Law on General Administrative Procedure:

Contemporary Tendencies and Challenges

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METHODS OF CONSISTENT APPLICATION OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE IN CONDITIONS OF INCONFORMITY OF SUBSTANTIVE LAWS

Abstract

The legal framework for the actions of public authorities in the Republic of North Macedonia is made up of the Law on General Administrative Procedures (LGAP) and a large number of special (substantive) laws regulating procedural issues in special administrative procedures. With the adoption of the LGAP of 2015, the rules of general administrative procedures were significantly remodeled so that they provide a better basis for protection of the rights of citizens and business entities in the administrative procedures. According to the findings in SIGMA's 2021 Monitoring Report on the Republic of North Macedonia, the general legal framework (LGAP) is well aligned with the principles of good administration, but the alignment of specific (substantive) laws is slow and incomplete. The LGAP was adopted in 2015, and its application started in 2016. The legislator prescribed a delayed effect on the application of the LGAP for a whole year, in order to harmonize the special (substantive) laws with this general code of rules for the administrative procedure. Yet, this has not been done up to date. The application of the new provisions of the LGAP, especially those that provide for broader protection of citizens and legal entities and increased efficiency of the public authorities, is jeopardized. Thus, this article shall focus on the problem of non-application of the new provisions of the LGAP, especially due to the inconsistency of substantive laws with the LGAP, but also for other reasons. Suggestions on how to strengthen the implementation of the LGAP shall be offered. A vital role will be played by the administrative judiciary, which is corrective to the administration, but also the process of digitalization of the administration.

Keywords: General Administrative Procedure, Administrative Dispute, Digitization, Public Services.

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1. Introduction

In the traditional sense of the word, we understand the administrative procedure as a procedure for adopting an administrative act.[1] Today, the rules of the administrative procedure also apply to the implementation of legal administrative actions (real acts) as well as the adoption of administrative agreements. The idea behind the administrative procedure rules is an equilibrium:

- on one hand the procedural rules should enable the protection of rights and interests of the parties (individuals or legal entities) when the public authorities issue administrative acts/real acts or when an administrative contract is to be concluded;
- on the other hand the procedural rules should enable the protection of the public interest.

At the same time, what is required from the authorities that are authorized to act in an administrative procedure is to carry it out not only in a legal way, but to enable the procedure to be carried out in the simplest possible way (easy and transparent communication with the parties), in the most efficient way possible (action in the shortest possible period of time, without delay), and in a way that will be economical (with as few costs as possible that would arise for the parties in the procedure). On the other hand, the public authority should be careful that all this does not affect the quality of the procedure and the decision that will be made.

Bearing in mind these general goals of the administrative procedure, and with the motive to modernize the conduct of the administration and ensure a more consistent implementation of the principle of constitutionality and legality, transparency, efficiency and reduction of costs when public authorities decide on the rights, obligations and legal interests of citizens and business entities, in 2015 the Republic of Macedonia[2] adopted a new Law on General Administrative Procedure (LGAP).[3] This law replaced the LGAP from 2005, which was amended and supplemented in 2009 and 2011.[4]

However, today, almost a decade after its adoption, the LGAP is still inconsistently implemented in certain aspects. In particular, the new provisions on the delegation of decision-making powers, electronic communication and official exchange of evidence and data between public authorities are not implemented. This is due to the inconsistency of special laws with the new LGAP and the established (outdated) practices. Therefore, in this paper we will discuss how to

[1] Stevan Lilić, *Upravno pravo – upravno procesno pravo*, osmo izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 432.

[2] Before 2019, when Amendment XXXIII of the Constitution of the Republic of Macedonia entered into force, the name of the state was "Republic of Macedonia". Today the name has been changed to "Republic of North Macedonia". In this paper, both names will be used, depending on which period is being discussed.

[3] *Official Gazette of the Republic of Macedonia*, No. 124/2015.

[4] *Official Gazette of the Republic of Macedonia*, No. 38/2005, 110/2008 and 52/2011.

achieve a consistent application of the LGAP. In that context, we will firstly pay some attention to the novelties in the LGAP from 2015.

