10 of the Circular provides for policy rules to Articles 8.7 until 8.25 of the Aliens Decree that transpose the Citizenship Directive. The text of section B10 of the Aliens Circular does not contain explicit references to the FMP guidance documents. Nevertheless, two linguistic similarities

²⁰ Using the list of search terms included above.

²¹ *Kamerstukken II*, 2005/06, 30493, 3 and *Stb.* 2006, p. 215.

²² Articles 8.7 until 8.25 the Aliens Decree. I did not examine amendments to the Aliens Act, since this act only lays down the basic rule that Community subjects shall be issued a residence card.

²³ *Stb.* 2016, 86, p. 27. The explanatory note cites the definition given on p. 8 of the Handbook.

were identified when reading through the text of the policy rules: the Aliens Circular adopts the same definition as the guidelines for abuse and also follows the guidance on the concept of persistent petty criminality.

The policy rules in section B10 were included in the Aliens Circular in January 2009.²⁴ The first FMP guidance document COM(2009)313 was issued a few months later, in July 2009, which explains why the amending decision of the Dutch State Secretary that introduces the policy rules in section B10 does not refer to any FMP guidelines. The search for traces of FMP guidelines therefore only includes amending decisions to the Aliens Circular that were taken later than July 2009.

The search for explicit references in amending decisions revealed two explicit references to the 2009 Communication COM(2009)313.²⁵ The first reference features in the amending decision of 9 April 2013 and refers to the interpretative rule laid down in the 2009 Communication that persistent petty criminality may represent a threat to public policy.²⁶ The second reference features in the amending decision of 23 December 2011 and refers to the 2009 Communication in relation to the concept of a durable relationship.²⁷

Annex Table 6 – Amending decisions to the Aliens Circular

Amending decisions to the Aliens Act included in the search:

Stcrt. 2013, 8389; *Stcrt.* 2013, 27834; *Stcrt.* 2014, 8761; *Stcrt.* 2014, 35433; *Stcrt.* 2016, 33962; *Stcrt.* 2017, 17943; *Stcrt.* 2017, 36329; *Stcrt.* 2017, 53847.

Results:

One explicit reference to Handbook addressing marriages of convenience (*Stb.* 2016, 86).

1.3 THE SEARCH FOR EXPLICIT REFERENCES IN THE RULINGS OF DUTCH COURTS

An important part of the empirical research involves a case law analysis of rulings of the CJEU and of rulings of Dutch courts. The main focus is on the analysis of the rulings of Dutch courts, as the central research question asks in what ways national courts use guidance documents of the European Commission. The analysis of rulings of Dutch courts followed the same two-step approach outlined above. First, a search for explicit references to Commission guidance documents in the rulings of Dutch courts was conducted in the three policy areas. Second, a textual analysis was conducted of the rulings that were found with explicit references. In some cases, this search was complemented with additional case law research for other rulings. This complementary research explored whether the rulings

²⁴ *Stcrt.* 2009, 19.

²⁵ The search was conducted at <http://wetten.overheid.nl>.

²⁶ *Stcrt.* 2013, 8389, p. 120.

²⁷ *Stcrt.* 2011, 23324, p. 24.

that refer to guidance documents were copied in later rulings without explicitly referring to these guidance documents.

The analysis in this section concentrates on the first stage of the case law research: it describes the search for explicit references to Commission guidance documents in the rulings of Dutch courts. This search for explicit references was conducted in the database accessible at www.rechtspraak.nl.

The results of this search for explicit references does not give, nor does it aspire to give, an exhaustive overview of all rulings that refer to Commission guidance documents.²⁸ In the first place, it might be possible that the search terms that are used do not reveal all rulings that explicitly refer to Commission guidance documents. Secondly, the database of www.rechtspraak.nl does not include all rulings that are handed down by Dutch courts. For instance, in principle all rulings of the Dutch Supreme Court, the Judicial Division of the Council of State and the Dutch Trade and Industry Appeals Tribunal are published, in so far as these rulings are not manifestly unfounded, manifestly inadmissible and/or concluded with a standard formula.²⁹

1.3.1 Direct payments

In the area of direct payments, the Dutch Trade and Industry Appeals Tribunal is the competent court in first and only instance. Therefore, the search for rulings that refer to direct payments guidelines of the Commission was confined to rulings of this Court. In order to be able to find 'relevant rulings' I used the search terms that in an earlier study conducted by the author of this research³⁰ revealed rulings of the Tribunal that refer to direct payments guidelines. I complemented these search terms with other search terms which I expected could reveal relevant rulings or that were derived from rulings that were brought to my attention by experts and scholars in the field of EU subsidies. This resulted in the following list of search terms with which the rulings included in this research were found:³¹

- Werkdocument + steun;
- Oriëntatiedocument + steun;
- Interpretatienota + steun;
- Joint Research Centre;
- Joint Research Center;³²
- Guidance + steun;
- Observations.

