

Varying Perceptions of the Legal Effect of EU Post-legislative Guidance

Citation for published version (APA):

Polak, J., & Versluis, E. (2022). Varying Perceptions of the Legal Effect of EU Post-legislative Guidance. *European Law Review*, 47(1), 52-68.

Document status and date:

Published: 01/02/2022

Document Version:

Publisher's PDF, also known as Version of record

Document license:

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**Varying Perceptions of the Legal Effect of EU Post-
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***Reprinted from European Law Review*
Issue 1 2022**

***Sweet & Maxwell*
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)
SWEET & MAXWELL**

Varying Perceptions of the Legal Effect of EU Post-legislative Guidance

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☞ Aviation safety; Binding force; European Union; Guidelines; Integrated pollution prevention and control; Interpretation; Netherlands; Poland; Portugal; Product safety

Abstract

Post-legislative guidance, such as interpretative rules, decisional acts and compliance templates, is but one of the many tools that the European Union (EU) has at its disposal to compel compliance from its Member States. The legal effect of these different types of guidance varies, but so does its interpretation in different Member States. This article analyses the varying perceptions of the legal effect of post-legislative guidance via EU directives on pollution prevention, air safety and product safety. Based on interviews in the Netherlands, Poland and Portugal, this study illustrates a wide variety of perceptions of the legal effect of EU post-legislative guidance, as well as a variety of perceptions about whether such guidance should be binding. In turn, this may influence the extent to which such post-legislative guidance is actually followed up.

Introduction

The European Union has several tools it can use to ensure that Member States, across all policy sectors, implement EU legislation. This article concentrates on one of its softer tools: post-legislative guidance. This is first and foremost aimed at clarifying “how the body of primary and secondary [EU] law must or will be applied”.¹ Post-legislative guidance is a regular feature of EU law, which has been increasingly used over time because of the complexity of legislative provisions. In addition, we have also seen an increase due to the rise of jurisprudence of the European Court of Justice (ECJ) on the interpretation of EU measures.² Next to these rather instrumental reasons on why guidance is developed are more symbolic or strategic reasons—for instance, to serve as ammunition to back up organisational preferences, or in a legitimising fashion by exploring the type of expert knowledge that enhances organisational legitimacy.³

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¹ L. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004), p.140.

² S. Lefevre, “Interpretative Communications and the Implementation of Community Law at National Level” (2004) 29 E.L. Rev. 809–810; Senden, *Soft Law in European Community Law* (2004), p.140.

³ C. Boswell, “The Political Functions of Expert Knowledge: Knowledge and Legitimation in European Union Immigration Policy” (2008) 15 *Journal of European Public Policy* 4; R.F. Rich, “Measuring Knowledge Utilization: Processes and Outcomes” (1997) 10 *Knowledge and Policy: The International Journal of Knowledge Transfer and Utilization* 3.

The adoption of post-legislative guidance can be seen as important in light of the debate on the need for better quality legislation, as first acknowledged by the 1992 Edinburgh European Council, after which significant effort to address the relevant concerns was made. Legislative improvements are, however, cumbersome and slow. On the other hand, guidance is regarded as a relatively fast and flexible tool to address the need for clarification that emerges in the system of shared administration in the EU.⁴

We do not know much about the extent to which post-legislative guidance is actually used by those whom it targets. How such actors perceive its relevance and legal effect is very much likely to influence the extent to which they will use it. The analysis in this article adds to the academic literature on post-legislative guidance, since it provides the first empirical insights into the perception of the legal effect of guidance by national authorities. While all guidance is soft law, and thus in principle non-binding, there are conditions that may be seen as endowing guidance with a legal binding effect (see section “Different types and features of post-legislative guidance”). Consequently, we expect variation in the perceived degree of bindingness of different types of post-legislative guidance. What the analysis in this article illustrates is that different actors in different Member States and different policy sectors have varying perceptions of the legal effect—that is, the degree of bindingness—of post-legislative guidance. In addition, they have varying opinions on the usefulness of such effect. This is relevant information to know, as their perception of the legal effect—and the usefulness of the bindingness of the guidance—will influence the use and thus the overall effectiveness of such guidance for supporting implementation.

Based on case law, document analysis and 22 interviews with officials from three Member States,⁵ this article explores the perceived legal effect of post-legislative guidance in the context of three EU directives. The Member States selected for examination are the Netherlands, Poland and Portugal, as they are said to belong to one of the four different “worlds of compliance”: the world of law observance, the world of domestic politics, the world of transposition neglect and the world of dead letters.⁶ These countries are claimed to respond differently to EU legislation and, in turn, we expect that they would thus also respond differently to post-legislative guidance. Countries belonging to the “world of law observance” or the “world of domestic politics” are thought to have few problems in the application of EU law; both are diagnosed as having effective administrative and court systems ensuring smooth application. The Netherlands is chosen as a sample country for the world of domestic politics, which assumes that it will implement EU policies according to its own domestic preferences. Here, we might expect the post-legislative guidance to be utilised when it is in line with the domestic situation. By contrast, countries that are thought of as belonging to the “world of transposition neglect” are known to stumble upon problems at the application stage depending on whether domestic conditions suit. In other words, compliance is neglected unless the domestic conditions make it easy to apply. For this category, Portugal is chosen as a sample country. In this case, we may assume a more symbolic use of the guidance. Countries clustered in the “world of dead letters” are considered to be the worst performers when it comes to process patterns at the application stage, with the consequential lack of implementation being referred to as rather systematic.

⁴ L. Senden, “Soft Post-legislative Rulemaking in the EU: A Time for More Stringent Control” (2013) 19 E.L.J. 61–62.

⁵ In the wider research project, 91 interviews were carried out. Additionally, we studied different mechanisms related to the implementation of EU directives (e.g. EU agencies, infringement procedures) using the same directives and Member States as in this article. For this article, we only resort to those 22 interviews in the Netherlands (9), Poland (8), Portugal (4) and the European Aviation Safety Agency (1) that directly link to the mechanism of post-legislative guidance. At the Member State level, we interviewed officials from both the relevant national ministries and from the agencies responsible for applying the relevant EU law provisions, i.e. the street-level actors involved in market surveillance, inspecting airplanes and deciding on permit conditions “on the ground”.

⁶ G. Falkner and O. Treib, “Three Worlds of Compliance or Four? The EU-15 Compared to New Member States” (2008) 46 J.C.M.S. 293; S. Leiber, “Transposition of EU Social Policy in Poland: Are there Different ‘Worlds of Compliance’ in East and West?” (2007) 17 *Journal of European Social Policy*.