2. Novelties in the LGAP From 2015 and Their Application

2.1. Scope of the LGAP from 2015

Speaking about the LGAP of 2015, it is firstly important to emphasize that it applies not only to the administrative authorities (i.e. state administrative bodies) but to every public authority when it, performing its legal competences, acts, decides (adopts individual administrative acts) and undertakes other administrative actions in administrative matters. This in itself does not mean much, if several terms are not defined: public authority, individual administrative act, administrative matter and administrative action. We will, of course, find the definitions in the LGAP's glossary (Art. 4).

At the beginning, an administrative act is an individual act of a public authority that was adopted on the basis of a law that decides on the rights, obligations and legal interests of the parties (Article 4, Paragraph 1, Paragraph 6). But the LGAP goes one step further, stating how the administrative acts can be titled: decision, order, license, permit, prohibition, approval or other. The reason why the names administrative acts can bear are listed, while leaving open space for other names as well (stating that the administrative act can bear "other" names), is to reduce the space for "creativity" of public authorities. In the past public authorities who wanted to avoid administrative-judicial control over their acts often used to send "notices" to the parties regarding their requests.[5] The argument of the public authorities was that they did not issue an administrative act at all, which the party can challenge before the administrative judiciary, but that they only informed the party that its request was rejected. So, the purpose of the LGAP of 2015 is to interpret whether an administrative act has been issued in a given situation or not according to its effect, and not according to the name. Yet, as an additional safety ground, guidelines are also given as to what name the administrative act can bear.

Administrative action, in addition to the adoption of administrative acts, is also the conclusion of administrative contracts, the undertaking of other administrative actions (real acts) and the protection of users of public services and services of general interest (Art. 4, paragraph 1, sub-para. 5).

Administrative matters, according to the glossary of LGAP, are all acts and actions through which the competences of public authorities are expressed or carried out, and with which the rights, obligations or legal interests of natural

[5] Ana Pavlovska-Daneva (ed.), Commentary on the Law on Administrative Disputes, OSCE Mission in Skopje, Skopje, 2021, p. 51.

persons, legal persons or other parties in the procedure are resolved or affected (Art. 4, paragraph 1, sub-para. 4).

In the end, public authorities are the ministries, bodies of state administration, organizations established by law, other state bodies, legal and natural persons entrusted by law with exercising public powers,[6] as well as the bodies of local self-government units (Art. 4 , paragraph 1, sub-para. 1).

Thus, one may conclude that the LGAP of the Republic of (North) Macedonia from 2015 has a wide scope.

2.2. Some of the Novelties in The LGAP From 2015 and Their Application

2.2.1. The Principle of Delegation of the Decision-Making Power

The first principle that we would single out, as a complete novelty in the LGAP of 2015, is the principle of delegation of the decision-making power (Art. 13), according to which, within the framework of the public authority, the power to resolve administrative matters is, as a rule, delegated to employees (administrative servants), in accordance to the complexity of the administrative matter. This means that according to the LGAP political appointees or elected persons who are the head of authorities,i.e., those who are responsible persons (sometimes also called managers or directors) should no longer adopt administrative acts. Instead, administrative acts should be adopted by the administrative servants who worked on the matter themselves. Simply put, in public authorities the head/the manager (the minister, director, mayor, etc.) no longer needs to sign the administrative acts. The act is adopted with the signature of the administrative servant who drafted the act. At the same time, according to the LGAP, the decision-making power should be delegated by the provisions of the Act on Internal Organization, which will then be transposed into the Act on Systematization on Working Positions (in the description of the work tasks of a given workplace, the adoption of administrative acts should be foreseen). According to Art. 24, para. 1, 2 and 3:

> "(1) In the administrative procedure, the public authority acts through the authorized official person appointed in accordance with the rules specified in this article.
>
> (2) If it is not determined by a separate law or by a by-law, the official who manages the public authority, that is, the managing person, is obliged to determine with the Act on Organization an organizational unit competent for each type of administrative matter under his authority.

[6] These are all chambers that have entrusted public powers (for example, the Medical Chamber, the Bar Chamber, etc.), public enterprises, joint-stock companies in dominant or full ownership of the state that exercise public powers, private trading companies that exercise public powers and others. It is rare for a natural person as such to be entrusted with public authority, but the LGAP did not exclude natural persons, in order not to create a legal vacuum in practice.

(3) The authorized official person leads and completes the procedure, unless otherwise determined by law."