28 As also mentioned above in section 1.1 of the Annex.

29 See *Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl*, accessible at <https://www.rechtspraak.nl/Uitspraken/Paginas/Selectiecriteria.aspx>.

30 Van Dam 2013, section 3.2.1.

31 Last search was conducted at on 12 June 2019.

32 'Center' and 'Centre' appear to be used as terminology in the rulings – therefore both search terms have been included.

The rulings found refer to different direct payments guidance documents. Annex Table 7 provides an overview of the different direct payments guidance documents and the number of rulings that refer to the document.³³

Annex Table 7 – Direct payments guidance documents and number of rulings

Name of group	Guidance document	No. of rulings
Obvious error rulings	Working document VI/7103/98 Rev2-NL + Working document AGR 49533/2002	182
Fifty trees rulings	Working document 60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) No 796/2004	4
Interpretative note rulings	Interpretative notes no. 51 and 26	12
WikiCAP rulings	Information on the WikiCAP website of the Joint Research Centre on the measurement method	5
Permanent grassland rulings	Information on the WikiCAP website of the Joint Research Centre on permanent grasslands	10
Active farmer rulings	Active farmer guidance. Guidance document on the implementation of Article 9 of regulation (EU) No 1307/2013, DSCG/2014/29.	2
Observations on notifications rulings	Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) No 639/2014 (DS-CDP-2015-04-rev1).	3
LPIS guidance rulings	Guidance document on the Land Parcel Identification System (LPIS) under Articles 5, 9 and 10 of Commission Delegated Regulation (EU) No 640, DSCG/2014/33.	2
Administrative penalties rulings	Guidance for implementation of Article 19a of Regulation (EU) 640/2014 on the simplification of administrative penalties for certain direct payments schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016.	1
Total		221

³³ I draw inspiration from the presentation of rulings by Stefan 2013, p. 275.

Rulings that refer to Working document VI/7103/98 Rev2-NL + Working document AGR 49533/2002 (obvious error rulings)

