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Tackling Disinformation Through Public Administration Recommendations – The Czech Experience[1]

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ABSTRACT

Purpose: The aim of this paper is to critically evaluate the practice of public administration, in which it influences the addressees of public administration not through classical forms of public administration (e.g. administrative decisions) but by issuing recommendations to third parties, who then carry out regulatory interventions.

Design/Methodology/Approach: The paper employs qualitative research methodology and a case study approach, focusing on the analysis of the specific situation in the Czech legal environment (including existing case law), which it frames as a broader issue that can be replicated and thus requires a more general solution.

Findings: The text critiques the conclusion drawn from the Czech administrative court case law, which holds that public administration recommendations, if not legally binding, are not subject to judicial review. This conclusion suggests, at first glance, that public administration recommendations are an activity that has no legal limits. However, this interpretation is challenged in particular from the perspective of the rule of law. Specifically, the regulatory model outlined above, where public administration (the state) achieves its objectives by influencing third parties, raises concerns.

Practical Implications: It is inadvisable to view non-binding public administration activity as incapable of infringing upon or otherwise influencing the rights of the addressees of public administration. Political accountability in this area seems inadequate, particularly because of a potential lack of transparency. On the contrary, changes to legislation and greater sensitivity from administrative courts towards these non-traditional forms of public administration might be advisable.

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Originality/Value: The topic can be considered novel, given the limited attention it has received in the literature. This is especially true for national literature (in the case of the Czech background on which the text is primarily based). While it has been explored within EU law in the context of debates about the nature of EU soft law, the issue under study does not align well with soft law (understood as a type of normative legal act, albeit legally non-binding). Therefore, only partial reference can be made to EU law. The topic of the paper is thus more closely related to the general principles of public administration rather than EU law, making it a presumably original contribution.

Keywords: *administrative justice, non-binding act, public administration, recommendation, rule of law, soft law*

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1 Introduction

A public administration recommendation can be generally understood as a legally non-binding public administration action (a legally binding action would typically result in an administrative decision of some kind) which does not merely state facts, but through which public administration expresses a certain preference in pursuit of public administration objectives. Or in simpler words, administrative recommendations can be defined as "declarations which suggest a certain behaviour should be followed" (Flückiger, 2019, p. 122). It can be aimed within the public administration but also at entities outside the public administration and can be used in various contexts and for various purposes. Public administration recommendations can also vary in "strength" (from mere advice to warnings of imminent danger, cf. Flückiger, 2019, p. 122), etc.

In theory, recommendatory legal acts are typically referred to as *soft law* (see, e.g., Senden, 2004, pp. 111 et seq.). However, not all public administration recommendations will qualify as such. Firstly, soft law is usually understood as more or less analogous to rulemaking (see Senden, 2004, pp. 111 et seq.; or Chiti, 2013, pp. 93–110). In the case of public administration recommendations, however, these need not be of a normative nature. Some recommendations can be entirely individualised and, as will be illustrated, unpublished, which also practically disallows any pseudo-normative effects. Some recommendations may lack a direct or even indirect legal basis as these may be of a *de facto* nature. This may raise the question of whether these are still acts of public administration in the legal sense. Therefore, some of these recommendations may even lack the character of a "legal act" making these recommendations beyond the common understanding of soft law. This makes them difficult to categorise and review.

At the same time, however, we probably cannot say that public administration recommendations (including those non-formalised and unforeseen by

law) should be prohibited. To be more precise, the public administration recommendations embody a certain contradiction. On the one hand, they reflect advanced ideas about how the public administration should generally operate. These ideas include activities that go beyond the "statutory minimum" of performance of public administration. Mainly the *principles of good administration* could be referred to (see, e.g., Marzel, 2019, pp. 31 et seq.; or in more detail Wakefield, 2007). Public administration should therefore serve the public, which may involve various non-legally binding non-formalised acts (including recommendations) if that is what the high standard of good administration requires.

On the other hand, questions arise regarding the *limits* of these administrative recommendations. More precisely, what are the limits of what and how (the good) public administration can recommend? In the legal sense, in particular, there are questions of which form of public administration activity these recommendations are supposed to take and how (if at all) these activities can be legally challenged, in particular in administrative justice.

The aim of this paper is to present some of the problems that may arise from the use of the recommendations – as specific legally non-binding activities – in public administration and to formulate some of the basic limits to this administrative practice and argue for the availability of judicial protection.

2 Administrative Recommendations

2.1 Administrative Recommendation and (Theoretical) Forms of Administrative Activity

Of course, public administration recommendations are not entirely unrecognized by administrative law doctrine. However, we cannot speak of any uniform approach - different legal systems understand these specific activities differently.