These countries are described as “only” transposing EU directives, without applying them in practice. Poland has been selected as a sample country, and here we have little expectation about the guidance being utilised. Officials from these three countries may thus be expected to demonstrate different perceptions of the usefulness and legal effect of post-legislative guidance.

As we are interested in unravelling the different effects of guidance across countries and sectors, we have decided to only concentrate on directives. Adding regulations would lead to too much variation in the research design. The directives that have been selected for study are the EU Directive on Integrated Pollution Prevention and Control (IPPC Directive),⁷ the Directive on Safety Assessment of Foreign Aircraft (SAFA Directive)⁸ and the General Product Safety Directive (GPS Directive).⁹ The IPPC Directive obliges Member States to provide environmental licenses to large industrial installations; the SAFA Directive requires Member States to conduct inspections and to assess the safety risks of non-EU aircrafts; finally, the GPS Directive requires Member States to undertake inspections and to assess the safety risks of non-food consumer products that are not covered by harmonising legislation. These directives were selected based on their variation in the type of post-legislative guidance in place, as well as in their legal effect (see section “Post-legislative guidance relevant to this study”).

As the EU harbours many different legal cultures, and the use of post-legislative guidance varies considerably in different policy sectors, our analysis of the perception of guidance under three directives in three Member States can be no more than a first exploratory insight. Based on these explorations, we illustrate how guidance that is said to have a legal effect on paper is not necessarily perceived as such in different Member States. The three countries selected respond individually to different types of post-legislative guidance, and also independently value the wish for guidance to be more binding.

Post-legislative guidance and its legal effect

Different types and features of post-legislative guidance

Post-legislative guidance may come in three forms, as shown in fig.1 below.

⁷ Council Directive 96/61 concerning integrated pollution prevention and control [1996] OJ L257/26; Directive 2008/1 concerning integrated pollution prevention and control (codified version) [2008] OJ L24/8. This Directive has been replaced by Directive 2010/75 on industrial emissions [2010] OJ L334/17.

⁸ Directive 2004/36 on the safety of third-country aircraft using Community airports [2004] OJ L143/76. This Directive has been repealed and replaced by implementing rules, which acquired general applicability in autumn 2014.

⁹ Directive 2001/95 on general product safety [2001] OJ L11/4.

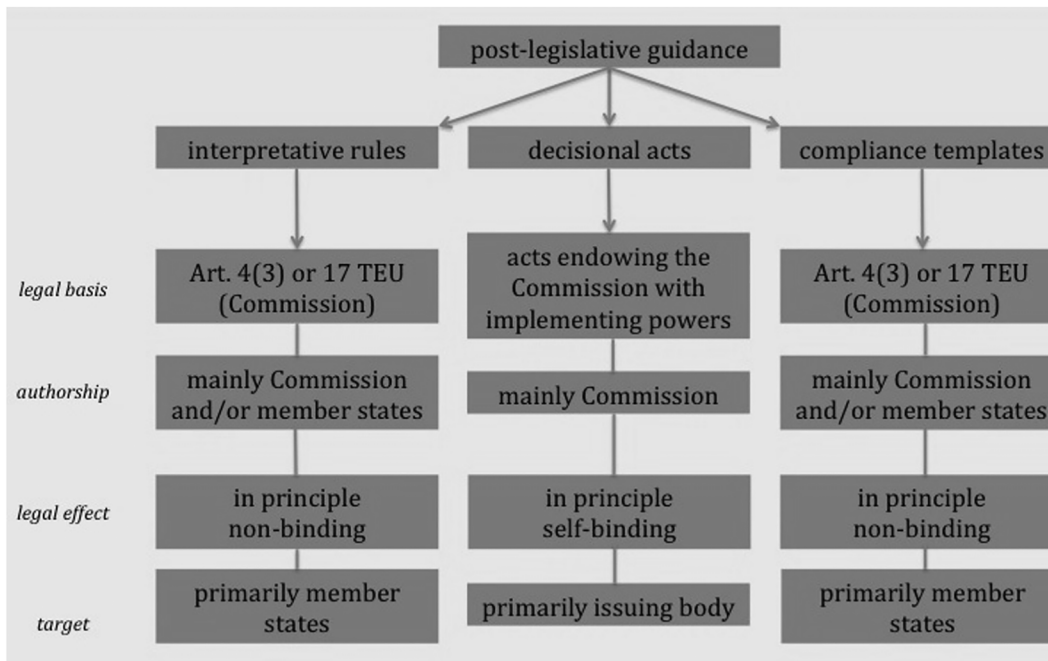


Fig.1—Types and features of post-legislative guidance¹⁰

Interpretative rules serve to clarify certain legal provisions in order to prevent distinct interpretations from occurring (“active interpretation”), or to codify the existing legal framework and Court of Justice case law in order to increase the accessibility of a certain domain (“passive interpretation”).¹¹ Such rules are primarily targeted at Member States. While they may be adopted by institutions other than the European Commission,¹² such as EU agencies, the Commission remains the main body when it comes to the issuance of interpretative rules.¹³ The Commission may itself take the initiative to adopt such rules whenever it deems this necessary to clarify the rights and obligations inherent in certain legal provisions. It is argued that if the Commission is to carry out its duty as guardian of the Treaties (art.17 Treaty on European Union) (TEU) properly, it must be empowered not only to react to infringements that have already occurred, but also to act proactively in order to prevent such infringements from occurring in the first place.¹⁴ The Commission may well opt to involve the Member States in the development of interpretative rules. Working in partnership with the Member States may be beneficial to the Commission, since it allows it to take advantage of the expertise of the national authorities and because such cooperation may enlarge the support

¹⁰ Based on J. Scott, “In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law” (2011) 48 C.M.L. Rev. 329–355.

¹¹ Senden, *Soft Law in European Community Law* (2004), p.146; Senden, “Soft Post-legislative Rulemaking in the EU” (2013) 19 E.L.J. 60; Lefevre, “Interpretative Communications and the Implementation of Community Law at National Level” (2004) 6 E.L. Rev. 809–810.

¹² Senden, *Soft Law in European Community Law* (2004), p.141.

¹³ *Re Zwartveld* (C-2/88 Imm) EU:C:1990:315; [1990] 3 C.M.L.R. 457 at [17]–[33].