CBb 21 March 2001, ECLI:NL:CBB:2001:AB0861; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1293; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1294; CBb 18 April 2001, ECLI:NL:CBB:2001:AB1295; CBb 10 July 2001, ECLI:NL:CBB:2001:AB1500; CBb 6 June 2001, ECLI:NL:CBB:2001:AB2130; CBb 6 June 2001, ECLI:NL:CBB:2001:AB2131; CBb 4 July 2001, ECLI:NL:CBB:2001:AB2524; CBb 8 August 2001, ECLI:NL:CBB:2001:AC0156; CBb 8 August 2001, ECLI:NL:CBB:2001:AB4352; CBb 8 August 2001, ECLI:NL:CBB:2001:AC0124; CBb 22 August 2001, ECLI:NL:CBB:2001:AD1265; CBb 26 September 2001, ECLI:NL:CBB:2001:AD3894; CBb 3 October 2001, ECLI:NL:CBB:2001:AD4701; CBb 3 October 2001, ECLI:NL:CBB:2001:AD4706; CBb 18 October 2001, ECLI:NL:CBB:2001:AD4769; CBb 7 November 2001, ECLI:NL:CBB:2001:AD5555; CBb 7 November 2001, ECLI:NL:CBB:2001:AD5562; CBb 2 January 2002, ECLI:NL:CBB:2002:AD9108; CBb 6 February 2002, ECLI:NL:CBB:2002:AD9673; CBb 16 January 2002, ECLI:NL:CBB:2002:AD9058; CBb 2 April 2002, ECLI:NL:CBB:2002:AE1883; CBb 3 May 2002, ECLI:NL:CBB:2002:AE3415; CBb 28 June 2002, ECLI:NL:CBB:2002:AE7069; CBb 1 November 2002, ECLI:NL:CBB:2002:AF1177; CBb 12 March 2003, ECLI:NL:CBB:2003:AF6804; CBb 25 April 2003, ECLI:NL:CBB:2003:AF9584; CBb 11 July 2003, ECLI:NL:CBB:2003:AI0376; CBb 21 November 2003, ECLI:NL:CBB:2003:AO1041; CBb 4 May 2004, ECLI:NL:CBB:2004:AO9947; CBb 12 May 2004, ECLI:NL:CBB:2004:AP1017; CBb 4 June 2004, ECLI:NL:CBB:2004:AP1564; CBb 9 June 2004, ECLI:NL:CBB:2004:AP1571; 18 August 2004, ECLI:NL:CBB:2004:AR2140; CBb 20 August 2004, ECLI:NL:CBB:2004:AR1629; CBb 12 December 2004, ECLI:NL:CBB:2004:AR8438; CBb 11 March 2005, ECLI:NL:CBB:2005:AT2696; CBb 30 March 2005, ECLI:NL:CBB:2005:AT3912; CBb 13 April 2005 ECLI:NL:CBB:2005:AT4981; CBb 1 June 2005, ECLI:NL:CBB:2005:AT7331; CBb 24 June 2005, ECLI:NL:CBB:2005:AT8903; CBb 7 October 2005, ECLI:NL:CBB:2005:AU4648; CBb 18 November 2005, ECLI:NL:CBB:2005:AU7332; CBb 9 December 2005, ECLI:NL:CBB:2005:AU9318; CBb 15 February 2006, ECLI:NL:CBB:2006:AV2917; CBb 8 March 2006, ECLI:NL:CBB:2006:AV5870; CBb 29 March 2006, ECLI:NL:CBB:2006:AX8790; CBb 5 April 2006, ECLI:NL:CBB:2006:AW3632; CBb 7 June 2006, ECLI:NL:CBB:2006:AX8376; CBb 21 July 2006, ECLI:NL:CBB:2006:AY6959; CBb 6 September 2006, ECLI:NL:CBB:2006:AY9330; CBb 29 November 2006, ECLI:NL:CBB:2006:AZ5764; CBb 12 February 2007, ECLI:NL:CBB:2007:AZ9934; CBb 12 February 2007, ECLI:NL:CBB:2007:AZ9936; CBb 12 March 2007, ECLI:NL:CBB:2007:BA0974; 14 March 2007, ECLI:NL:CBB:2007:BA1557; CBb 5 June 2007, ECLI:NL:CBB:2007:BA7356; CBb 6 June 2007, ECLI:NL:CBB:2007:BA7361; CBb 6 June 2007, ECLI:NL:CBB:2007:BA7166; CBb 3 July 2007, ECLI:NL:CBB:2007:BB0115; CBb 4 July 2007, ECLI:NL:CBB:2007:BB0098; CBb 10 July 2007, ECLI:NL:CBB:2007:BB0105; CBb 5 September 2007, ECLI:NL:CBB:2007:BB3575; CBb 26 September 2007, ECLI:NL:CBB:2007:BB6157; CBb 3 October 2007, ECLI:NL:CBB:2007:BB5669; CBb 17 October 2007, ECLI:NL:CBB:2007:BB6209; CBb 29 October 2007, ECLI:NL:CBB:2007:BB7143; CBb 29 October 2007, ECLI:NL:CBB:2007:BB7142;

