



*Directorate-General for Library,
Research and Documentation*

RESEARCH NOTE

Admissibility of court actions against ‘soft’ law measures

[...]

Subject: Examination of the admissibility of court actions brought against ‘soft’ law instruments adopted by administrative authorities, including recommendations, opinions, instructions, communications or other guidelines. Examination of the main reasons adopted for accepting the introduction of such actions

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SUMMARY

INTRODUCTION

1. The comparative study of the thirteen legal systems examined for the purposes of the present note reveals that, with the exception of *Common Law* countries, the courts of the Member States generally consider actions brought against ‘soft’ law instruments to be inadmissible.¹ However, almost all the jurisdictions concerned (apart from **Hungary**, where the legal situation is changing) allow, in exceptional cases, reviews of the legality of certain ‘soft’ law instruments, especially in situations where the measure in question constitutes a ‘disguised’ legislative act or administrative decision of individual application, or in order to guarantee effective judicial protection. However, in **Ireland** and the **United Kingdom**, the nature of a measure as a ‘soft’ legal instrument as such does not preclude the admissibility of actions and such actions are a priori admissible.
2. The present note therefore, first, discusses the eight legal systems which consider those actions to be inadmissible but provide for their admissibility in exceptional cases (section 1); second, discusses the two legal systems which make no provision for direct actions against ‘soft’ law instruments (section 2); and third and last, compares them to the two legal systems which consider such actions to be a priori admissible (section 3). In each category, explanations are given of the reasons for considering court actions against the soft law measures in question to be admissible, the remedies available in those proceedings and, where appropriate, the scope of a plea of inadmissibility and the related limitations. Finally, the conclusion sets out an assessment of the legal situation on this question of admissibility in the thirteen Member States, identifying their points of comparison and contrast.

¹ The legal systems studied for the purposes of this note are those of **Belgium, France, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Romania, the Slovak Republic, Spain, Sweden** and the **United Kingdom**.

3. As a preliminary point, it should be pointed out that the case-law set out in the present note focuses on acts and measures issued by administrative authorities. As is apparent from the contributions relating to each legal system, to date national courts have not been required to rule on the admissibility of actions brought against recommendations or resolutions issued by a legislative body. Accordingly, the case-law on issues of admissibility contained in the note arose out of administrative proceedings. Case-law relating to constitutional proceedings was also included where it was clearly relevant.

- 1. LEGAL SYSTEMS PROVIDING, IN EXCEPTIONAL CASES, FOR THE POSSIBILITY OF ACTIONS AGAINST ‘SOFT’ LAW INSTRUMENTS**

4. It should be noted that even though court actions against ‘soft’ law instruments are, in principle, inadmissible in eight Member States, those Member States provide, in exceptional cases, for the possibility of bringing such actions (namely, **Belgium, France, Germany, Italy, Latvia, Romania, the Slovak Republic and Sweden**). It should be pointed out that, in four of those Member States, a person has, as a general rule, the possibility of relying on a ‘soft’ law instrument only in the context of an action brought against an administrative act, since the possibility of a direct action is exceptional (that is to say **Belgium, Latvia, the Slovak Republic and Romania**). Moreover, in **Hungary**, where any possibility of action is currently excluded, the 2017 Administrative Code, which will come into effect on 1 January 2018, provides for the possibility of bringing actions against ‘conduct of the administrative authorities’, which could allow ‘soft’ law instruments to be contested directly.
5. As regards the conditions governing the admissibility of those exceptional actions, the administrative courts (including in *Common Law* countries, where such actions are not exceptional) concern themselves not with the name or form of the instrument but with its content and scope. Accordingly, those courts declare admissible actions brought against ‘soft’ law instruments having binding legal effects vis-à-vis

individuals or third parties (section 1.1), where those effects materially affect the legal situation of the person concerned, by imposing on him an obligation or by depriving him of a right (section 1.1.1). Thus, a pragmatic approach is taken, with actions against ‘soft’ law instruments sometimes being declared admissible where those instruments appear comparable to a binding administrative measure (section 1.1.2). Lastly, the guarantee of effective judicial protection (section 1.2), as a cross-cutting principle, in some cases allows such actions to be regarded as admissible.