¹⁴ Senden, *Soft Law in European Community Law* (2004), pp.317–318.

base for interpretative rules once adopted.¹⁵ Interpretative rules are in principle non-binding, although exceptions apply.¹⁶

Decisional acts are adopted mainly by the Commission, and only in areas in which the Treaty or secondary acts assign implementing and discretionary powers to them.¹⁷ More recently, committees, networks and agencies have also gained the power to establish decisional acts to ensure the implementation of EU measures.¹⁸ Decisional acts go beyond the mere interpretation of legislative provisions by indicating how the issuing body intends to apply EU law in individual cases and how it will make use of the discretionary powers assigned to it in this respect.¹⁹ While interpretative rules cannot in themselves be decisional, because the assignment of implementing powers is a precondition for the adoption of decisional acts, decisional acts may well have an interpretative element. Decisional acts are primarily meant as internal guidelines for the relevant issuing bodies but may have external effects as well; for example, they may be beneficial for Member States, since they contribute to equal treatment and increase the transparency of individual decisions,²⁰ and allow Member States to anticipate the way in which EU measures will be applied.²¹ Decisional acts are in principle binding on the issuing body.

Compliance templates, finally, serve to steer the national competent authorities in the registration of data by fleshing out legislative requirements.²² A uniform registration of data through the use of compliance templates is vital where information gathered by national competent authorities is submitted to the Commission or to another EU body to ensure this information is analysed or exchanged amongst Member States. Compliance templates may be adopted by the Commission or by other EU bodies, sometimes in partnership with Member States. Where adopted by the Commission, no specific legal basis seems to be required; just as in the case of interpretative rules, the Commission may act on the basis of arts 4(3) and 17 TEU. Compliance templates are in principle not binding on Member States, but exceptions apply.²³

In conclusion, we can thus state that, while decisional acts do in principle bind the issuing body, interpretative rules do not bind anyone in principle. The legal effect of interpretative rules ultimately depends on the basis on which they were established.²⁴ Member States may be under a duty of compliance where a binding legislative act provides for the adoption of interpretative rules and calls upon the national authorities to take these rules into account in the implementation of the law or to comply with them to a certain extent. In this case, Member States have a duty to comply with interpretative rules. One may argue that, in such cases, national competent authorities can—as in the case of binding decisional acts—rely on guidance in national courts, not just as an interpretation aid but to provide standards for judicial review.²⁵ Interpretative rules that do not follow a provision in a binding legislative act must be understood to be

¹⁵ See Scott, “In Legal Limbo” (2011) 48 C.M.L. Rev. 331 for the notion that guidance may be elaborated upon through a “partnership working method” between the Commission and the Member States.

¹⁶ See Scott, “In Legal Limbo” (2011) 48 C.M.L. Rev. 329–355.

¹⁷ See, initially, *De Santis v Court of Auditors of the European Union* (C-146/84) EU:C:1985:242 (staff cases), and further, for example, *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* (C-311/94) EU:C:1996:383; [1997] 3 C.M.L.R. 373; *Spain v Commission* (C-169/95). For a discussion, see Senden, *Soft Law in European Community Law* (2004), p.312; Senden, “Soft Post-legislative Rulemaking in the EU” (2013) 19 E.L.J. 63–64.

¹⁸ Senden, “Soft Post-legislative Rulemaking in the EU” (2013) 19 E.L.J. 61.

¹⁹ Senden, *Soft Law in European Community Law* (2004), p.148.

²⁰ *Spain v Commission* (C-442/97) EU:C:1999:560 at [32].

²¹ Senden, *Soft Law in European Community Law* (2004), pp.141, 148.

²² Scott, “In Legal Limbo” (2011) 48 C.M.L. Rev. 334.

²³ See Scott, “In Legal Limbo” (2011) 48 C.M.L. Rev. 329–355.

²⁴ Senden, *Soft Law in European Community Law* (2004), p.140; Scott, “In Legal Limbo” (2011) 48 C.M.L. Rev. 329–355; F. Snyder, “Soft Law and Institutional Practice in the European Community” in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (Dordrecht: Springer, 1994), p.198.

²⁵ Senden, “Soft Post-legislative Rulemaking in the EU” (2013) 19 E.L.J. 63.

non-binding.²⁶ In this case, compliance is voluntary, and the decision whether or not to use the guidance thus remains with the Member States. Given the variation between the three Member States described previously, we thus assume that actors in these different countries might have varying perceptions of the legal effect of the various types of guidance used. Before we can explore this in practice, the next section first elaborates on the types of guidance in place for the three selected directives.

Post-legislative guidance relevant to this study

The current section elaborates on the guidance documents that are relevant in the context of the three directives included in this study. The key features of the guidance documents are outlined in Table 1. While more types of guidance are available, in our detailed description we concentrate on the guidance used *most* in all three cases: for the GPS Directive this is the Rapid Alert System for dangerous consumer products guidelines (RAPEX Guidelines), for the IPPC Directive this is the Best Available Techniques Reference Documents (BREFs) and for the SAFA Directive this is the Guidance Materials.

Table 1 Post-legislative guidance relevant to the context of this study

	Interpretative	Decisional	Template	Legal effect
<i>IPPC</i>				
BREFs	X			legally binding
<i>SAFA</i>				
Guidance Materials	X		X	non-binding
<i>GPS</i>				
RAPEX Guidelines	X	X	X	legally binding

The IPPC Directive

Most prominent in the context of the IPPC Directive is, no doubt, the BREFs.²⁷ The IPPC Directive foresees environmental licenses to large industrial installations. These installations should make use of the best available techniques to control environmental pollution, and the BREFs provide guidance on the application of such techniques. Each BREF consists of several hundreds of pages that provide general information regarding, amongst others, the relevant sector and the applied processes and techniques in that sector. In total, thirty-five BREFs are available.²⁸ The BREFs are addressed to the Member States.²⁹ They are published by the European Commission, and Member States are actively consulted in the information exchange process leading up to the adoption of the BREFs. Additionally, the BREFs must be understood to be legally binding. This is the case, first of all, since the IPPC Directive requires the Commission to establish guidance on the Best Available Techniques (BAT). Secondly, the IPPC Directive obliges Member States to take the BREF guidelines into account when determining the best available techniques.³⁰ Note that the Directive does not lay down a duty of compliance for Member States; its wording suggests that deviation from the BREFs is possible, provided that such a deviation is sufficiently motivated. The possibility for

²⁶ Senden, *Soft Law in European Community Law* (2004), p.242.