The *common law* typically distinguishes between the activities of the different branches of state power (i.e. the legislative, judicial, and executive branches) (see Singh, 2001, p. 69). However, when it comes to a more detailed categorisation of the activities of public administration, this is generally no longer provided by the common law doctrine.[2] It is therefore essential for the recommendation of public administration in the common law context that it is an activity of the public administration, which is then subject to the corresponding requirements. In this case, this perspective may be beneficial, as it prefers to approach the administrative recommendation through its content rather than its form.

2 For example, while common law publications focused on general administrative law usually do cover the application of the law by public administration ("administrative adjudication"), they generally do not categorise forms of administrative activities in the same way (not even the general concept of an administrative act) as the continental doctrine of administrative law usually does; see, e.g., Wade and Forsyth, 2009; or Cane, 2016.

The continental law perspective is different, as legal doctrine here typically classifies and categorises administrative activities. However, various approaches can be found as well. According to the literature, a more systematic place for public administration recommendations can be found, for example, in Swiss law (Flückiger, 2019, pp. 121–135). Other jurisdictions, while they may not view public administration recommendations as stand-alone instruments, may understand them as part of broader categories of administrative activities.

For example, Polish administrative doctrine distinguishes (in addition to classical forms of administrative activities, in particular administrative acts) also "factual activities", which include, for example, various information activities of the public administration (see, e.g., Pawlowski, 2021, pp. 516–517 and 520). A somewhat similar situation is in the Czech administrative law doctrine, which distinguishes factual activities (as non-formalised actions of public administration) and so-called "other acts" as generally formalised acts, but different from a classical administrative decision (particularly in having lesser legal effects, which is why these acts are sometimes referred to as non-regulatory or non-decisions, therefore these acts are generally legally non-binding) (see, e.g., Potěšil and Svoboda, 2024, p. 20). A public administration recommendation may fall under both of these categories – depending on its form and purpose.

In the case of the Polish or Czech legal doctrine, the German so-called administrative "real acts" (*Realakt*) can be regarded as a starting point for the aforesaid categories. These acts are not intended to have traditional legal effects (as is the case with an administrative act – *Rechtsakt*), but rather the actual (real) results of administrative activities are the purpose. In German administrative law doctrine, a distinction is made between explanatory real acts (*Wissenserklärungen*) and real acts with factual functions (*Verrichtungen*) (Singh, 2001, p. 107). Recommendations of public administration are well subsumable under the former category – explanatory real acts. This is typically where various information activities, warnings, expert opinions of public administration, etc., are included (Singh, 2001, p. 107). The foundations of real acts are shared by other related legal orders (e.g. Swiss) (see, e.g., Tschannen, and Zimmerli, 2005, pp. 205 et seq.).

The basis for administrative recommendations as a form of public administration can also be found in the administrative law doctrine of other European countries. For example, the Slovak concept of the forms of public administration is based on many similar historical foundations as the Czech system (which is because of the common Austrian and later socialist fundamentals of the former Czechoslovak legal doctrine). Therefore, even in Slovak administrative law, the category of factual activities (which is one of the possible classifications of an administrative recommendation) is present (see, e.g., Machajová et al., 2012, p. 195). French administrative law, on the other hand, offers a different perspective. Here, instead of subordinating administrative recommendations to appropriate forms of administrative activity, the broader

concept of non-binding (soft law) administrative activities can be highlighted – *droit souple*.[3]

However, the possible subsumption of public administration recommendations within the theoretical system of forms of public administration activities does not mean that the nature of the administrative activity in question will be clear to the addressees, the public administration itself or, even the administrative courts. A particular problem, which is mentioned later in the text, is the "non-administrative" legal basis for the exercise of a particular public administration recommendation – some recommendations may be of a private law nature (typically in the context of the exercise of the so-called non-sovereign public administration, i.e. property management by the state or other public entities or providing certain public services). In such cases, administrative law does not generally provide the necessary answers, as the essence of administrative law is to regulate the performance of public powers, which (unlike public administration recommendations) generally leads to the legally binding outcomes.

Beyond the exercise of public administration in particular (European) states, public administration recommendations, or more precisely soft law instruments in general, have their place in international law or the EU law (cf. Harlow and Rawlings, 2014, p. 51).

2.2 A Closer Outline of the Addressed Issue

As already mentioned, some of the public administration's recommendations are legally anticipated. Probably the most general example is the recommendations in EU law. Article 288 of the Treaty on the Functioning of the European Union allows the EU institutions (which may be regarded as public administration in the broader sense), when exercising their competencies, to adopt "regulations, directives, decisions, recommendations and opinions." According to the same Article both recommendations and opinions explicitly "shall have no binding force". At the same time, as the literature accurately points out, the fact that these recommendations are foreseen by the primary EU law indicates that they are intended to be legal acts, albeit legally non-binding (Hubková, 2022, p. 2).