The delegation of the decision-making power, in fact, is not completely unknown in the legal system of the country. Even before the obligation to delegate was inserted in the LGAP, the practice of delegating the decision-making powers by ministers, directors and mayors to administrative servants was known. Ministers, directors, and mayors would issue specific letters of authorizations, i.e. letters for delegation of the decision-making powers to administrative servants (usually ones of high rank) allowing them to adopt administrative acts and perform other administrative actions without the need for approval. Namely, ministers, directors, and mayors used to delegate the decision-making powers on the basis of the Law on Organization and Work of State Administration Bodies[7] (in relation to ministers and directors) and the Law on Local Self-Government (in relation to mayors).[8] Art. 52, para. 2 of the Law on the Organization and Work of State Administration Bodies provides that the minister can authorize a civil servant to make decisions in administrative matters, while Article 52, para. 3 provides that the director who manages an independent body, or an administrative organization, can authorize a civil servant to make decisions in administrative matters.[9] Similarly, Article 50, para. 2 of the Law on Local Self-Government provides that the mayor can authorize a senior civil servant of the municipality to decide on administrative matters.

The principle of delegation of the decision-making power was foreseen in the LGAP of 2015 with the expectancy for multiple positive outcomes: depoliticization of administrative procedures; clear distinction between the responsibilities of the manager, i.e. the politician and the administrative servant, that is, the professional;[10] greater efficiency, considering the fact that numerous draft decisions prepared by several administrative servants will not be collected and waiting for signature by the manager and so on. Practically, the principle was introduced to overcome the "dominance of verticalism" [11] typical for Central and Eastern European countries.

Although the principle of delegation has long been incorporated into the LGAP (ever since 2015), today not many managers have really complied with it. According to SIGMA's Monitoring report for the Republic of North Macedonia in 2021, the delegation of decision-making powers in the ministries was only an exception,[12] not a rule. We can confirm the fact that the principle of delegation

[7] *Official Gazette of the Republic of Macedonia*, No. 58/2000.

[8] *Official Gazette of the Republic of Macedonia*, No. 5/2002.

[9] It is interesting to ask why in Art. 52, para. 3 stipulates that only the director of independent body of the state administration and the director of an administrative organization can authorize a civil servant to make decisions in administrative procedures, and not the directors of the bodies within the ministries?

[10] The manager, that is, the politician, should deal with building policies and managing the authority. The administrative servant who is an expert in the relevant matter is the one who should solve the administrative cases.

[11] *Ibidem*.

[12] SIGMA, OECD, *Monitoring Report: Republic of North Macedonia – The Principles of Public Administration*, 2021, p. 92.

was insufficiently implemented if we take into account the fact that the Government on several occasions, with its conclusions, bound the bodies that answer to it (first of all, the ministries, the bodies in their composition and the independent bodies of the state) to implement the principle of delegation.[13] The principle of delegation is not implemented due to two reasons: some of the substantive laws are not aligned with LGAP in terms of delegation (which is allowed per Art. 24, para. 2 of LGAP) and outdated practices.

2.2.2. The Principle of Economy and Efficiency and Obligation for *Ex Officio* Acquisition of Data and Evidence

Another important principle foreseen in the LGAP, which is additionally operationalized in its further provisions, is the principle of economy and efficiency (Art. 7): "[t]he procedure should be carried out in the simplest possible way, without delay and with as little as possible costs for the parties, while ensuring full respect for the rights and legal interests of the parties and a complete determination of the factual situation". An emanation of this principle is, among others, Art. 56 titled acquisition of evidence *ex officio*. Art. 56 (para. 1 and para. 2) practically provides that:

- it shall be considered that the party submitted the necessary evidence along with the request, if the respective documents/data are being kept in the official records of public authorities
- the authority which carries out the administrative procedure shall *ex officio* obtain all evidence and data necessary to complete the administrative procedure, if those evidence and data are recorded in its official records or the records of other public authorities.

Unfortunately this obligation is rarely respected by public authorities, for few reasons. First, some of the substantive laws and the by-laws adopted on their basis still provide that the party is the one who should obtain all the evidence from other public authorities and attach it to the request. These laws are not only contrary to the LGAP, but they are also contrary to the Law on Electronic Management and Electronic Services,[14] where it is stipulated that public authorities should obtain evidence from the official records *ex officio*. Secondly, the infrastructure of the institutions does not allow them to really implement this obligation, considering that they have outdated software and devices they work on, lack of trained staff, etc.