²⁷ All BREFs are retrievable online; see European IPPC Bureau, "References", available at <https://eippcb.jrc.ec.europa.eu/reference/> [Accessed 11 January 2022].

²⁸ Number valid for September 2021.

²⁹ Directive 2008/1 consideration 27.

³⁰ Directive 2008/1 Annex IV(12).

deviation seems to also be implied in the idea that authorities must not only take the BREFs, but other factors too, such as the local environmental conditions, into account in the determination of BAT.³¹

The SAFA Directive

The SAFA Directive requires Member States to conduct inspections and to assess the safety risks of third-country aircrafts, and the SAFA Guidance Materials guide national competent authorities in how to execute such inspections and assessments. Two versions exist: the Guidance Material for the qualification of SAFA inspectors,³² and the Guidance Material for SAFA ramp inspections.³³ The first document, comprising 81 pages, clarifies the qualification criteria of inspectors, the organisation of training courses for inspectors in accordance with the relevant syllabi established and published by the European Aviation Safety Agency (EASA) and the criteria for the assignment of senior inspectors. The second document totals 217 pages and elaborates on the scope and method of inspection for each of the items on the SAFA checklist, on the categorisation of findings and on the relationship between such categorisations and the corrective actions to be taken. Some 180 pages detail inspection instructions, which include standard references to applicable international standards and pre-described findings.³⁴ Encompassing both interpretative rules and compliance templates, the SAFA Guidance Materials are addressed to Member States.³⁵ They are adopted by EASA, as an Executive Director Decision.³⁶ Member States were given the right to be consulted in the development process. Furthermore, the SAFA Directive itself stipulates that in the development of the guidance materials, EASA must establish a,

“transparent procedure for consulting the Member States drawing on available expertise in the aviation regulatory authorities of Member States and by involving, whenever necessary, appropriate experts from relevant interested parties”.³⁷

The Guidance Materials are not legally binding. While the SAFA Directive mandates EASA to develop and publish detailed guidance materials in order to assist the Member States in the implementation of certain provisions thereof,³⁸ it does not explicitly impose an obligation on Member States to consider these guidelines or to comply with them, as was the case for the aforementioned IPPC Directive.

The GPS Directive

The GPS Directive requires Member States to carry out inspections and to evaluate the safety of non-food consumer goods, and the RAPEX Guidelines guide national authorities in how to carry out such inspections

³¹ Directive 2008/1 art.9(4).

³² European Aviation Safety Agency, ED Decision 2008/001/S of the Executive Director of the European Aviation Safety Agency on the guidance material for the qualification of SAFA inspectors, available at <https://www.easa.europa.eu/> [Accessed 18 December 2021], (not published in the Official Publication of the Agency).

³³ European Aviation Safety Agency, ED Decision 2009/001/S of the Executive Director of the European Aviation Safety Agency on the guidance material for SAFA ramp inspections (first version); European Aviation Safety Agency, ED Decision 2012/001/S of the Executive Director of the European Aviation Safety Agency on the guidance material for SAFA ramp inspections (second version), both available on <https://www.easa.europa.eu/> [Accessed 18 December 2021], (not published in the Official Publication of the Agency).

³⁴ European Aviation Safety Agency, ED Decision 2012/001/S of the Executive Director of the European Aviation Safety Agency on the guidance material for SAFA ramp inspections, Appendix I.

³⁵ Commission Directive 2008/49 amending Annex II to Directive 2004/36 of the European Parliament and of the Council regarding the criteria for the conduct of ramp inspections on aircraft using Community airports [2008] OJ L109/17, art.2. See also European Aviation Safety Agency, Decision 2008/001/S, p.2; Decision 2012/001/S, p.5.

³⁶ Note that these decisions are not published in the Official Publication of EASA; they are only available online.

³⁷ Commission Directive 2008/49 art.2.

³⁸ Directive 2004/36 Annex II, point 2.3.4, 2.4.7, 2.5.4, 4.3, 5.2, 6.1, 6.4.

and safety evaluations. They also explain how Member States should work with the Rapid Alert System when dealing with dangerous consumer products. The preamble to the Directive provides for the establishment of non-binding guidelines regarding the management of the RAPEX system.³⁹ This system is used by the Commission and the Member States in the exchange of information about dangerous non-food products. In 64 pages, these guidelines clarify the obligations for Member States under the information exchange system and provide reporting templates for Member States when they use RAPEX.⁴⁰ As they specify the duties of both the Commission and the Member States,⁴¹ the RAPEX Guidelines seem to exhibit a combination of decisional and interpretative rules. They also include compliance templates.

While Commission decisions are inherently legally binding,⁴² the hallmark of guidelines is that they are soft-law elaborations of binding hard-law norms.⁴³ The GPS Directive itself requires the European Commission to adopt and regularly update guidelines concerning the management of RAPEX by the Commission and the Member States.⁴⁴ In addition, the Directive requires that Member States take these guidelines into account both in risk assessment and risk management processes.⁴⁵ We thus consider these guidelines to have a binding effect, similarly to the IPPC Directive.

Outlining the cross-sectional and cross-national variations in the perception of the legal status of post-legislative guidance

The three cases at hand make use of different types of post-legislative guidance, varying in their legal effect. To provide the first empirical insights into how post-legislative guidance can be perceived, and thus used, differently, this section explores how the actors making use of this guidance in the three selected Member States perceive the legal effect thereof. As a reminder, our case selection is based on the world of compliance hypotheses that the Dutch will only use the guidance when this is in line with their domestic interpretation, the Portuguese are more likely to use it symbolically, while we expect the Polish to be less likely to use the guidance.

The BREF guidance documents

The status of guidance documents seems to have been the subject of discussion most explicitly in the area of integrated pollution prevention and control. There have been great divergences in the use of the BREFs and the three countries included in this study exemplify some of these instances.

The position of the BREF guidance documents in the national implementation context seems to be strongest in the Netherlands. In line with the provisions laid down in the IPPC Directive, Dutch legislation stipulates that authorities are required to take the BREFs into account in the determination of the BAT for industrial installations covered by the IPPC Directive.⁴⁶ While the legislation does clearly allow officials a margin of discretion as to the conclusions to be attached to this exercise, jurisprudence of the Dutch

³⁹ Directive 2001/95 consideration 28.

⁴⁰ See Commission Decision 2004/418 laying down guidelines for the management of the Community Rapid Information System (RAPEX) and for notifications presented in accordance with art.11 of Directive 2001/95 [2004] OJ L151/83; Commission Decision 2010/15, respectively.