1.1 ‘SOFT’ LAW INSTRUMENT PRODUCING BINDING LEGAL EFFECTS

6. The remedies provided for by the eight legal systems in question (namely, **Belgium, France, Germany, Italy, Latvia, Romania, the Slovak Republic** and **Sweden**), although governed by different procedural rules, display a certain uniformity in that they aim to grant individuals the right to seek a review by the courts of any measure intended to have a binding legal effect. Accordingly, certain direct actions against instruments having legal effects vis-à-vis third parties have been ruled admissible.
7. In the first place, certain administrative acts presented as non-binding but which essentially have binding effects and are therefore mandatory may be the subject of an action for annulment. In that regard, reference should be made to the case-law of the **Belgian** Conseil d’État (Council of State). Under Belgian law, the conditions governing admissibility are normally strictly applied and it is possible to bring an action for annulment only against binding administrative acts. Nevertheless, an action for the annulment of an opinion which was de facto binding on the administrative authority called upon to decide on a building permit was declared admissible. In the case in question, that unfavourable opinion was binding on the authority concerned, whereas a favourable opinion would not have been binding on that authority. A more general solution is adopted in **Italy** where negative (binding) opinions can be the subject of an action for annulment when they have effects on third parties.
8. Moreover, again in **Belgium**, administrative guidelines may be the subject of an action for annulment where they amount to disguised provisions which are

ultimately binding on individuals. For those purposes, three cumulative criteria must be fulfilled: those guidelines must constitute more than a transmission of information, a mere description or interpretation of a 'hard' legal measure; they must contain new, binding rules, drawn up in mandatory terms; and the body adopting the guidelines must have the power to impose its will on the addressee and, where appropriate, penalise him. The Conseil d'État has thus recognised the regulatory nature of 'guidelines, instructions or general requirements supplementing existing rules with new rules having some degree of generality, since the body adopting such directives intends to make them mandatory and has the means to enforce compliance with them. Such measures may be the subject of an action for annulment'.

9. The same is true in **France**, where an *ultra vires* action against guidelines is, in principle, admissible if those guidelines 'add' to the law as it stands. On the other hand, the principle that actions against opinions and recommendations of the French administrative authorities are inadmissible holds good, except in the case of recommendations of general application drafted in mandatory terms.
10. In the second place, instruments regarded as 'soft' law which, in principle, provide only for internal effects (in that they are addressed only to the administrative authorities themselves, for example, internal administrative instructions) may be regarded as challengeable acts if they adversely affect individuals.
11. Accordingly, in **Germany**, in order for a legal remedy to become available, an applicant must show that an internal measure, such as administrative guidelines, is purposely intended to have an external legal effect on citizens. This is the case in particular where guidelines alone determine the conditions for access to certain State entitlements. Thus, for example, applications were ruled admissible where they sought reviews of guidelines establishing the scales of social allowances and setting out the detailed rules for entitlement to the basic benefit under the relevant social security legislation. In those circumstances, the admissibility of an action is based on the quasi-normative nature of the contested measure.

12. In accordance with the settled case-law in **Latvia**, the Constitutional Court had declared admissible actions against certain internal normative measures, that is to say the internal regulations of State bodies, in circumstances in which such measures had external legal effects capable of affecting the fundamental rights of third parties.
13. In the third place, it is, in principle, established that, in the eight legal systems concerned, provisional and preparatory measures cannot, by their nature, be the subject of an action for annulment, although an action brought against such measures is admissible, if those measures themselves produce legal effects and/or bring an administrative procedure to a final conclusion.
14. For example, according to the Consiglio di Stato (Council of State) in **Italy**, a negative binding opinion issued by a public authority may be the subject of an action where it leaves the interested party in no doubt as to the content of the final decision at the end of the administrative procedure in question or de facto discontinues that procedure. The same applies to interlocutory measures and measures postponing a decision (*atti soprassessori*), which have the practical consequence of bringing to an end the administrative procedure and are therefore, on an exceptional basis, open to challenge in order to provide a remedy to the person concerned. Similarly, in **Sweden**, acts of the administrative authorities which are of a provisional, procedural or organisational nature are excluded from review by the courts, except for those acts which may adversely affect the rights of the parties to the administrative proceedings.
15. It should also be noted that in **Romania**, in a form of advance review, the administrative operations preceding the award of a public contract by the administration may be the subject of an action. In such cases, access to justice is ensured with the aim of preventing the award of a public contract in breach of the provisions laid down by the law.
16. It is also necessary to refer to measures adopted in the context of a delegation of powers. The admissibility of an action against such measures is justified by the fact that