[13] One such conclusion was adopted at the 120th session of the Government of the Republic of North Macedonia in February 2019: *https://vlada.mk/sednica/120,* 17. 2. 2024.
[14] *Official Gazette of the Republic of North Macedonia*, No. 98/2019, 244/2019.

2.2.3. The Principle of Active Assistance to the Party and the Obligation to Enable Electronic Communication Between the Public Authority and the Party

One interesting principle in the Macedonian LGAP from 2015 is the principle of active assistance to the party, according to which the public authority is obliged to enable all parties in the procedure to exercise and protect their rights and legal interests in the most effective and easy way possible, but also to inform the parties about legal provisions that are important for solving the administrative matter, about their rights and obligations, and about all the information related to the procedure (Art. 17, paragraphs 1 and 2). In para. 3 of Art. 17 it is also provided that the public authority provides the party with the possibility for electronic communication.

2.2.4. The Application of the LGAP to Real Acts and Administrative Contracts

In the previous text, we already talked about the fact that the LGAP of 2015 regulates not only the procedure for administrative acts, but also the procedure for issuing real acts. In addition, the LGAP regulates the legal protection against real acts, that is, it introduces the objection as a legal remedy. In this part, the LGAP is properly implemented by t numerous public authorities that issue real acts, regardless of their name: confirmation, statement, certificate, etc.

As another administrative action, administrative contracts were also foreseen: contracts the public authority concludes with parties for the purpose of performing public tasks which usually fall under the jurisdiction of the public authority. When such contracts are concluded, but also when they are canceled or unilaterally terminated, the provisions of the LGAP should be respected. This is regulated in Art. 98 – 101 of LGAP. What is especially important is that Art. 99 of the LGAP provided that the administrative judiciary shall decide, in an administrative dispute, on the lawsuits for annulment of administrative contracts. Also, the LGAP specified the occasions when the public authorities may terminate the administrative contracts unilaterally. An administrative contract may be unilaterally terminated by the public authority if that is necessary to neutralize immediate danger to the life and health of people or property, if there is no other way to neutralize the danger. In order to unilaterally terminate an administrative contract the public authority must issue a specific administrative act, against which the other contracting party may initiate an administrative dispute.

So, to put it briefly, all disputes regarding annulment of administrative contracts and unilateral termination of administrative contracts should be resolved, per the LGAP, in administrative disputes. Yet, this is where there is a collision between the provisions of the LGAP and the provisions of the Law on Administra-

tive Disputes. In Article 3, para 1, sub-para. 8 of the Law on Administrative Disputes it is stated that the (Administrative) Court decides on disputes arising from the procedure for concluding administrative contracts. Disputes arising from the procedures for annulment or unilateral termination of administrative contracts are not mentioned in the Law on Administrative Disputes.

Thus, if the provision from the Law on Administrative Disputes is interpreted in a strict and literal manner, a wrong conclusion might be reached that the Administrative Judiciary resolves only disputes related to the conclusion of administrative contracts, while the disputes related to the annulment/unilateral termination of administrative contracts are supposed to be resolved by the civil courts. Of course, such conclusion is irrational.

2.3. How to Implement the LGAP Consistently and Properly

2.3.1. Consistent Implementation of the Principle of Delegation of Decision-Making Power

First of all for the consistent implementation of this principle a process of changing the substantive laws should be initiated. This means that all substantive laws which contain provisions that explicitly stipulate that the administrative act is adopted by the head of the authority (minister, director, mayor, etc.) should be amended. This is necessary considering that Art. 24, para. 3 of the LGAP reads "[t]he authorized official person conducts and completes the procedure, unless otherwise determined by law." So, if it is determined otherwise by the special law, the delegation will not be implemented.

In cases where the substantive laws do not contain provisions that explicitly stipulate that the head of the authority/the manager adopts the administrative act, the delegation must be carried out in accordance with the LGAP. If in such cases the principle of delegation of the decision-making power is not implemented, the Administrative Court and the Higher Administrative Court should have a corrective role. The Administrative Court should annul all administrative acts which are adopted by an unauthorized person, i.e. by the head of the authority/manager (minister, director, mayor) and not by an administrative servant in accordance with the LGAP.