CBb 31 October 2007, ECLI:NL:CBB:2007:BB7147; CBb 31 October 2007, ECLI:NL:CBB:2007:BB7148; CBb 1 November 2007, ECLI:NL:CBB:2007:BB7205; CBb 14 November 2007, ECLI:NL:CBB:2007:BB8854; CBb 21 November 2007, ECLI:NL:CBB:2007:BB9727; CBb 11 December 2007, ECLI:NL:CBB:2007:BC1348; CBb 11 December 2007, ECLI:NL:CBB:2007:BC1358; CBb 20 February 2008, ECLI:NL:CBB:2008:BC6219; CBb 21 February 2008, ECLI:NL:CBB:2008:BC8230; CBb 19 March 2008, ECLI:NL:CBB:2008:BC8201; CBb 2 April 2008, ECLI:NL:CBB:2008:BC9985; CBb 16 April 2008, ECLI:NL:CBB:2008:BD0258; CBb 8 December 2008, ECLI:NL:CBB:2008:BG7022; CBb 18 February 2009, ECLI:NL:CBB:2009:BH4683; CBb 26 March 2009, ECLI:NL:CBB:2009:BI1003; CBb 28 May 2009, ECLI:NL:CBB:2009:BI9211; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9418; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9420; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9441; CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9445; CBb 15 October 2009, ECLI:NL:CBB:2009:BK2049; CBb 20 November 2009, ECLI:NL:CBB:2009:BK5141; CBb 2 December 2009, ECLI:NL:CBB:2009:BK5978; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7268; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7270; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7271; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7274; CBb 11 December 2009, ECLI:NL:CBB:2009:BK7275; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6809; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6813; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6819; CBb 14 December 2009, ECLI:NL:CBB:2009:BK6817; CBb 14 December 2009, ECLI:NL:CBB:2009:BK7266; CBb 14 December 2009, ECLI:NL:CBB:2009:BK7267; CBb 16 December 2009, ECLI:NL:CBB:2009:BL4501; CBb 13 January 2010, ECLI:NL:CBB:2010:BM1569; CBb 25 January 2010, ECLI:NL:CBB:2010:BM1597; CBb 25 January 2010, ECLI:NL:CBB:2010:BM1599; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1827; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1825; CBb 19 February 2010, ECLI:NL:CBB:2010:BM1829; CBb 4 March 2010, ECLI:NL:CBB:2010:BM2459; CBb 10 March 2010, ECLI:NL:CBB:2010:BM2454; CBb 10 March 2010, ECLI:NL:CBB:2010:BM2461; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2451; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2705; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2728; CBb 24 March 2010, ECLI:NL:CBB:2010:BM2729; CBb 28 March 2010, ECLI:NL:CBB:2010:BM3397; CBb 03 May 2010, ECLI:NL:CBB:2010:BM3419; CBb 19 May 2010, ECLI:NL:CBB:2010:BM6074; CBb 9 June 2010, ECLI:NL:CBB:2010:BM8566; CBb 9 June 2010, ECLI:NL:CBB:2010:BM8567; CBb 23 June 2010, ECLI:NL:CBB:2010:BN0427; CBb 24 June 2010, ECLI:NL:CBB:2010:BN0409; CBb 25 June 2010, ECLI:NL:CBB:2010:BN0306; CBb 25 June 2010, ECLI:NL:CBB:2010:BN0323; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0990; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0992; CBb 30 June 2010, ECLI:NL:CBB:2010:BN0995; CBb 30 June 2010, ECLI:NL:CBB:2010:BN1001; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0914; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0915; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0918; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0919; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0921; CBb 2 July 2010, ECLI:NL:CBB:2010:BN0923; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4361; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4362; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4372; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4373; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4375;

CBb 8 July 2010, ECLI:NL:CBB:2010:BN4376; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4381; CBb 8 July 2010, ECLI:NL:CBB:2010:BN4385; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4975; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4980; CBb 14 July 2010, ECLI:NL:CBB:2010:BN4981; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4896; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4897; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4899; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4993; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4996; CBb 28 July 2010, ECLI:NL:CBB:2010:BN4998; CBb 28 July 2010, ECLI:NL:CBB:2010:BN5008; CBb 28 July 2010, ECLI:NL:CBB:2010:BN5010; CBb 29 September 2010, ECLI:NL:CBB:2010:BO1049; CBb 6 October 2010, ECLI:NL:CBB:2010:BO1697; CBb 26 October 2010, ECLI:NL:CBB:2010:BO2413; CBb 10 November 2010, ECLI:NL:CBB:2010:BP0447; CBb 10 November 2010, ECLI:NL:CBB:2010:BO5302; CBb 8 December 2010, ECLI:NL:CBB:2010:BO7419; CBb 7 January 2011, ECLI:NL:CBB:2011:BP2677; CBb 17 February 2011, ECLI:NL:RBZLY:2011:BP7612; CBb 29 June 2011, ECLI:NL:CBB:2011:BU3161; CBb 16 December 2011, ECLI:NL:CBB:2011:BV1020; CBb 15 February 2012, ECLI:NL:CBB:2012:BV7086; CBb 15 February 2012, ECLI:NL:CBB:2012:BV8371; CBb 18 July 2012, ECLI:NL:CBB:2012:BX5079; CBb 5 September 2012, ECLI:NL:CBB:2012:BX7333; CBb 1 February 2013, ECLI:NL:CBB:2013:BZ4272; CBb 20 December 2013, ECLI:NL:CBB:2013:295; CBb 21 May 2014, ECLI:NL:CBB:2014:202; CBb 8 March 2017, ECLI:NL:CBB:2017:83; CBb 9 November 2017, ECLI:NL:CBB:2017:371; CBb 25 January 2018, ECLI:NL:CBB:2018:42; CBb 10 April 2018, ECLI:NL:CBB:2018:137; CBb 24 April 2018, ECLI:NL:CBB:2018:129; CBb 8 May 2018, ECLI:NL:CBB:2018:314; CBb 8 May 2018, ECLI:NL:CBB:2018:323; CBb 5 June 2018, ECLI:NL:CBB:2018:265; CBb 17 July 2018, ECLI:NL:CBB:2018:360; CBb 17 July 2018, ECLI:NL:CBB:2018:379; CBb 4 December 2018, ECLI:NL:CBB:2018:640.