⁴¹ Commission Decision 2010/15 Part I.

⁴² See art.288 TFEU, fourth indent.

⁴³ Scott, "In Legal Limbo" (2011) 48 C.M.L. Rev. 334.

⁴⁴ Directive 2001/95 arts 11(1) and 12(3), and Annex II.

⁴⁵ Directive 2001/95 art.8(3).

⁴⁶ Besluit omgevingsrecht, Besluit van 25 maart 2010, houdende regels ter uitvoering van de Wet algemene bepalingen omgevingsrecht [2010] *Stb.* 143, Artikel 5(4), sub.2.

Council of State endows the BREFs with a rather specific legal meaning.⁴⁷ The Dutch Council of State has concluded that deviation from the BREFs is possible only where adequately motivated.⁴⁸ It has also ruled that, where the requirements laid down in the BREFs are met, compliance with BAT is assumed.⁴⁹ Moreover, if techniques are not listed in the BREF documents, only those techniques that facilitate the achievement of a similar or further reduction of emission levels are permitted.⁵⁰

Particularly in view of the strict judicial interpretation of the status of the BREFs, national authorities attach great importance to the BREFs in the determination of BAT. Dutch officials indicate that when it comes to the determination of BAT in specific cases, they first look at the relevant (draft) BREFs, in combination with the relevant national BAT documents.⁵¹ Interviewees tend to denote the Netherlands as the darling of the EU in this regard; a qualification that may be illustrated by the following quote:

“In the Netherlands, because of jurisprudence, the BREFs have a much more important status than in other Member States. Therefore, the impact of the BREFs is much bigger than elsewhere. We may only deviate from the BREFs if we motivate this adequately. In other countries, people just read the BREFs and they may say: ‘this is not so good, I know a better solution than what the BREF says.’”⁵²

The meaning with which the BREFs are endowed seems to be different in Portugal and Poland. Portuguese implementing legislation refers to the BREFs as one of the information sources that should be taken into account in the determination of BAT.⁵³ Legislation furthermore states that the environmental permit must be rejected where an installation’s operating conditions do not comply with BAT, especially where the installation does not attain emission limit values within the range associated with BAT as laid down in the BREFs.⁵⁴ In reply to a Commission questionnaire, the Portuguese Environment Agency confirms that “Portugal considers application of the BREFs formally adopted as at the date of the permit to be mandatory”.⁵⁵ Interviewees, however, indicate that the BREFs are viewed “as something that we want to achieve as binding”, and that the BREFs are not strictly binding as such.⁵⁶ Supporting these latter perceptions is the fact that Portuguese officials do have room to accommodate what they call “the really problematic cases”.⁵⁷ This approach seems to leave room for a greater degree of leniency on the part of permit writers than the approach taken in the Netherlands. In the absence of national case law on the use of BREFs in Portugal, the validity of these perceptions has not been confirmed in court.

In Poland, finally, the interpretation of the BREFs seems to be much less committal than what has been observed in the Netherlands and Portugal. Similarly to Dutch and Portuguese legislation, the relevant Polish implementing act stipulates that the BREFs need to be taken into consideration in the determination

⁴⁷ E.g. RvS, 26 April 2006, NL:RVS:2006:AW3976; 25 January 2006, NL:RVS:2006:AV0295; 22 April 2009, NL:RVS:2009:BI1839; 22 July 2009, NL:RVS:2009:BJ3426; 16 March 2011, NL:RVS:2011:BP7775; 5 October 2011, NL:RVS:2011:BT6639.

⁴⁸ For an overview, see J.H.G. Van den Broek, “IPPC-proof op 30 Oktober 2007” (2007) 2 *Milieu en Recht* 34.

⁴⁹ E.g. RvS, 14 November 2006, No.200608547/1; 4 April 2007, NL:RVS:2007:BA2227; 16 May 2007, NL:RVS:2007:BA5207; 21 December 2007, NL:RVS:2007:BC1397; 21 December 2007, NL:RVS:2007:BC1400; 22 July 2009, NL:RVS:2009:BJ3426; 7 April 2010, NL:RVS:2010:BM0215; 7 July 2010, NL:RVS:2010:BN0430.

⁵⁰ RvS 23 February 2005, NL:RVS:2005:AS7235; 17 February 2010, NL:RVS:2010:BL4140.

⁵¹ All interviews with Dutch officials.

⁵² Interview NL22.

⁵³ Decreto-Lei n° 173/2008 de 26 de Agosto (2008) DR 1.^a série, N° 164/5967, art.7, 18(1).

⁵⁴ Decreto-Lei n° 173/2008, art.16(6)(e).

⁵⁵ European Environment Agency, “Reply to the second questionnaire on the implementation of Directive 96/61 concerning integrated pollution prevention and control (IPPC), reference period 2003–2005”, <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/> [Accessed 11 January 2022], 15.

⁵⁶ Interview PT9.

⁵⁷ Interview PT9. Such deviation is possible where motivated adequately, as previously stated.

of BAT.⁵⁸ And just as with Dutch and Portuguese permit writers, Polish permit writers also refer to the BREFs—in combination with national regulations and national guidance—as crucial, and as the basis for the determination of BAT.⁵⁹ However, unlike Dutch and Portuguese legislation, the relevant Polish act does not assign special importance to the BREFs in comparison with the other aspects that must be taken into consideration in the determination of BAT. Rather than treating the BREFs as sources laying down unequivocal recommendations of solutions to be applied or standards to be complied with, Polish legislation seems to consider the BREFs merely as points of reference.⁶⁰ Jurisprudence on the status of the BREFs does exist in Poland, although, in contrast to the Netherlands, the BREFs do not take on a pivotal position. An analysis of Polish case law on the application of the IPPC Directive suggests that, contrary to Dutch judges, Polish judges do not examine the contents of individual BREF documents or verify whether permit requirements are set within the scope of the requirements laid down in the BREFs.⁶¹ Where regional courts refer to the guidance documents, these references are usually merely formalistic; in most cases, the court does not go beyond simply stating that the BREFs need to be taken into account.⁶² The inherently non-binding nature of the BREFs is confirmed by the Polish Supreme Administrative Court, which has noted that the BREFs “give opinions” on BAT, and that “these studies are not official” and “not binding” on the administrations of the Member States.⁶³ In view of this case law, the relatively loose attitude of Polish officials with regards to the BREFs seems understandable.⁶⁴