A practical example of application is the recommendations within The European System of Financial Supervision (ESFS). This network is based on three European Supervisory Authorities (ESAs), the European Systemic Risk Board, and the national supervisory authorities with the main objective of consistent and appropriate financial supervision throughout the EU.[4] In particular, the ESAs involved in this system issue guidelines, which are then taken into consideration by the national supervisors. These recommendations have indi-

3 Including some general recommendations for its use by *Conseil d'État*: Le Conseil d'État - le droit souple. At <https://www.conseil-etat.fr/publications-colloques/etudes/le-droit-souple>, accessed 6 November 2024.

4 European System of Financial Supervision. At <https://www.bankingsupervision.europa.eu/about/esfs/html/index.en.html>, accessed 30 September 2024.

rect effects – they are addressed to national supervisors, who then regulate (in conventional forms – i.e. in a legally binding way) the individuals in the EU member states.

However, recommendations of public administration authorities can also operate more or less *directly* – targeting society and influencing its behaviour. These recommendations can also be specified, and individualised (not implemented in a normative manner – i.e. guidelines). Currently, these recommendations can be observed, for example, in the area of cybersecurity. A broader example could be the EU's recommendation not to use the 5G software or hardware technologies from Chinese suppliers (Huawei, ZTE),[5] based on a certain EU policy framework ("5G Toolbox").[6] Another example of recommendations in EU law may be consumer warnings – recommendations designed to protect consumer against defective products.[7]

It is important to emphasize that the possibility of not complying (lack of legally binding force) does not mean the recommendations of public administration "do not work" – are non-existent, irrelevant, or ineffective. The intention of the public administration's recommendation is, of course, some desired effect. Therefore, public administration recommendations pursue (or should pursue) a specific objective. If a public administration warns against a dangerous product, for example, this usually reflects the lawful and legitimate task of the public administration to protect consumers. These recommendations are generally non-binding for consumers, therefore, they may disregard them. But at the same time, we could argue that it is in the consumer's best interest to *trust* the administrative authority and follow these warnings in order to avoid possible injury.

But trust in public administration is two-sided because it can also lead to an injury if the public administration's recommendation is flawed (incorrect in its grounds, unreasonable, disproportionate, etc.). Obviously, an incorrect warning of a defective product can harm a manufacturer of products incorrectly marked as defective. Similarly, in the aforementioned case of 5G technologies, without questioning the validity of the recommendations, they probably have led to much fewer business opportunities for problematic suppliers in the EU. Questions logically arise regarding the protection of rights and the possibility of reviewing administrative recommendations.

This is probably less of a problem in cases when the public administration's recommendations are legally anticipated (when they are made by specific administrative bodies in a specific area of the public administration agenda using specific legal forms of public administration, etc.). However, some (and probably most) public administration recommendations are adopted without

5 Commission announces next steps on cybersecurity of 5G networks in complement to latest progress report by Member States. At <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3309>, accessed 30 September 2024.

6 The EU toolbox for 5G security. At <https://digital-strategy.ec.europa.eu/en/library/eu-toolbox-5g-security>, accessed 30 September 2024.

7 Safety Gate: the EU rapid alert system for dangerous non-food products. At <https://ec.europa.eu/safety-gate-alerts/screen/webReport>, accessed 30 September 2024.

an explicit legal basis. In practice, this is arguably not problematic because these recommendations tend to be very general and not individualised (e.g. as was the case of various recommendations concerning the covid-19 pandemic). Hence, even if these recommendations turn out to be incorrect, they are not sufficiently manifested in the individual sphere (and there is usually no practical reason to raise legal questions).

Sometimes, however, the "perfect storm" can occur - a public administration recommendation without any direct legal basis, which is (in its content) difficult to accommodate within the requirements of the law, and which is directly aimed at specific individuals in the context of a major social issue. One such case was the blocking of so-called disinformation websites in the Czech Republic in 2022 which the paper briefly introduces below.

3 The Recent Czech Experience

3.1 The Blocking of Disinformation Websites

The Czech legal doctrine, despite the historical presence of a classification of forms of public administration activity, generally does not pay attention to the issue of recommendations or, more generally, non-binding activities of the public administration (the focus is almost exclusively on "traditional" legal forms of public administration activities, but even there the doctrine is not very robust). At this time, probably the only area where a public administration recommendation receives some in-depth attention in the field of administrative law is cybersecurity (see, e.g., Bražina, 2020, pp. 692–702).

In the Czech Republic, following the EU approach against Chinese 5G technology suppliers, a recommendation ("warning") was issued in 2018 by the public administration - the National Cyber and Information Security Agency. Later (in 2022), this administrative authority also issued a "Recommendation for assessing the trustworthiness of technology suppliers of 5G networks in the Czech Republic" which is basically a guideline aimed at problematic Chinese suppliers. However, these recommendations have not drawn wider public attention (probably because of a very narrow group of their addressees).