the bodies to which the administrative authority has delegated certain powers may adopt measures which, were they adopted by the administrative authority itself, would be actionable. This is the case, in particular, where a legislative provision expressly or implicitly provides that it is to be supplemented or implemented by a 'soft' law instrument, such as guidelines. Consequently, the latter instrument has a quasi-normative effect in that application of the legislative provisions is impossible without the requirements set out in the 'soft' law instrument, in accordance with the legislature's intention. The delegation mechanism must not have the effect of depriving the person concerned of a right of action on account of the identity of the body adopting the measure in question. However, it should be noted that, in such circumstances, the possible lack of competence of the body adopting the measure, which may constitute a ground for annulment during the examination of substantive validity, does not preclude the admissibility of the action.

17. In that regard, it is appropriate to refer to the situation in **Italy** as regards the communications of the Financial Markets Authority, where there has been some relaxation of the challengeable act criterion. Normally, only administrative acts giving rise to a decision are directly open to challenge in administrative proceedings. However, where the Financial Markets Authority's activities are concerned with a legislative act, the communications issued by that authority do not constitute mere guidance but are regarded as being of a regulatory nature. Those communications are therefore open to challenge. A similar solution has been adopted by the legislature in **Spain** exclusively in relation to guidelines issued by the Bank of Spain. Notwithstanding the general situation in Spain that direct actions against 'soft' law instruments are a priori inadmissible, that category of guidelines, which are *sui generis* 'soft' law instruments, have an essentially normative nature. It is therefore possible to bring a direct action against those measures.
18. The same is true in **Romania** with regard to measures issued by the Competition Council, whose regulations, instructions and orders are challengeable acts. That solution developed in the case-law is justified by the fact that regulations essentially contain mandatory provisions, while instructions primarily contain supplementary rules. Those

measures of the Competition Council have therefore been classified by the Romanian Curtea Constituțională (Constitutional Court) as ‘unilateral administrative acts of a normative nature’.

1.1.1 EFFECT OF THE ‘SOFT’ LAW INSTRUMENT ON THE APPLICANT’S LEGAL SITUATION

19. Under some of the eight legal systems to which this section relates, as regards certain acts of individual application, an administrative act is deemed to have an adverse effect where it prejudices an applicant’s rights and obligations. In that case, an administrative court is called upon to identify the characteristics of an actual administrative act (or rule) contained in the ‘soft’ law measure challenged. An action is thus admissible against acts, such as individual decisions, taken under the guise of a non-binding measure, which directly undermine or affect the rights or legal interests of applicants, whether the latter are natural or legal persons. That subjective admissibility criterion is, of course, closely linked to the considerations below relating to the effects of the contested measure but, notwithstanding the nature of the measure, the admissibility of the court proceedings will also be subject to the applicant’s legal situation being directly affected.
20. Thus, in **France**, the Conseil d’État (Council of State) usefully recalled that subjective admissibility requirement, in finding that an applicant must demonstrate a direct and certain interest in the annulment of the non-binding measures in question, that is to say press releases from the Financial Markets Authority warning investors about financial products marketed by the applicant. The Conseil d’État found that actions may be admissible if those non-binding measures ‘are such that they will have considerable effects, in particular of an economic nature or have the purpose of significantly influencing the behaviour of the persons to whom those measures are addressed’.
21. The same is true in the **Slovak Republic**, where the Supreme Court has found that certain ‘soft’ law instruments — namely opinions, recommendations or instructions issued by a public authority which are, despite their form, nonetheless binding on the

addressee — may affect the rights of a natural or legal person. In those cases, those measures cannot be excluded from review by the courts.