These cross-country variations in perceptions on the status of the BREF documents, combined with the desire to limit imbalances in the Union regarding the level of industrial emissions, has led to demand for “more binding” guidance on the BAT. These calls have already been answered by the latest directive in 2010. This Industrial Emissions Directive provides that the BAT, to be adopted as Commission implementing decisions, “shall be the reference for setting the permit conditions” for installations covered by the Directive.⁶⁵ This wording contrasts sharply with the IPPC Directive, which referred to the BREFs as a “help” to authorities in the implementation process.⁶⁶

The SAFA guidance materials

We anticipated that the BREFs were legally binding, and the aforementioned descriptions illustrated that respondents in the three countries perceived this status differently. We categorised the SAFA guidance material as non-binding, and this is clearly confirmed by respondents in all three countries investigated.⁶⁷ All three national aviation authorities included in this study perceive the guidance as laying down working procedures only; national legislation does not refer to them as binding. National case law on the status of the guidance is absent.

⁵⁸ Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Environmental Protection Act) art.207(1), sub.6.

⁵⁹ Interviews PL11, PL12.

⁶⁰ Entec UK Ltd, *Assessment of the Implementation of the IPPC Directive* (2010) (report prepared for the European Commission, DG Environment); EU Forum of Judges for the Environment, “Questionnaire on the IPPC Directive for the annual conference in Stockholm 2009 (country report for Poland)” (2009) <https://www.eufje.org/index.php?lang=en> [Accessed 18 December 2021].

⁶¹ Note that ECJ case law on this issue does not exist. If it did, this might have been different.

⁶² E.g. cases IV SA/Wa 2324/12, judgement of 6 February 2013; IV SA/Wa 1650/11, judgement of 23 January 2012; IV SA/Wa 889/09, judgement of 12 January 2010; II SA/Sz 816/09, judgement of 4 November 2009; IV SA/Wa 1757/11, judgement of 12 January 2012; IV SA/Wa 771/13, judgement of 5 July 2013; IV SA/Wa 231/08, judgement of 9 May 2008.

⁶³ Case OSK 874/10, judgement of 15 May 2011.

⁶⁴ None of the Polish officials interviewed for this study referred to the BREFs as binding; rather, they emphasised the idea that the BREFs are non-binding documents.

⁶⁵ Directive 2010/75 on industrial emissions, art.14(3) (emphasis added).

⁶⁶ Directive 2008/1 recital 27; Directive 96/69 recital 25 (emphasis added).

⁶⁷ Interviews with all EU and national SAFA officials.

Interviews do suggest, however, that the Guidance Materials have a clear practical effect.⁶⁸ Dutch officials indicate that, although deviation from the Guidance Materials is possible, “you need to stick to them, since they have a very strong legal effect”.⁶⁹ This is considered to be the case, first of all, because the guidelines are seen as fundamental for standardising implementation practices across Member States. There is a call for such standardisation because of the high levels of interdependence amongst authorities in the area of air safety.⁷⁰ In other words, inspectors in one country feel dependent on the quality of the work done by inspectors in other countries. It is in particular the Pre-Described Findings (PDFs) that are seen as constituting a powerful tool for the standardisation of findings across the board.⁷¹ These PDFs are lists of standardised “findings” that inspectors can observe for each inspection item (for example, “damage to flight deck windows”, or “insufficient number of flight crew members”).⁷² The following quotation, which is taken from an interview with the Portuguese SAFA National Coordinator, not only confirms this idea but also underlines a second benefit of the guidelines, namely their practical usefulness for supporting SAFA inspectors in their work:

“I can spend half an hour arguing against the harmonised and Eurocratic way of doing things, but it’s a total waste of time. In my opinion, the practical way of doing that and of assuring that the same criteria are applied all over the Participating States is by having this approach: using always, if possible, the PDFs. It’s so practical, since if there is an issue that can be considered to be a finding, we apply the standard, and the technical requirement and even the categorisation of the finding immediately pop up. And what I really like about this system is that it is not mandatory, there is always room for UDFs [user-defined findings].”⁷³

This quotation reveals the impact that the SAFA Guidance Materials appear to have despite its non-binding nature. It also suggests that the idea of guidance as “binding” may well cause resistance on the part of officials to duly use such guidance in the implementation practice. Bindingness is associated with rigidity,⁷⁴ and with an unwanted harmonising drift on the part of European bureaucracy.⁷⁵ It seems that the allowance of a certain margin of discretion to officials may help these officials overcome their initial resistance to the use of guidance documents on the ground.⁷⁶

The latter aspect is something of which EASA has also become aware. An official from EASA indicates that, while the guidance materials are “pretty binding” and SAFA inspectors “cannot deviate too much,”⁷⁷ guidance should be “guiding rather than complicating”, and bindingness is certainly not considered to be helpful in this regard.⁷⁸ In line with this perception, co-operation with Member States—rather than top-down imposition—is considered the way to go; the same EASA official clarifies that the Agency wants “to sell the guidance to the Member States rather than force it down their throat”.⁷⁹

All in all, then, we see in this case of air safety that guidance does not have to be binding in order for it to be applied across Member States. Indeed, we learn that the perception of guidance as binding may have the opposite effect of creating aversion amongst officials to using such guidelines. Guidelines should

⁶⁸ All interviews with national SAFA officials.

⁶⁹ Interview NL29.

⁷⁰ K. van Boetzelaer and S. Princen, “The Quest for Co-Ordination in European Regulatory Networks” (2012) 50 J.C.M.S. 819.

⁷¹ Interview NL29, PT17.

⁷² SAFA Guidance Material, Annex I.

⁷³ Interview PT17.

⁷⁴ Interview NL29, PT17, PT15, PL15.

⁷⁵ Interview PT17.

⁷⁶ Interviews PT17, PT15, PL15, NL29.

⁷⁷ Interview EASA3.

⁷⁸ Interview EASA3.

⁷⁹ Interview EASA3.

be guidelines, the message seems to be. In other words, they should essentially be no-strings-attached mechanisms for officials to accept them as a compliance instrument. This illustration clearly sets the area of air safety apart from the domain of integrated pollution prevention and control, in which a call for binding guidance has been made. It seems that this difference may be explained, in part, by the divergent dynamics underlying compliance behaviour in both areas. In the area of air safety, voluntary compliance driven by a shared appreciation of the usefulness of guidance materials for achieving standardisation in situations of interdependence seems to be the rule. In the area of integrated pollution and control, in contrast, compliance behaviour seems to be directed at least in part by parties' own interests, making compliance with the BREFs difficult to predict. Seen in this light, the differences between both areas seem to be easily explicable.