Things have changed with the case of the blocking of so-called *disinformation websites* from 2022, which is still subject to court decisions. This blocking took place as a direct reaction of the Czech state to the Russian invasion of Ukraine on 24 February 2022. It can be characterized as a somewhat improvised reaction of the public administration to the alleged disinformation activities of about twenty websites that were supposed to justify the Russian aggression. In a broader sense, it was, as the state has claimed, a matter of national security.

The problem, however, is that the blocking in question was not based on any specific administrative act (typically a decision), as there is no legal basis for issuing such an act in the Czech legal order (not even now, more than two years later). However, according to statements made by some state officials, the Czech public administration nevertheless felt the need to react. This response

happened through a request to the technical infrastructure providers (private law internet infrastructure administrators and mobile phone operators) to block the designated websites. This request was largely followed and most of the designated sites were temporarily blocked for many months (some are still unavailable today).

The request was issued by Military Intelligence as one of the Czech secret services. However, the request was rather ambiguous in its content. This is because it combined elements typical of binding acts of public administration (e.g. it repeatedly referred to the implementation of a preventive *measure*, terminology typical for Czech administrative law, and referred to a preceding Government decree, thus indicating the implementative nature of the request). On the other hand, the request did not contain a clear statement establishing an obligation to obey. Instead, it expressed appreciation to the addressees for their courage and wished them good luck, which, of course, is very unusual for a binding administrative act. It can be argued that already this ambiguity rendered the request faulty from a legal perspective.

Also problematic is the fact that the request was made in private (was not published or announced). In short, the Military Intelligence approached the addressees of the request directly and did not communicate it publicly in any way. The content of the request therefore only became public about a month after it was made, on the basis of the transparency laws.[8] The blocking, behind which the state was later "exposed", sparked the discussion about the limits of how the public administration should or should not act, including allegations of state censorship (which is forbidden by the constitutional order[9]). The case also had a judicial follow-up on two levels – on both the public and private law levels. However, the legal aspect of the whole case turned out to be very simplified – especially from the point of view of the administrative courts.

3.2 The "Trap" of Legal Dualism

The basic problem of legal evaluation of the above-mentioned public administration recommendation seems to be the division of law into private and public law (the so-called *legal dualism*). This is true at least in the Czech Republic and probably also in other legal systems that strictly differentiate between public and private law – e.g. France (cf. Bell and Lichère, 2022, pp. 128 et seq.), Germany (cf. Singh, 2001, pp. 94 et seq.), etc.

Legal dualism in the Czech Republic leads to a sometimes overly simplistic view of public administration, which appears *binary*. In this sense, either the public administration acts as a performer of public authority (public powers), or on the other hand, the public administration bodies act as bodies of public legal entities (typically the state, municipalities, etc.), and their activities are regulated, in principle, by private law. This view is typical for administrative

8 Cibulka, J. ‚Hybridně působí ve prospěch Ruska.' Vojenští rozvědčíci zveřejnili dopis, proč žádali blokaci webů. At <https://www.irozhlas.cz/zpravy-domov/vz-rozvedka-armada-blokace-webu-cenzura-svoboda-projevu_2204050644_cib/>, accessed 30 September 2024.

9 Article 17(3) of the Charter of Fundamental Rights and Freedoms (of the Czech Republic).

courts. It is also understandable because administrative courts do indeed operate in a binary fashion – either a certain public administration activity (or inactivity) falls within their competencies or it does not. There is no third option.

The reality of public administration seems to be far more complex. Rather, it is a *spectrum* of activities (see Svoboda, 2024, p. 185) that starts with the characteristic (fully legally binding) exercise of public authority (mainly issuing administrative decisions or administrative rule-making) and continues through less legally "involving" activities (e.g. various auxiliary acts – such activities may include public administration recommendations, statements, certificates, registration acts, information acts, etc.), which do not, usually, interfere with the rights of the addressees of public administration (but at the same time it cannot be ruled out), and ends with the remaining subsidiary acts or other activities of public administration that have no external legal relevance (e.g. organisational acts, etc.), or are of a private law nature.

However, the strictly binary perception leads to only two conclusions. In the context of the outlined request to block disinformation websites, either the recommendation in question was a "traditional" exercise of public authority (then, in particular, it is required to be legally binding), or it was a kind of private law expression of the state's "opinion" on whose websites should be (voluntarily) blocked by technical infrastructure providers in the name of so-called (society-wide) fight against disinformation. These options do not seem sufficient. In the presented case, the Czech administrative courts came up with a different option – *a third solution*. Unfortunately, the case law interpretation of the request in question was even less favourable to the applicants. Therefore, it does not lead out of the "trap" of legal dualism but rather reinforces it.