1.1.2 A 'SOFT' LAW INSTRUMENT PRESENTED AS AN ACTUAL ADMINISTRATIVE ACT

22. Some of those eight legal systems also allow for the possibility of a court action where the 'soft' law measure appears comparable to a binding administrative measure, because it is likely significantly to influence the behaviour of the persons to whom it is addressed (which is similar to the solution adopted in common law). This is the case in particular where the issuing State body normally has regulatory powers or powers to impose penalties.
23. For example, in **France**, actions against a position adopted by the Competition Authority and against a report of the Conseil national de l'ordre des médecins (National Council of the Medical Association) were declared admissible. In the first case, the Conseil d'État considered that a position could be in the nature of an individual requirement, the infringement of which the Competition Authority could subsequently censure. In the second case, it was held that, in view of the role of the Conseil national de l'ordre des médecins in applying the principles of medical ethics, the imperative terms in which the report was couched conferred a right of access to legal proceedings.
24. A right of action has been recognised in **Sweden** against 'advice' and 'information' issued by a public authority in such a form that it could be perceived as binding by its recipient. This was also the case with a letter from a municipal commission for environmental and health protection sent to undertakings informing them that certain substances had been assessed as harmful by the Swedish Chemicals Inspectorate, urging them to stop selling the products concerned from a specific date and referring to the applicable criminal penalties. The Högsta förvaltningsdomstolen (Supreme Administrative Court) held that those elements rendered the letter so significant to its addressees that they should not be deprived of a right of action and, consequently, that the absence of direct legal effects was not relevant in that case.

25. A similar approach is adopted in **Germany**, in the context of individual warnings addressed to private individuals in the form of a reminder of the law suggesting that they abstain, in a specific situation, from engaging in particular behaviour contrary to public policy (*Gefährderanschreiben/Gefährderansprache*). Provided that type of measure is not an administrative act, it may nonetheless be challenged before the courts where it is likely, by virtue of its aim, to constitute an interference in the exercise of the addressee's fundamental rights, such as freedom of expression or freedom of assembly.

1.2 THE GUARANTEE OF EFFECTIVE JUDICIAL PROTECTION: THE CRITERION RELATING TO THE INTERESTED PARTY'S PERCEPTION OF THE 'SOFT' LAW INSTRUMENT

26. The right to effective judicial protection forms an integral part of all the legal systems examined in this chapter, but for some Member States that right is the main reason for relaxing the criteria for the admissibility of actions brought against 'soft' law instruments. The relaxation of those criteria is essentially based on the aim of ensuring the protection of fundamental rights.

27. Thus, in **German** law, effective judicial protection is enshrined in the Basic Law. According to the case-law of the Federal Administrative Court, that protection means that a person must have access to justice with regard to any administrative measure, regardless of its form, which constitutes an interference with that person's individual rights, particularly his fundamental rights. Where a person's rights are, or are likely to be, adversely affected by a 'soft' law measure adopted by a German administrative authority, even though it is not legally binding or has no external effect, the person must, by way of exception, have a remedy.

28. It is interesting to note the **Swedish** approach to admissibility and **Germany's** approach to public warnings concerning risks connected with certain products (*öffentliche Warnung*). The relevant case-law contains a potential admissibility criterion based on the applicant's perception of the non-binding legal act as an actual administrative act.