Rulings that refer to Working document 60363/2005-REV1. On-the-spot checks of area according to Article 23-32 of Commission Regulation (EC) No 796/2004 (fifty trees rulings)

CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249; CBb 16 September 2013, ECLI:NL:CBB:2013:152.

Rulings that refer to Interpretative notes no. 51 and 26 (interpretative note rulings)

CBb 21 March 2003, ECLI:NL:CBB:2003:AF6914; CBb 13 October 2006, ECLI:NL:CBB:2006:AZ0218; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3568; CBb 30 November 2006, ECLI:NL:CBB:2006:AZ3571; CBb 6 December 2006, ECLI:NL:CBB:2006:AZ4328; CBb 14 December 2006, ECLI:NL:CBB:2006:AZ5816; CBb 20 December 2006, ECLI:NL:CBB:2006:AZ5867; CBb 26 June 2007, ECLI:NL:CBB:2007:BA8565; CBb 22 December 2006, ECLI:NL:CBB:2006:AZ5865; CBb 12 April 2007, ECLI:NL:CBB:2007:BA4862; CBb 26 June 2007, ECLI:NL:CBB:2007:BA8574; CBb 3 July 2007, ECLI:NL:CBB:2007:BB0115.

Rulings that refer to Observations on the notifications due by Member States on 31 January 2015 pursuant to Commission Delegated Regulation (EU) No 639/2014 DS-CDP-2015-04-rev1 (Observations on notifications rulings)

CBb 11 July 2017, ECLI:NL:CBB:2017:212; CBb 9 October 2017, ECLI:NL:CBB:2017:316; CBb 25 January 2018, ECLI:NL:CBB:2018:41.

Active farmer guidance. Guidance document on the implementation of Article 9 of regulation (EU) No 1307/2013, DSCG/2014/29 (active farmer rulings)

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

Rulings that refer to Information on the WikiCAP website of the Joint Research Centre on the measurement method (WikiCAP rulings)

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

Rulings that refer to Information on the WikiCAP website of the Joint Research Centre on grasslands on airports (Permanent grassland rulings)

CBb 2 October 2013, ECLI:NL:CBB:2013:189; CBb 2 October 2013, ECLI:NL:CBB:2013:190; CBb 2 October 2013, ECLI:NL:CBB:2013:191; CBb 24 October 2013, ECLI:NL:CBB:2013:213; CBb 5 November 2013, ECLI:NL:CBB:2013:222; CBb 28 November 2013, ECLI:NL:CBB:2013:266; CBb 12 December 2013, ECLI:NL:CBB:2013:282; CBb 12 December 2013, ECLI:NL:CBB:2013:283; CBb 6 December 2013, ECLI:NL:CBB:2013:300; CBb 28 January 2014, ECLI:NL:CBB:2014:32.

Guidance document on the Land Parcel Identification System (LPIS) under Article 5, 9 and 10 of Commission Delegated Regulation (EU) No 640, DSCG/2014/33 (LPIS guidance rulings)

CBb 4 June 2019, ECLI:NL:CBB:2019:227; CBb 23 April 2019, ECLI:NL:CBB:2019:161.

Guidance for implementation of Article 19a of Regulation (EU) 640/204 on the simplification of administrative penalties for certain direct payments schemes and rural development support measures and the yellow card as well as of Article 33a of Regulation 809/2014 on the follow-up visits (D3/CC/Ares(2016)6144293) 4 November 2016 (Ruling on administrative penalties).

CBb 17 July 2018, ECLI:NL:CBB:2018:358.

1.3.2 The Habitats Directive

The search for references to Habitat guidance documents in the rulings of Dutch courts was conducted – as for the other policy areas – at www.rechtspraak.nl. In order to be able to find relevant rulings, the search set out by making a list of possible search terms that could reveal the rulings that refer to Habitat guidance documents.

Guidance documents related to the Habitats Directive often have the name ‘guidance’ in the title. Therefore, I used the search terms ‘guidance + *Habitatrichtlijn*’. I also used search terms that appeared ‘successful’ in the search for explicit references in the explanatory memoranda to the legislative acts, namely the terms *richtsnoer* and the term *leidraad*. Finally, an additional search was conducted by typing in the titles of the two core Habitat guidance documents: the Species guidance document and the Management Natura 2000 guidance documents.³⁴

The search for references to guidance documents related to the Habitats Directive in rulings of Dutch courts resulted in 31 rulings.³⁵ An overview of the guidance documents, the number of rulings and the search terms is included in Annex Table 8.