3.3 Closer Look at the Czech Case Law

The blocking of disinformation websites has been dealt with in three cases before Czech Administrative Courts. However, one of them was particularly interesting as the state (Military Intelligence) was sued by two non-profit organisations arguing that the blocking prevented them from accessing the websites they monitor in their operations (the case therefore also had the dimension of *strategic litigation*). Their lawsuit was also motivated by the advocacy of public administration transparency (as the Military Intelligence approach was clearly non-transparent). Surprisingly, no operator (owner) of the blocked websites sued the public administration (state) in administrative justice. Instead, in one case, they sued the technical infrastructure providers for damages.[10]

In each case, the administrative courts (Regional Court in Prague[11] and even the Supreme Administrative Court of the Czech Republic[12]) dismissed the claims for basically the same reasons. The main reason was that courts interpreted the request in question as a mere recommendation without any legal

10 See footnote 23.

11 See decisions no. 17 A 36/2022-9, 14 A 39/2022-14 and 11 A 25/2022-63.

12 See decisions no. 5 As 230/2022-66 4 As 206/2022-113 7 and As 22/2023-41.

obligation. In the courts' view it was not a blocking order, but rather a (in this situation generally understandable) *political declaration* by the state, which contained only a non-binding appeal to technical infrastructure providers. At the same time, however, the administrative courts, somewhat surprisingly, did not dispute that the request in question was a "product" of public administration activity, or that the Military Intelligence acted as an administrative authority (and that it was possible to file a lawsuit in the administrative justice system).

This conclusion is problematic since it means that the public administration's recommendation in question is not – in the binary perception of public administration outlined above – actionable in private law. For a private lawsuit (which, as should be added, probably would have been difficult and unlikely to succeed, but still possible), it is essential that the state acts as a legal entity, not as a public administration authority (or other public authority – e.g. a court), in giving the recommendation. An administrative action is therefore, according to the Czech case law, the only way of judicial protection against public administration recommendations. However, this possibility is restricted by the nature of the recommendation under review. If the recommendation is strictly legally non-binding, an action can be filed, but it cannot succeed.

It is appropriate to add that, constitutional complaints were raised against the decisions of the administrative courts, but they were – in all three cases – also rejected by the Constitutional Court of the Czech Republic.[13] At the same time, in Czech law, it is established that it is possible to appeal to the Constitutional Court only after having "used up" all the ordinary means of protection of rights, which is also considered to be an action in the administrative justice system. By accepting the opinion of the administrative courts, the Constitutional Court *de facto* closed the way to successful constitutional complaints in similar cases.

This means that in Czech law the non-binding recommendation of the public administration authorities *cannot* be subject to any judicial review. Apart from judicial review, there are no other potent means of protecting the rights of the persons concerned in these unusual situations. As in other legal systems, other means of protection (remedies) are also available in Czech administrative law. But at the same time, they are not as "strong" as judicial protection – they do not initiate any review proceedings with the power to revoke or declare the illegality of the public administration recommendation. The typical option is to complain to the Public Defender of Rights (Czech general ombudsperson institution). But this state body, as is characteristic, does not have the power to fully review the public administration's recommendation in question. In the nature of its design, it can only apply informal pressure (see Chamráthová et al., 2019). According to the author's information, no complaint to the Public Defender of Rights has been made in this case.

13 See decisions no. Pl. ÚS 6/23, Pl. ÚS 5/23 and III. ÚS 2628/23.

Another possible means of protection may be the general complaint under the Code of Administrative Procedure.[14] However, the same applies - it does not represent any authoritative review of the public administration activity. Rather, it is a subsidiary tool that may lead to individual public officials being disciplined for incorrect administrative practices. However, neither does this complaint have comparable effects on administrative practice as a binding decision of an administrative court. Compensation for damages against the public administration (the state) can also be seen as a means of protection of rights. In the Czech legal order this is regulated in a special law,[15] but it requires a defective performance of public administration, and its assessment is generally difficult (but not impossible) with an unfavourable prior decision of an administrative court.

It unfortunately means that the recommendation in question (which has led to the blocking of disinformation websites) cannot be effectively defended and that public administration recommendations probably have no real legal limits (in the sense of them being enforceable). The Czech public administration can thus – as it seems in the perspective of the case law – recommend "anything", provided that it maintains the strictly non-binding character of the recommendation.

I believe that such a conclusion is very difficult to accept in the context of the requirements for modern public administration and the rule of law (as the key fundamental principle of public governance in the Czech Republic and generally) (cf., e.g., Janderová, 2019, pp. 119 et seq.). It is, therefore, reasonable to consider where the mentioned *limits* of administrative recommendations should be, or rather when these limits should be legal and be enforceable by law (via appropriate legal remedies).

4 Discussion – Limits of Recommendations

4.1 The Political Accountability Scenario

The conclusion that the public administration recommendations (supposedly) have no legal limits does not mean, of course, that public administration will do "anything" in practice. There will still be limits, even if not legal ones. The main limit seems to be political responsibility or rather accountability (see Crawford, 2013, pp. 83–85). After all, political accountability has (somewhat) worked in the analysed case. Due to considerable public criticism, the public administration has not yet repeated a similar recommendation as in the case of blocking disinformation websites in 2022. Systematic relying on political accountability in the case of public administration's (legally non-binding) recommendations, however, has at least two serious pitfalls.