29. In **Germany**, it has been held to be possible to challenge non-binding publications of State bodies (including lists and reports) enumerating products containing allegedly harmful substances. Therefore, an action for an injunction against such a public warning was declared admissible on the ground, on the one hand, that a warning relating to certain products could entail interferences with the freedom to choose an occupation and the right to property and, on the other hand, that a warning relating to certain activities was capable of undermining personal rights, the freedom of religion and the freedoms of expression, assembly and association. It was incumbent upon the person concerned to demonstrate the existence of such a risk of interference with his fundamental rights in order to request that the public authority be ordered to refrain from giving such a warning or to stop disseminating it. That approach is found in the case-law of the **Swedish** Supreme Administrative Court (see paragraph 24 above). That case-law shows that, in the interests of ensuring effective judicial protection, an action against a ‘soft’ law instrument may be permissible, where that instrument has been understood to be binding by its addressees and they (whether public or private entities) have acted in order to comply with that instrument.
30. As regards the substance of the action, it should be added that a warning, since it is similar in its effects to a binding prohibition, must be consistent with the **German** substantive law capable of justifying such a policy measure (including the conditions laid down by the relevant legislation) and with more general requirements such as the existence of an appropriate legal basis, the competence of the issuing authority and compliance with the principle of proportionality.

2. LEGAL SYSTEMS NOT PROVIDING FOR ANY DIRECT ACTION AGAINST ‘SOFT’ LAW INSTRUMENTS

31. Two legal systems are distinct as far as the admissibility of actions against ‘soft’ law instruments are concerned. In the **Netherlands** and **Spain** (apart from the situation referred to in paragraph 17 above), ‘soft’ law instruments are excluded from any possibility of direct action before the administrative courts, since such instruments are regarded in general, by their very nature, as being devoid of legal effects. In that

context, they can be called into question only in the context of actions against challengeable acts.

32. In the **Netherlands**, with respect to guidelines (*beleidsregels*), which, while not being mandatory acts of general application, are established by administrative decision and are published, Netherlands administrative law excludes any possibility of a direct action. However, the illegality or irregularity of such guidelines may be relied on before the administrative courts by way of preliminary objection. Accordingly, those ‘soft’ law instruments may be reviewed by the administrative courts in the context of an action against a decision implementing such an instrument. Moreover, this also seems to be the case with certain other ‘soft’ law instruments. Where the administrative courts regard guidelines or another instrument made in the exercise of own powers as manifestly unreasonable or unjustified, those courts may declare the ‘soft’ law instrument concerned null and void.
33. Moreover, in the **Netherlands**, in the context of an action against an administrative decision, an individual may put forward the argument that the issuing body departed, in that decision, from the principles established by a ‘soft’ law instrument which has an internal binding effect and which therefore binds that body. In that regard, it should be noted that it is from that perspective that, in **France**, the debate concerning the administrative court’s taking account of ‘soft’ law initially commenced, when it was accepted, *inter alia*, that it was possible to rely on instructions issued under French administrative law and to rely on certain ‘soft’ law instruments, in disciplinary proceedings in particular, to assess the existence of possible fault — before the Conseil d’État expressly identified real admissibility criteria for the actions brought, in relation to some acts adopted by certain independent administrative authorities.
34. In **Spain**, the case-law seems to show that an individual cannot rely on ‘soft’ law instruments alone as sources of law which may be relied on as against the administration. Those instruments are, quite simply, non-binding. On the other hand, where the applicable rules make reference to a ‘soft’ law instrument, the court is

required to take into account the ‘soft’ law instrument without being bound by it.

35. Moreover, in that legal system, even if the ‘soft’ law instruments cannot be the subject of a plea of illegality and the administrative court is not empowered to rule on their illegality, they may sometimes be taken into account in a review of the legality of ‘hard’ law measures. As an example of an indirect review of ‘soft’ law instruments in a particular case, a judgment of the **Spanish** Supreme Court must be referred to. In that judgment, annulling the penalties imposed on a company for anti-competitive practices, the Court ruled on the National Competition Commission’s methodology for calculating the penalties contained in one of its communications and found that the communication was incompatible with the provisions of the applicable legislation. The Court took the opportunity to point out that the communications issued by the National Competition Commission are ‘neither legislative nor externally binding in nature’.