The GPS Directive

For the final case, specifically the RAPEX Guidelines linked to the GPS Directive, we observe that the guidelines are not perceived as binding, despite previously establishing that they could be considered as legally binding. These guidelines are considered to be “just one model on how to do risk assessment”.⁸⁰ Such perceptions are not surprising in view of the national legislative frameworks of the three countries included in this study, which do not endow the guidelines with legal effect, and in view of the absence of national case law on the status of the guidelines in these same countries.

The prescription in the GPS Directive for the Commission to adopt guidelines, on the one hand, and the obligation for Member States to take these guidelines into account in their implementation practice, on the other hand, does, thus, not seem to lead to the perception at Member State level that they are legally binding. It would be interesting to verify if such perceptions are in line with national court rulings in this regard. This is not possible, however, as no case law exists on the interpretation of the RAPEX Guidelines in any of the three countries selected.

In brief, then, whether or not the RAPEX guidelines are binding does not seem to be at the forefront of officials' minds; if anything, the guidelines are considered to be a helpful tool in the market surveillance process. The idea that the guidelines are not exactly watertight may be taken to explain this particular stance, at least in part. Contrary to the SAFA Guidance Materials, the RAPEX Guidelines allow for substantive room for subjectivity. This noted leeway makes compliance hard to verify.

⁸⁰ Interview NL5, see also PT7 and PL3.

Comparing the various national perceptions

	Legal status of the guidance	Netherlands	Portugal	Poland
<i>Theoretical expectations</i>		<i>Use of guidance when in line with the national situation</i>	<i>Symbolic use of guidance</i>	<i>No use of guidance</i>
IPPC Directive	Legally binding	Expectation confirmed: Dutch law shows a similar interpretation as EU law, and guidance is perceived as needed to be used	Expectation might be confirmed: guidance not seen as strictly binding, which might imply a more symbolic use	Expectation confirmed: guidance seen as non-binding, least committed responses
SAFA Directive	Non-binding	No variation between Member States observable; guidance perceived as non-binding, yet observably used		
GPS Directive	Legally binding	No variation between Member States observable; guidance perceived as non-binding, yet observably used		

Table 2: Summarising the case studies

The three Member States were selected according to different theoretical expectations about the use of post-legislative guidance. Belonging to different worlds of compliance, Table 2 summarises these varying theoretical expectations, and illustrates the outcomes per Member State as well as per policy sector. What the three Member States and three policy sectors analysed in this article illustrate is that guidance does not need to be legally binding for it to be used. We observe a difference in legal bindingness between the SAFA and GPS cases, yet responses in both sectors are the same in the countries analysed. There is no variation between the countries, and interviewees discuss the guidance as non-binding, yet highly useful. What influences whether the national actors actually use the guidance, no matter its legal effect, is the level of interdependence in the policy sector. In the aviation and product safety sectors, inspectors feel a high level of dependence on the execution of the legislation in other countries. Thus, they see an urgent need for some form of standardisation within the EU. In these cases, it seems that it does not make a difference whether guidance is binding or not; non-binding guidance (actual or perceived) is used and

approached as relevant. In these cases of high interdependence, variation between national perceptions is only marginal, and the expected variation based on the different worlds of compliance is not observed. The expectations about differentiated domestic perceptions did hold in the case of IPPC.

Requests for binding guidance: a question of culture?

The preceding section illustrates that perceptions on the (legal) effects of guidance documents vary across both countries and policy sectors. In addition, it also suggests that perceptions of guidance as non-binding may be a blessing in terms of their use by national officials in the implementation practice, as the case of the SAFA Guidance Materials demonstrates. Without claiming an EU-wide generalised trend, the following section aims to explore how the relevant street level implementing actors involved value the bindingness of post-legislative guidance in our case studies.

Guidance in the area of IPPC

Although the introduction of “binding” BAT conclusions is a *fait accompli* with the latest EU directive, the debate on the desirability of this development does not seem to have died down. Interviews suggest that perceptions on this issue have continued to diverge. While all officials see benefits in having binding guidelines on the application of the BAT in permits for IPPC installations (examined further below), criticism has been loud and clear. This criticism relates, first of all, to the quality of the BREFs on which the BAT conclusions are based. Secondly, concerns also relate to the infrequent updating of the BREFs, which must be explained by the excessive duration of the drafting process. This duration, in turn, is partly explained by the manifold tugs of war amongst the stakeholders involved in the drafting process. The problem with the duration of the drafting process is that the time lapse between two consecutive guidance documents may be more than a decade, a fact that questions the extent to which the BREFs actually provide guidance on the best *available* techniques.⁸¹ Thirdly, and finally, officials refer to the binding nature of the BAT conclusions as problematic because it removes the little room for manoeuvre that authorities used to have to accommodate problematic cases.⁸² It should be noted that this complaint is not expressed by Dutch officials who, as pointed out earlier, encountered the same issue in the previously applicable legal framework.

Against these critical considerations stand perceptions underlining the benefits of having binding guidelines on the application of the BAT. Some officials indicated they were content with the binding BAT conclusions, since they are thought to increase the probability of the underlying legislative requirements being consistently applied across Member States. This motivation seems to be relevant in particular for officials who perceive themselves as faithful compliers and who perceive others as taking a rather casual attitude towards compliance with the BREFs. In the context of this study, the former are typically Dutch and Portuguese officials.⁸³

What counts for Polish officials is in particular the idea that the bindingness of the BAT conclusions is likely to ease discussions on permit requirements with economic operators in the environmental licensing process. More concretely, Polish interviewees indicate that the non-binding nature of the BREFs gives them little persuasive power in discussions with economic operators that may seek to exploit loopholes in legislation.⁸⁴ The more limited margin of discretion for authorities under the Industrial Emissions Directive makes it easier for officials to justify decisions and to “stand strong” in relation to operators, they say, as the following quotation illustrates:

⁸¹ Interview NL25.

⁸² Interview PT9, interview PL11.

⁸³ Interview PT9, NL21.

⁸⁴ Interview PL9, PL11, PL12.