14 See Article 175 of the Czech Code of Administrative Procedure (Act No. 500/2004 Coll., Administrative Code).

15 Act No. 82/1998 Coll., on Liability for Damage Caused in the Exercise of Public Authority by Decision or Maladministration.

The first one is the overall mechanism of political accountability. In general, it can be linked to the level of political culture in a given country. Unfortunately, in the Czech Republic, the political culture cannot be regarded as well developed.[16] Therefore, this mechanism may not be "reliable", or rather, it is undoubtedly much less predictable than the legal responsibility (liability). Frequently, political accountability will also be unavailable simply because some administrative authorities are legally protected from political influence as well as political accountability (thus, there are no public officials who can be punished for their misconduct by not being elected).

Secondly, knowledge of a particular public administration practice seems to be a *conditio sine qua non* for the application of political accountability. Without transparency, public administration practices cannot be effectively subjected to public criticism. In the case of the recommendation in question, however, transparency was lacking. More specifically, details of the substance of the public administration's approach were only published months later, and potentially may not have been published at all or too late for effective political accountability to be applied (e.g. after the elections).

4.2 The Need for Legal Limits

Therefore, I believe that reliance on public criticism is generally inadequate. More specifically, public administration recommendations should be subject to legal limits and scrutiny. The reason is not only to protect against non-binding acts and activities of the public administration but also to uphold the rule of law from a broader perspective. This is because the opposite approach would lead us to the conclusion that public administration can recommend (to someone else to do) what it cannot legally do itself.

In the case of blocking disinformation websites in the Czech Republic, the state is prohibited from censorship, and freedom of expression is protected.[17] If the state wanted to block the websites in question, it would have to have an appropriate legal framework, which would have to respect the underlying constitutional and human rights grounds (in particular, it would have to be *proportionate*) and, consequently, this framework would have to be correctly legally applied and, if necessary, reviewed by the administrative courts.

When the state (public administration) asks private entities (e.g. technical infrastructure providers as in the case) to block the websites, its request is not subject to any specific procedural requirements (e.g. determination of the

16 An example of this is the current case of serious shortcomings in the implementation of the digitalisation of the Czech building procedures, which, according to the parliamentary opposition and some members of the Government should have led to the resignation of I. Bartoš, the Minister for Regional Development. Bartoš has had, however, made it clear that his resignation would be of no benefit (for the goal of digitalisation). But we could argue the essence of political accountability is not to supposedly optimise the utility of someone's resignation but to sanction a political failure. Later at the end of September 2024, Bartoš was removed by the Prime Minister.

17 See Article 17 of the Charter of Fundamental Rights and Freedoms (of Czech Republic), similarly see e.g. Article 10 of the Convention for the Protection of Fundamental Rights and Human Freedoms.

facts) and is apparently not even bound by the constitutional principles, as long as these recommendations are still only recommendations without legal binding force.

In one of the administrative lawsuits in the case, it was argued that the state, according to the case law of the European Court of Human Rights, cannot block the entire website, but that the blocking should be directed more specifically at the problematic content (as the entire website may have various content and the overall blocking may be disproportionate),[18] but the Czech administrative courts did not follow this argument (again referring to the recommendatory nature of the request). Therefore, the state probably could not have decided to block the websites in question *"en masse"*, but it could have asked someone else (!) to block them on this large (and probably unconstitutional) scale. That seems somewhat absurd.[19]

Therefore, I believe that there must be legal limits to public administration recommendations, including the ability to control and reinforce them. *Transparency* should be the most obvious one. That is to say, if a public administration asks a certain entity to cooperate with a potentially significant impact on the recipients of the public administration (or probably even one individual recipient) it should do so transparently and allow for public scrutiny. I believe, however, that we should go much further, or rather that the risks of the absence of legal limits are higher than the mere lack of transparency.

4.3 Governing by Recommendations?

The problem to which the outlined legal vacuum may lead is potentially a "new model" of public administration delivery. More precisely, in some cases, public administration can effectively achieve its objectives not through traditional legal instruments (administrative acts, etc.), but rather through various recommendations and informal influence on non-state actors. This model may represent a *win-win* situation for both the state and these non-state entities.

The state may find this model attractive for obvious reasons. The absence of a statutory regulation means that the state does not have to adopt often complex and socially controversial laws. Consequently, it does not have to apply them in the presence of strict procedural requirements. Above all, the state does not bear responsibility for possible failures. The one who will infringe the rights of the addressee of state action will not be the state (a public administration authority) but a non-state actor following a state recommendation.