Annex Table 8 – Habitat guidance documents in the rulings of Dutch courts

Name of guidance document	No. of rulings (31)	Found with search terms
Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC	6	‘Beheer van “Natura 2000”-gebieden’
Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC	20	‘Guidance document + habitat’ ‘Richtsnoeren + Habitatrichtlijn’ ‘Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC’
Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC	4	“Richtsnoeren + habitatrichtlijn
EU Guidance on wind energy development in accordance with the EU nature legislation	1	‘Guidance + habitat’

34 For the document on the Management Nature 2000 guidance document I used search terms that reflect both the English title and the Dutch title, as I was told during interviews with judges that rulings might refer to the Dutch title and therefore I added this additional search.

35 Last search conducted at 10 June 2019.

After the search for explicit references, the question arose how to find possible patterns in these rulings with regard to the use of the Habitat guidance documents in judicial decision- making practices. To this end, I categorised the rulings along the lines of the substantive topics that the rulings deal with. For the questions that concerned the application of Article 6 of the Habitats Directive this appeared to be difficult. Except for two rulings that concern the question on the assessment of satisfactory alternatives, the rulings each deal with different legal questions. For the rulings related to the interpretation and application of the Species protection regime, the exercise was more successful. Among the rulings that relate to the Species protection regime different ‘groups of rulings’ can be identified. These groups of rulings are presented below in Annex Table 9.

Annex Table 9 – Groups of rulings that refer to the Species guidance document

Foraging area rulings: ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464; Rb. Leeuwarden 17 December 2012, ECLI:NL:RBL EE:2012:BY6864; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024; Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748.
Breeding site rulings: ABRvS 25 February 2009, ECLI:NL:RVS:2009:BH3985; Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561.
Rulings on scope of the obligation to set up a system of species protection Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593.
Incidental killing ruling: ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215.
Rulings related to the concept of disturbance: Rb. Maastricht 1 February 2011, ECLI:NL:RBMAA:2011:BP2657; Hof Arnhem 29 November 2011, ECLI:NL:GHARN:2011:BU6242; Hof Arnhem 29 May 2012, ECLI:NL:GHARN:2012:BW7281.

The criminal rulings related to the concept of disturbance do not fall within the scope of this research, since in these rulings the courts do not assess the practices of a public authority. Instead, private parties are accused of having disturbed breeding sites or resting places. Therefore, these rulings were not included in the analysis.

In the other four groups of rulings, the courts assess implementing practices of the Minister or the provinces. Therefore, these rulings are included in the analysis that aims to explore in what ways the Habitat guidance documents are used in judicial decision-making practices. When conducting the analysis, I also searched for rulings in which the use of guidance resonates or is reflected, but which do not explicitly refer to Habitat guidance documents.

Rulings that refer to the guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (the Species guidance document)

Rb. Middelburg 13 January 2011, ECLI:NL:RBMID:2011:BP2647; Rb. Maastricht 1 February 2011, ECLI:NL:RBMAA:2011:BP2657; Rb. Alkmaar 16 March 2012, ECLI:NL:RBALK:2012:BV8951; Rb. Leeuwarden 17 December 2012, ECLI:NL:RBLEE:2012:BY6864; Rb. Noord-Nederland 18 March 2013, ECLI:NL:RBNNE:2013:BZ4503; Rb. Den Haag 22 May 2013, ECLI:NL:RBDHA:2013:CA0593; Rb. Midden-Nederland 8 February 2019, ECLI:NL:RBMNE:2019:748; Hof Arnhem 29 November 2011, ECLI:NL:GHARN:2011:BU6242; Hof Arnhem 29 May 2012, ECLI:NL:GHARN:2012:BW7281; Hof 's Hertogenbosch 3 May 2013, ECLI:NL:GHSHE:2012:4855; ABRvS 17 January 2007, ECLI:NL:RVS:2007:AZ6380; ABRvS 25 February 2009, ECLI:NL:RVS:2009:BH3985; ABRvS 19 January 2010, ECLI:NL:RVS:2010:BL0689; ABRvS 8 February 2012, ECLI:NL:RVS:2012:BV3215; ABRvS 15 February 2012, ECLI:NL:RVS:2012:BV5086; ABRvS 7 March 2012, ECLI:NL:RVS:2012:BV8041; ABRvS 2 May 2012, ECLI:NL:RVS:2012:BW4561; ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2464; ABRvS 5 February 2014, ECLI:NL:RVS:2014:281; ABRvS 12 November 2014, ECLI:NL:RVS:2014:4024.