3. THE LEGAL SYSTEMS CONSIDERING THE USE OF ACTIONS AGAINST ‘SOFT’ LAW INSTRUMENTS AS ADMISSIBLE A PRIORI

36. **Ireland** and the **United Kingdom** differ from the other groups of Member States in that there is no general prohibition of legal actions against ‘soft’ law instruments. However, the case-law on admissibility displays features similar to those in the case-law of the Member States in the groups examined above. It should be noted in that regard that the main requirement for admissibility in both these legal systems is that the applicant’s legal situation must be directly affected by the instrument in question.

3.1. WHETHER THE LEGAL SITUATION OF THE PERSON CONCERNED IS AFFECTED BY THE ‘SOFT’ LAW INSTRUMENT

37. In *Common Law* jurisdictions it has long been accepted that direct court actions against ‘soft’ law instruments are admissible. Where a measure adopted by an administrative body is the subject of an action before the administrative court, that court attaches importance neither to the form of the measure nor to whether it is binding in nature. The court’s assessment focuses on the substantive effects of that

measure on the legal situation of the person concerned, so as to guarantee his effective judicial protection, especially in situations where there is a risk of interference in his fundamental rights.

38. In **Ireland**, judicial review proceedings against reports and guidelines issued by State bodies have been declared admissible, despite the fact that they had no binding force. As is true with the **German** approach, the Irish administrative courts ensure the protection of fundamental rights even in situations where the measure in question has no specific effect on the applicant's rights and obligations. It suffices to show that that measure represents a 'potential interference' in the exercise of fundamental rights such as the right to protection of the individual's reputation, the right for him freely to choose his lawyer or the proceedings necessary to access justice.
39. A slight difference as compared with **Germany** (paragraphs 27 to 29 above) can be observed in **Ireland**, in that effective judicial protection in that regard seems to be limited to the protection of the fundamental rights of natural persons.
40. In the **United Kingdom**, on the other hand, the requirement that the applicant's legal situation be affected — which is not limited to natural persons — seems to be broader, in that a 'general interest' is sufficient to allow, for example, a request for review of a Competition Commission report on a proposed merger. By analogy with **Belgium, France and Italy** (see, in particular, paragraph 7 above), the English *High Court* also allows challenges against opinions which are non-binding or even preparatory to a possible administrative decision, where there is a strong likelihood that a public authority would be bound by the opinion in question.
41. For example, an opinion issued by the *General Medical Council*, according to which the applicant had breached its disciplinary code, was considered by the **English** Court of Appeal to be, in fact, a decision of individual application addressed to the applicant.

3.1.1 EXAMPLE OF A DIFFERENCE IN MATTERS OF ADMISSIBILITY IN ACTIONS
UNDER COMPETITION LAW

42. Having regard to the preceding sections of this note, it is possible to identify differences in approach in the various legal systems studied. As is apparent from the second section, in **Spain** a communication from the National Competition Commission on the methodology for calculating penalties was subject only to indirect review in the context of an action against the decision imposing the penalty (see paragraph 35 above). The administrative court took the view that that communication was contrary to the applicable law and, in any event, had no binding force. As is apparent from the first section, in **France** an administrative court held that a position adopted by the Competition Authority was actually in the nature of an individual requirement and therefore subject to review by means of a direct action (see paragraph 23 above). Similarly, in **Romania** an administrative court held that certain instruments issued by the Competition Council (see paragraph 18 above) are actually normative in nature. In **Ireland**, on the other hand, the Competition Authority's guidelines were recognised both by the parties and by the administrative court as being *de facto* and *de iure* without binding force. The court nevertheless declared admissible the direct action against them on account of the potential interference in the rights of witnesses before the Competition Authority.