Even for the non-state actors, this model may be beneficial. By obeying the public administration's recommendations, they can avoid the introduction of potentially much stricter legal regulation, which could impose (as a legal

18 See especially ECtHR Judgment of 23 June 2020 in Case No. 10795/14 (*Kharitonov v. Russia*).

19 A witty comment by one of the Czech scholars illustrates it well – if the state cannot issue a death sentence (since the death penalty is constitutionally prohibited), it also cannot recommend the killing of a certain person inconvenient to the state to the company "Murders, Ltd." – Koudelka, Z. (2024). Cenzura webů a správní soudy. At <https://www.ceska-justice.cz/blog/cenzura-webu-a-spravni-soudy/>, accessed 30 September 2024.

obligation) what has been so far requested without any obligation, and potentially on a much wider scale. There may be advantages in complying with a public administration's recommendation, even if it may trigger some legal liability. In other words, the costs of such liability may be lower than the potential costs induced by a traditional statutory regulation. Compliance with the recommendations may, therefore, be preferable to compliance with a "full-scale" regulation.

According to some opinions, this is the reason why the United States does not yet regulate digital platforms in a comparable way to the European Union.[20] The US administration's objectives, as it seems, can also be achieved on the basis of informal cooperation. More precisely, according to unofficial sources (investigative journalists), this cooperation is already happening.[21]

This model also has some "justification" in the Czech Republic. After blocking disinformation websites, the Government initiated the preparation of a law that would allow the state to order the blocking (the so-called "Disinformation Act"). The first draft of this law was unsatisfactory,[22] but the problem was elsewhere – the related public criticism made this law a politically "toxic" matter. Thus, until after the parliamentary elections in 2025, it is very unlikely that the state will attempt to regulate this area. But at the same time, the coordinated disinformation operations may pose a threat and there may indeed be a need for legally correct (i.e. especially constitutionally proportionate) regulation. Meanwhile, what the state has at its disposal is this problematic model of *governing by (administrative) recommendations*. And the lesson for achieving objectives of public administration this way from the current development is clear – it is possible to recommend, but it is necessary "not to get caught" while doing so (more precisely, not to allow transparency and corresponding political accountability to arise).

Those who "lose" in the model outlined above are, of course, the recipients of state regulation. They can be restricted in their rights without being confronted with an administrative act that can be legally challenged. In the context of the above-mentioned case law of the Czech administrative courts, defence against the state by means of public law is rather unattainable. Therefore, what is left is, in general, a private law defence against the non-state actor through which the state influences the final addressee.

However, these remedies are problematic. They may not be available (the non-state actor is not in breach of any legal obligation or the breach cannot be effectively sued). But even if these remedies are available, it is generally diffi-

20 See especially Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

21 As claims M. Taibbi and some other American investigative journalists in the publicly known *Twitter Files* case – see, e.g., Malik, K. The Twitter Files should disturb liberal critics of Elon Musk – and here's why. At <https://www.theguardian.com/commentisfree/2023/jan/01/the-twitter-files-should-disturb-liberal-critics-of-elon-musk-and-heres-why/>, accessed 30 September 2024.

22 Ministerstvo vnitra ČR. Poskytnutí informace - zákon, dezinformace. At <https://www.mvcr.cz/clanek/poskytnuti-informace-zakon-dezinformace.aspx/>, accessed 30 September 2024.

cult to protect public individual rights through private law remedies. Although fundamental rights also play a role in private law (according to the Czech Constitutional Court's jurisprudence fundamental rights "shine through" the legal order), and some judicial protection is obtainable (e.g. on the basis of liability for damages[23]), in the end, it is not the public administration that is being sued. The deterrent effect of a court decision is therefore limited.

We could even argue that this model of public administration delivery somewhat bypasses *the rule of law* principle. We could certainly recognise a number of aspects of the rule of law, but the key aspect (apart from the legal basis for the exercise of public authority) appears to be the availability of legal remedies. When it comes to the protection of public individual rights, the legal order has a certain system of remedies with the administrative judiciary at its core. The exercise of public administration through private "intermediaries" instead of administrative bodies seems to substantially weaken this system. It also weakens the rule of law itself.

4.4 The Outline of Possible Solutions

It is worth adding that the problem of governance through soft law is not entirely new – it has been recognised and discussed in the context of EU law. In this context, it is referred to by some authors as "soft governance" (Harlow, 2014, pp. 51 et seq.). The problem is that this model has some justification and rationality. Advantages of this model in the context of EU law include the flexibility and range of legal instruments allowing the construction of voluntary EU policies that can also include non-member states (Harlow, 2014, pp. 52–53). On the contrary, the disadvantage of soft law at the EU level is described as its deliberate vagueness, leading to hiding the expansion of the EU's hard law. It is also accused of being undemocratic, as soft law is not a product of the ordinary rule-making process of the EU institutions. Yet, as such, EU soft law is accepted as inevitable (Harlow, 2014, pp. 53).