Rulings that refer to the document Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (Managing Natura 2000 guidance document)

Rb. Haarlem 28 November 2003, ECLI:NL:RBHAA:2003:AN9193; Rb. Alkmaar 20 November 2007, ECLI:NL:RBLK:2007:BB9271; Rb. Den Haag 3 October 2012, ECLI:NL:RBSCR:2012:BX8921. ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5684; ABRvS 19 June 2013, ECLI:NL:RVS:2013:CA3652; ABRvS 17 September 2014, ECLI:NL:RVS:2014:3380.

Rulings that refer to the guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

ABRvS 13 May 2009, ECLI:NL:RVS:2009:BI3701; ABRvS 7 November 2012, ECLI:NL:RVS:2012:BY2504; ABRvS 18 February 2015, ECLI:NL:RVS:2015:438; ABRvS 18 July 2018, ECLI:NL:RVS:2018:2454.

Ruling that refers to the EU guidance on wind energy development in accordance with the EU nature legislation

ABRvS 4 May 2016, ECLI:NL:RVS:2016:1227.

1.3.3 The Citizenship Directive

The search for rulings that refer to the FMP guidance documents was conducted using the search terms listed above in section 1.2.3.³⁶ This search resulted in a total number of 91 cases that explicitly refer to the 2009 Communication or the Handbook addressing marriages of convenience.³⁷ The large majority of the rulings refers to the 2009 Communication of the European Commission. Three rulings also refer to the Handbook addressing marriages of convenience. The competent courts reviewing administrative decisions on free movement of persons are the District Court of The Hague (in first instance) and the Council of State (the highest administrative court).

Annex Table 10 – FMP guidance: Search terms and results

Search terms	No. of relevant rulings
COM(2009)313	67
Richtsnoeren + 2004/38	86
Guidance + 2004/38	0
Handbook + 2004/38	0
Handboek + 2004/38	3
Total no. relevant rulings	91

Annex Table 11 – FMP guidance documents: number of relevant rulings

Guidance document	No. of relevant rulings
Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2009)313 final.	88
Handbook addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens SWD(2014)284 final.	3

Annex Table 12 – FMP guidance: Council of State and District Court of The Hague

Court	No. of relevant rulings
Council of State	28
District Court of The Hague	63

36 *Europese Commissie; Handboek; Mededeling; Richtsnoeren; Communication; Guidance; Handbook.*
37 Last search was conducted on 7 June 2019.

Within the rulings found with the search for explicit references, different groups of rulings can be discerned along the lines of the legal question or issue for which the rulings refer to the Commission guidelines. An overview of the different groups of the rulings is given below.

References that relate to the concept of a durable relationship (par 2.1.1 of COM(2009)313)

Rb. Den Haag 19 August 2010, ECLI:NL:RBSGR:2010:BN6033; Rb. Den Haag 26 January 2011, ECLI:NL:RBSGR:2011:BP3126; Rb. Den Haag 26 January 2012, ECLI:NL:RBSGR:2012:BV2627; Rb. Den Haag 11 February 2015, ECLI:RBDHA:2015:1506; 28 May 2015, ECLI:RBDHA:2015:7317; Rb. Den Haag 28 May 2015, ECLI:RBDHA:2015:7323; Rb. Den Haag 15 March 2019, ECLI:NL:RBDHA:2019:3720; ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678.

References that relate to the concept of sufficient resources (par. 2.3.1. of COM(2009)313)

Rb. Den Haag 17 February 2012, ECLI:NL:RBSGR:2012:BV7441; Rb. Den Haag 5 June 2014, ECLI:NL:RBDHA:2014:10661; Rb. Den Haag 18 September 2014, ECLI:NL:RBDHA:2014:11638; Rb. Den Haag 14 June 2016, ECLI:RBDHA:2016:6623; Rb. Den Haag 22 December 2016, ECLI:RBDHA:2016:17144; Rb. Den Haag 6 November 2017, ECLI:NL:RBDHA:2017:16273; ABRvS 3 September 2013, ECLI:NL:RVS:2013:1068; ABRvS 13 June 2016, ECLI:NL:RVS:2016:1628; ABRvS 13 June 2016, ECLI:NL:RVS:2016:1629.

References that relate to the concept of genuine, present and sufficient serious threat (par. 3.2 of COM(2009)313))

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References that relate to the concepts of fraud and abuse other than marriages of convenience (par. 4 of COM(2009)313)

Rb. Den Haag 14 October 2013, ECLI:NL:RBDHA:2013:15326; Rb. Den Haag 10 June 2015, ECLI:RBDHA:2015:8481; Rb. Den Haag 9 August 2016, ECLI:RBDHA:2016:10837; Rb. Den Haag 9 January 2019, ECLI:NL:RBDHA:2019:155; ABRvS 5 October 2012, ECLI:NL:RVS:2012:BX9567; ABRvS 17 December 2012, ECLI:NL:RVS:2012:BY7401; ABRvS 11 November 2016, ECLI:NL:RVS:2016:3081; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2492; ABRvS 31 January 2018, ECLI:NL:RVS:2018:360.