“Now [prior to the application of the BAT conclusions] you’ve got more flexibility. You must always say: ‘of course this is in the BREF, but I took into account regional circumstances’, whatever those regional circumstances will be. This will be much more difficult when the BAT conclusions need to be applied. In fact, I would say that it would be easier for permit writers to issue permits, because they don’t have a lot of thinking. They just need to use the BAT conclusions. Now you can also prove as a company that maybe it is not in the BREF, but it is in my local BREF. With the BAT conclusions, this will be much more difficult. So it will be easier for authorities, but more difficult for companies.”⁸⁵

It is noteworthy that Dutch and Portuguese interviewees also suggest that permitting processes are broadly a negotiation game between authorities and companies.⁸⁶ Most companies are mainly preoccupied with cost implications,⁸⁷ and try to compel authorities into setting more lenient permit conditions.⁸⁸ The binding BAT conclusions are helpful to the permitting authorities since there is less room for discussion for environmental organisations and economic operators.⁸⁹

Guidance in the area of SAFA

The area of air safety seems to be the only domain in which calls for binding guidance are absent across the board. In view of the Polish insistence described previously on the usefulness of having binding guidance, it is in particular the Polish silence that seems to be surprising in this regard. Note, however, that Polish inspectors suggest the use of the SAFA Guidance Materials not only because they come in useful in the implementation process, but also because EASA insists they do so.⁹⁰ In other words, Polish inspectors consider the documents to be moderately binding despite the non-binding nature of these guidelines. The idea that Polish inspectors say they “are adequate for their needs”⁹¹ seems to be partly explained by the fact that they are seen as binding.

Motivations as to the use of the Guidance Materials are markedly different for Dutch and Portuguese officials. These officials use the guidance for several reasons, but not because they are thought to be binding. Of more importance is the fact that these officials seem to harbour quite a degree of aversion to the idea of the guidance as binding. It is also interesting that Portuguese inspectors in particular complain that the documents provide excessive information and “too much and too rigid guidance”.⁹²

Guidance in the area of GPS

The RAPEX Guidelines should be interpreted as legally binding, yet we have observed that the actors involved on the ground in the three selected Member States do not perceive them as such.

There is a shared perception in the selected countries, however, that binding guidance may ease relations between authorities and economic operators, just as in the domain of integrated pollution prevention and control. In contrast to the area of IPPC, in the area of product safety it is only Polish officials who express such perceptions. The following quotation, which is taken from an interview with an official from the Polish Office for Competition and Consumer Protection (UOKiK), suggests the importance in this context of cultural determinants shaping state-society relations on the one hand, and intra-organisational relations within state bureaucracy, on the other hand:

⁸⁵ Interview PL12, similar PL11.

⁸⁶ Interview NL21, NL23, similar NL25, NL24.

⁸⁷ Interview NL18, NL21.

⁸⁸ Interview NL23.

⁸⁹ Interview NL24.

⁹⁰ Interview PL15.

⁹¹ Interview PL15.

⁹² Interview PL15.

“We need formal guidance in relation to companies. If we don’t have this interpretation then we have to rely on our own interpretation, which might be too vague, which might not be enough for convincing the market operator. Whenever there is formal guidance from the Commission, that will end any discussion. So I think inspectors want formal guidance to additionally prove that they are right, and that goes into two directions. There is whether they are right vis-à-vis the market operator, and there is whether they are right vis-à-vis any audit from the supervisory office that says: ‘what the hell are you doing here, this is illegal’. It is the fear of being punished.”⁹³

Indeed, Polish trade inspectors indicate that formal guidance is what they need most, and they look to the UOKiK to provide them with that guidance.⁹⁴ UOKiK, in turn, looks to the European Commission, but mostly in vain, or so it seems, since the Commission is perceived to be “not very eager” to provide formal interpretations of legislative requirements. In the words of one official: “it looks like the Commission serves mostly as a guardian of the treaties, and not as a guide of the treaties”.⁹⁵

Conclusion

Post-legislative guidance in the EU is an important tool to tackle the compliance deficit. Nevertheless, we know relatively little about the workings and effects of such guidance tools. This article provides an empirical analysis of the perceptions of domestic users of such guidance documents. As the EU harbours many different legal cultures, and the use of post-legislative guidance varies considerably in different policy sectors, our analysis of the perception of guidance under three directives in three Member States can be no more than a first exploratory insight. A significant determinant for the usefulness of post-legislative guidance to improve the domestic implementation of EU legislation seems to be the legal effect that such guidance is perceived to have; “perceived”, since the legal effect that guidance documents are understood to have does not always mirror officials’ perceptions in this regard. The cases in this article illustrate that the legal effect of post-legislative guidance is not always evident. It is advantageous to learn that there are different national perceptions on the same piece of guidance, and that these perceptions might influence implementation practices on the ground. The IPPC case illustrates that guidance can lead to strong variations in the perceived bindingness between Member States. The GPS case suggests that guidance that is legally binding can be perceived as non-binding. Finally, the SAFA case shows that guidance that is non-binding can still have a strong effect on national practices.

The observed variation between the cases analysed provides initial thoughts about potential trends that need to be further explored in other cases. Our three case studies seem to illustrate that “making guidance binding” may not be needed in areas in which a shared incentive to use guidance is present, as is the case in sectors with high levels of interdependence. In the product and air safety sectors, the notion of interdependence pops up as relevant. Officials perceive guidance to be a useful tool not only because it helps them understand legislative provisions, but also since guidance increases the consistency of provision application across Member States and, therewith, the effectiveness and efficiency of their own implementation performance. We, therefore, expect that, in policy sectors with high levels of interdependence, differences in compliance cultures might be overruled, and guidance materials are expected to be used across the board due to the need for standardisation. In policy sectors with lower levels of interdependence, countries are expected to resort to default national strategies and thus illustrate the differentiated use of guidance in accordance with their “worlds of compliance typology”. This needs further testing, however, as the case studies explored in this article alone are insufficient to make further generalisations.

⁹³ Interview PL2.

⁹⁴ Interview PL3, PL4.

⁹⁵ Interview PL2. Similar NL8.

This article concentrates on the perceptions of the street-level implementers; how do those who actually need to use the guidance perceive the usefulness and legal effect of this guidance? What has been lacking in this approach is the perspective of the “designer” of this guidance. In order to capture the complete story on the legal effect of post-legislative guidance, the perception of the designer is relevant as well, and therefore we propose future research into the choices made by the European Commission, and other actors such as EU agencies, when designing such guidance. The Commission may have other, perhaps more symbolic or politically strategic, intentions with the provision of guidance, and more insight into this might shed a more comprehensive light on the perceived legal effect in the various Member States.