3.2 'LEGITIMATE EXPECTATIONS' AND THE SITUATION WHERE THE 'SOFT' LAW
INSTRUMENT IS PRESENTED AND PERCEIVED AS AN ACTUAL ADMINISTRATIVE
ACT

43. As in the case of the considerations set out in paragraphs 22 to 25 above, it should be pointed out that 'legitimate expectations' are the reason most frequently used in common law countries for allowing court actions against instruments such as guidelines, official letters or representations of State bodies. Expectations often arise because individuals rely on those 'soft' law instruments and do not always differentiate them from actual administrative acts. Here a parallel can be drawn with the approach adopted in **Germany**, **France** and **Sweden** in relation to instruments

which, on account of their content and method of drafting, have a form and structure similar to legal rules. In those cases, the applicant perceives the disputed instrument or measure as a legally binding act.

44. [...] It is worth mentioning the possibility in common law countries of challenging guidance published by national authorities and ministries before the administrative courts. Such measures are particularly important in the field of health protection to warn the public of a potential danger (in particular guidance and non-statutory guidance). The fact that such documents have no binding force is of no significance for the admissibility of any action. The examination of admissibility relates rather to the significance of the document in question either for the issuing authority or for the addressee. Administrative courts sometimes assume jurisdiction to examine the substance of those documents, in particular where they contain erroneous assessments of the applicable law which could lead to the adoption of unlawful measures pursuant to such a document, a solution which actually leads to such actions being declared admissible. It will be recalled in that connection that the United Kingdom Supreme Court has declared admissible an action brought against guidelines from the Ministry of Health, according to which the prescription of a particular medicine was subject to consultation with a doctor.

CONCLUSIONS

45. The foregoing analysis allows the following conclusions to be drawn concerning court actions brought against 'soft' law instruments.
46. All the legal systems examined allow, in principle, a review of 'soft' law instruments, although this may be on an exceptional basis. In **Hungary**, only from 2018 will a review of those instruments be provided for under the system to be established after the entry into force of the new administrative law.
47. Moreover, ten of those Member States allow direct review — whether on an exceptional basis or not — of 'soft' law instruments (namely, **Belgium, France, Germany, Ireland, Italy, Latvia, Romania, the Slovak Republic, Sweden** and the

United Kingdom).

48. The substance of the contested measure forms the basis of the main requirement for the admissibility of actions, since the administrative courts review disguised provisions or possible decisions/administrative acts of individual application contained in ‘soft’ law instruments. In principle, therefore, actions against measures producing legal effects are regarded as admissible, notwithstanding their designation or form (expressly so for those ten Member States, namely **Belgium, France, Germany, Ireland, Italy, Latvia, Romania, the Slovak Republic, Sweden** and the **United Kingdom**).
49. Whether the applicant’s legal situation is affected is another relevant element for the purposes of assessing the admissibility of actions brought against ‘soft’ law measures. In that regard, some Member States require evidence of negative or significant material effects on the situation of the person concerned (including **France, Italy, Sweden** and the **United Kingdom**). Other Member States ensure the prevention of interference with fundamental rights (including **Germany, Ireland, the Slovak Republic** and, at least historically, **Latvia**). In the latter case, actions are also declared admissible where the ‘soft’ law instrument is likely to infringe fundamental rights. That review extends to acts which are not of individual application, such as reports. In that way, the fact that such actions are considered admissible amounts to a form of preventive review of interference with fundamental rights. Thus, the case-law allows for the possibility of challenging a ‘soft’ law instrument which is likely to entail interferences with the freedom to choose an occupation, the right to property, personal rights, the freedom of religion and the freedoms of expression, assembly and association.
50. Finally, in some legal systems, the guarantee of effective judicial protection is relied on as the main reason for admissibility of actions against ‘soft’ law instruments (this is expressly the case in five Member States, namely **Germany, Ireland, Italy, Sweden** and the **United Kingdom**). That requirement forms the basis for a convergent approach between the *Common Law* countries and some civil law systems (including, in particular, those of **Germany** and **Sweden**). *Accordingly, when examining the admissibility of an action, the applicant’s perception of the ‘soft’ law instrument in question seems to be taken into consideration in most of the legal systems concerned.*

The perception that such an instrument is binding and mandatory may then either form the basis of an action based on '*legitimate expectation*' or provide access to justice, so that an applicant is not without a remedy, in particular when he has acted in accordance with the instrument in question.

[...]