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Rb. Den Haag 25 August 2011, ECLI:NL:RBSGR:2011:BU3879; Rb. Den Haag 21 December 2011, ECLI:NL:RBSGR:2011:BW4757; Rb. Den Haag 14 September

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1.4 INTERVIEWS

1.4.1 European Commission

Interview 1 – Commission official A

Interview with official A, Directorate General Agriculture and Rural Development, European Commission, 16 December 2015, Brussels.

Interview 2 – Commission official A

Interview with official A, Directorate General Agriculture and Rural Development, European Commission, 20 July 2018, (telephone interview).

1.4.2 Dutch ministries and agencies

Interview 3 – National officials A and B

Interview with officials A and B, Ministry of Economic Affairs, 26 April 2016, The Hague.

Interview 4 – National officials A and C

Interview with officials A and C, Ministry of Economic Affairs (RVO), 11 October 2018, Deventer.

Interview 5 – National official D

Interview with official D, senior official at the Ministry of Economic Affairs, Directorate Legislation and Legal Affairs, The Hague, 23 September 2015.

Interview 6 – National official D

Interview with official D, senior official at the Ministry of Economic Affairs, Directorate Legislation and Legal Affairs, telephone interview, 9 June 2017.

Interview 7 – National officials E, F, G

Interview with officials E, F and G, IND, Ministry of Justice and Security, Rijswijk, 11 December 2014.

Interview 8 – National officials H and I

Interview with officials H and I, Ministry of Justice and Security, Den Haag, 28 November 2014.

Interview 9 – National official H

Interview with official H Senior Policy Officer at the Ministry of Security and Justice, 20 July 2018 (telephone interview).

Interview 10 – National official F

Interview with official F, Senior Policy Officer at the Ministry of Security and Justice, 27 August 2018, The Hague.

1.4.3 Dutch Provinces

Interview 11- National official J

Interview with official J of Province A, Policy Advisor (Nature), telephone interview, 21 June 2017.

Interview 12 – National official K

Interview with official K of Province B, Legal Advisor (Nature Protection Act; Birds and Habitats Directive), telephone interview, 29 August 2017.

Interview 13 – National official L

Interview with official L of Province C, Senior Legal Official (Green legislation), telephone interview, 24 August 2017.

Interview 14 – National official M

Interview with official M of Province D, Senior Legal Policy Advisor (Green legislation), answer to interview questions in writing/via email, 8 August 2017 and telephone interview on Friday 24 October 2017.

Interview 15 – National official N

Interview with official N of Province E, Senior Legal Policy Advisor, answer to interview questions via email, August 2017.

Interview 16 – National official O

Interview with official O of Province F, telephone interview, 6 September 2017.

Interview 17 – National official P

Interview with official P of Province G, Legal Officer (Physical Environment), telephone interview on 15 September 2017.

Interview 18 – National official Q

Interview with official Q of Province H, Legal Officer (Licensing, Monitoring and Enforcement), telephone interview on 3 November 2017.

Interview 19 – National official R

Interview with official R of Province I, Legal Advisor (Nature and Environment), telephone interview on 6 November 2017.

Interview 20 – National official S

Interview with official S of Province I, Legal Officer, telephone interview on 7 November 2017.

Interview 21 – National official T

Interview with official T of Province J, Legal Advisor, telephone interview on 14 November 2017.

1.4.4 Interviews with lawyers

Interview 22 – Lawyer A

Interview with lawyer A at Dutch law office, telephone interview on 16 July 2015 (not recorded).

Interview 23 – B and C

Interview with lawyers B and C, lawyers at Dutch law office, The Hague, 16 September 2015 (not recorded).

1.4.5 Judicial Division of the Council of State

Interview 24 – Official A at Council of State

Interview with senior official A at the Judicial Division of the Council of State, The Hague, 17 October 2014.

Interview 25 – Official B at Council of State

Interview with senior official B at the Judicial Division of the Council of State, The Hague, 13 July 2015.

Interview 26 – State Councillors C and D

Interview with State Councillor C and State Councillor D at the Judicial Division of the Council of State, The Hague, 17 September 2015.

Interview 27 – State Councillor E

Interview with former State Councillor E of the Council of State, Amsterdam, 4 August 2015 (not recorded).

Interview 28 – State Councillor C

Interview with State Councillor C at the Judicial Division of the Council of State, The Hague, 2 October 2018.