At the same time, however, we could argue that the rationale behind EU soft law is not the same as the rationale behind the legally non-binding public administration recommendations under consideration at the level of national law. If in EU law it is (albeit disputed) part of an established legal system, in the case of national law it may constitute an escape from that system or even its deconstruction – by the use of public administration recommendations or other soft law instruments where more traditional hard law is supposed to be applied. Unfortunately, the answer to how to respond to this model of public administration delivery (based on recommendations to non-state actors) is not simple. Below is the outline of possible solutions (which would need to be discussed in greater detail, which is beyond the scope of this brief paper).

23 Currently, at least one of the applicants (the owner of one of the blocked disinformation websites) has been successful in its action against the mobile operator implementing the blocking (see the decision of the Municipal Court in Prague of 29 February 2024, No. 20 Co 6/2024-296). However, the decision is not final.

Firstly, we could consider that the issuing of recommendations by the public administration should be – in general – more strictly regulated and/or considered as a "classical" exercise of public administration with all the limits and protection of rights. But this solution is double-edged. Public administration has different layers and approaches. In particular, we can identify *managerial*, *political,* and *legal* layers (see Rosenbloom and Kravchuck, 2005, pp. 14 et. seq.). Many of the public administration recommendations, probably the vast majority, will be in the non-legal (managerial-political) sphere. Their strict legal regulation may lead to ineffectiveness. However, a general procedural basis for issuing recommendations within more or less traditional administrative agendas (e.g. the aforementioned cybersecurity recommendations) may be reasonable.[24]

Secondly, in areas where recommendations of public administration may be "abused" (e.g., the aforementioned area of regulation of disinformation) it seems desirable to have specific statutory frameworks for the exercise of public administration. These should allow public administration to act through standard legal means (forms) and not bypass this regulation (as it could be enforced by administrative courts). The disadvantage of this solution, however, is the feasibility of ensuring the existence of these special statutory regulations, especially if they are socially unpopular.

Finally, without the need for legislative changes, the situation can be addressed by appropriate "sensitivity" of the administrative courts when reviewing public administration recommendations (or other activities of a soft law nature). The administrative courts should pay attention to the context in which the recommendations are formulated. Specifically, whether it is a legitimate area of policy declarations or whether it is rather a *de facto* evasion of the rule of law (the performance of an activity that would normally have a statutory basis and be subject to ordinary judicial review). In the latter case, the courts should provide judicial protection, not protect administrative discretion where it is not substantiated. The disadvantage of this solution is the independence of administrative courts and their reluctance to review such actions (e.g. for practical reasons – because they are overburdened, etc.).

5 Conclusion

Public administration recommendations can be understood (in the continental context) as a specific form of public administration activity or an activity that can be subsumed under the forms of public administration activity identified by the theory of administrative law (e.g. German "real acts" and their equivalents in other jurisdictions or doctrine). These activities are generally non-binding and have no immediate legal effect. However, it cannot be said that they are legally irrelevant. They can serve as an instrument for the effective pursuit of the objectives of public administration and, consequently, of public policies. There is certainly room, however, to distinguish between dif-

24 The Czech Code of Administrative Procedure (Article 154 et seq.) regulates such activities, albeit very briefly and generally.

ferent public administration recommendations. Some may be of considerable practical importance and some may not. For the first group, they should be seen as a genuine public administration activity, comparable (but not identical) to other traditional forms of public administration delivery (typically administrative acts). As such, they may pose certain risks.

Of course, not every recommendation by the public administration is problematic and the issue illustrated in this article is probably very uncommon. However, the outlined mechanism of exercising public administration through recommendations to a non-state actor, which subsequently performs a certain regulatory intervention towards the final addressee of state action, may have considerable potential in the "digital age" (especially in the context of state influence on social media networks or other digital platforms). In particular, it can be applied to the agenda of disinformation regulation (which is an agenda that may be necessary but at the same time carries serious risks of disproportionality or outright abuse of public administration instruments).

The problem is that the consistent application of this model somewhat deconstructs the rule of law, as it does not require an explicit statutory basis and potentially evades judicial review. Generally, under the rule of law, there should be basic enforceable limits to what the public administration can and cannot recommend. It is also probably a broader manifestation of the unexplored boundaries of public administration in the context of new technologies and the "new (digital) public space" in general, where new powerful players are emerging alongside states, with who states may tend to negotiate with rather than to (as is usual in the "offline environment") regulate them by law.

It seems that the "new forms" of public administration (flexible, operative, quick) are typical for the digital environment, however, the traditionally conservative administrative law (based on traditional administrative acts) usually cannot keep up with the speed of change in this area, which potentially poses risks in terms of the protection of individual rights (but also in terms of the protection of the public interest in case of non-functioning or inefficient regulation). We should therefore take public administration recommendations in this area seriously, regardless of their immediately legally non-binding nature.

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