An interpretation that supports this claim can be found in the judgments of the Administrative Court. Thus, according to the explanation of the Judgment U-4. no. 113/2019, which refers to a case in the field of social protection, the Administrative Court states the following: "according to the concept of the new Law on General Administrative Procedure, the Minister of ... authorizes the head of the department to draw up a decision and decide on the appeal of the claimants for social protection rights […] the lawsuit allegations about the illegality of the

decision because it was not signed by the Minister of ... are unsubstantiated". So, in the case, the Administrative Court rejects the allegations of the party that the minister must sign the administrative act and confirms that the administrative act should have been signed by an administrative servant (in the case at hand, a head of a department within the Ministry), as it was done, in accordance with the principle of delegation of decision-making power and Art. 24 of the LGAP. The mere fact that the law provided that the act is adopted by the ministry (and not the minister as a person) means that the act is, in fact, adopted by an administrative servant employed at the ministry, not the minister himself/herself.

2.3.2. Consistent Application of the Principle of Economy and Efficiency and the Obligation to *Ex Officio* Acquisition of Data and Evidence

For the consistent application of the principle of economy and efficiency, public authorities must necessarily fulfill their obligation to obtain data and evidence necessary for decision-making *ex officio*. At the same time, the public authorities have an obligation not only *ex officio* to obtain the documents and data that they have at their disposal (they have them in their official records) but also those that other public authorities have at their disposal.

For the consistent implementation of this obligation, in addition to the provisions of the LGAP, other laws have been adopted, such as the Law on Electronic Management and Electronic Services[15] and the Law on the Central Population Register.[16] According to these regulations, a Central Population Register is established – an integrated database of personal data of the population, created on the basis of automatic integration of the data maintained by the competent authorities, from which the public authorities can obtain data on the individual who submits a request. In addition, the Interoperability Platform was established, conceived as a platform for the exchange of data and documents between public authorities, among others, those necessary for the adoption of a decision in an administrative procedure.

Although these efforts have been undertaken, the acquisition of evidence and data *ex officio* in administrative proceedings does not happen often. We see the first obstacle in some of the special laws and by-laws that are outdated and still stipulate that the parties attach evidence to the requests/applications they submit. In truth, however, the number of such laws is decreasing, so this obstacle is becoming less and less relevant. The second obstacle, which is more serious, is the lack of infrastructure within the public authorities to implement such an electronic exchange of data and evidence. The mentioned Interoperability Platform is, unfortunately, used by an extremely small number of authorities. According

[15] *Official Gazette of the Republic of North Macedonia*, No. 98/2019.
[16] *Official Gazette of the Republic of North Macedonia*, No. 98/2019.

to the State Audit Office "the number of institutions connected to the platform is only 2.93% of the total number of public institutions that, according to Article 9 and Article 30 of the Law on Electronic Management and Electronic Services, are obliged to use the IOP platform for the exchange of data and information in electronic form".[17]

2.3.3. Consistent Application of the Obligation to Enable Electronic Communication Between the Public Authority and the Party

The provision of the LGAP according to which every party should be given electronic access to the public authority, which in itself means electronic submission of a request for initiation of an administrative procedure and issuance of electronic administrative and real acts, is still not being properly applied.[18]Although the Law on Electronic Management and Electronic Services contains provisions that further operationalize this obligation from the LGAP, i.e. it was foreseen that every public authority must offer electronic administrative services,[19] a large part of the authorities still do not receive electronic requests nor issue electronic acts. There are two basic reasons: first, in some of the substantive laws and by-laws there are still provisions according to which requests in administrative procedure are submitted in written form;[20] secondly, institutions do not have the appropriate infrastructure to receive electronic requests, and even more so to issue electronic documents. Regarding the first problem, it must be taken into account that outdated legal provisions (or provisions in by-laws) that provide for a mandatory written request or a mandatory issuance of a written decision are in conflict with the Law on Electronic Documents, Electronic Identification and Confidential Services[21] where in Art. 6, para. 1 provides that "[t]he electronic document has the same legal and evidential force as the written form of the document, in accordance with the law", and in Art. 6, para. 3 is provided "[w]hen the written form of documents or acts is determined by law, the electronic document is considered a document or act in written form". Hence, the legal obstacles should be considered irrelevant, although this is not the case in practice. Speaking about the second

[17] State Audit Office, *Final Report on an IT Audit Performed as a Performance Audit: Platform Functionality for Interoperability Between Public Sector Institutions*, Skopje, 2022, p. 23.

[18] The national portal for electronic services is set up as a platform for electronic submission of requests to public authorities, but also for issuing electronic decisions and other acts. In other words, this Portal exists for public authorities (but only those that are central, not local) to provide electronic administrative services. But the situation in the month of February 2024 is such that only 107 services out of a total of 1288 institutions are offered on the National Portal for electronic services. This number is small, taking into account that thousands of decisions are issued every day, as well as real acts, in written form.

[19] By administrative services we mean the issuance of acts in administrative proceedings.

[20] Acts in which there are such provisions are enlisted in the paper: Konstantin Bitrakov, "Digitalization of the Macedonian public administration: a pathway to prevent maladministration and illegal activities", *Conference Proceedings "Law in the Digital Age"* (ed. Zoltan Vig), 2023, pp. 20-21.

[21] *Official Gazette of the Republic of North Macedonia*, No. 101/2019, 275/2019.

problem, i.e. the lack of infrastructure, the Government of the Republic of North Macedonia should be focused on building the necessary infrastructure for public authorities to connect to the appropriate platforms for data exchange and the appropriate platforms for issuing electronic services, but also serious training of officials so that they can deal with new technologies.

2.3.4. Consistent Application of the LGAP in Terms of Administrative Contracts

In the previous text we already spoke of the collision between the LGAP's and the Law on Administrative Disputes' provisions. According to the LGAP disputes arising from unilateral termination of administrative contracts are the subject matter of administrative disputes, therefore should be resolved by the Administrative Court and the High Administrative Court. According to the Law on Administrative Disputes, on the other hand, only disputes arising from the procedure for concluding an administrative contract are the subject matter of administrative disputes (implying that disputes related to unilateral termination of administrative contracts should not be resolved by the Administrative Court and High Administrative Court but by the civil judiciary).

Yet, in the previous case-law of the Administrative Court and the High Administrative Court these dilemmas are resolved. The administrative judiciary accepted that it is neither logical nor prudent to accept a narrow interpretation according to which disputes related to the conclusion of administrative contracts are resolved by the administrative judiciary but disputes related to the annulment or unilateral termination of administrative contracts are resolved by the civil courts.

After all, even if the provision of Art. 3, paragraph 1, sub-para 8 of the Law on Administrative Disputes is interpreted as narrowly as possible, the provision of the LGAP stipulates that unilateral termination of administrative contracts is carried out by an administrative act, and each administrative act is, of course, subject to administrative-judicial control in an administrative dispute.[22]

4. Conclusion

The LGAP of the Republic of Macedonia from 2015 was inspired by the idea of reforming the public administration with the aim of bringing it closer to the European standards. But even today, almost ten years after the LGAP was

[22] See: Verdict UZ-2. No. 495/2021 in the explanation of which it is stated that the Government (concessionaire) argued that the dispute related to the decision to terminate the contract (termination) is a civil-law dispute, i.e., it does not have the character of an administrative dispute, and the Administrative Court accepted this in the first instance and refused the lawsuit. The Higher Administrative Court states that such an interpretation of the Administrative Court was wrong and clearly points out that administrative disputes may be initiated against decisions to unilaterally terminate an administrative contract (in the present case concession contracts).

adopted, some of its (new) provisions are not consistently applied. We argued above that the principle of delegation of decision-making power, the principle of economy and efficiency, the principle of active assistance to the party and the provisions for administrative contracts are not properly and consistently applied. We also elaborated upon the reasons for not applying referred principles and provisions from the LGAP consistently. Several efforts are needed to overcome the existing situation, and to consistently apply all principles and provisions of the LGAP: amendments to the substantive laws to harmonize their provisions with the principle of delegation of the decision-making power from the LGAP, proactive and corrective role of the administrative judiciary when reviewing the legality of administrative acts and actions, and holistic approach in the digitalization of the public sector.

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