

Access to Environmental Information in Montenegro: the Case of the “Bar-Boljare Highway” Project

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INTRODUCTION

Ensuring the right to access to environmental information is one of the fundamental elements to boost the sustainable environmental development of a country. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) expressed such concept at the end of the 20th century. Since then, the principle according to which living in a healthy environment is a human right has gained prominence in the field of international law. In this perspective, the involvement of the civil society is essential and states are responsible for the protection of said right. This assumption is the starting point of the thesis. The objective of the dissertation is analysing the application of the right to access to environmental information in the context of the Bar-Boljare highway (the Project). This facility is a public infrastructure under construction in Montenegro and partially financed by the People's Republic of China.

Despite the fact that Montenegro is the most advanced Balkan state in the process of integration into the European Union, its future accession to the EU cannot be conceived separately from the resolution of certain critical issues. The analysis of the construction process of the Bar-Boljare highway was chosen to address many of the challenges the country has been facing in relation to the access to information on the state of the environment. These include a growing economic dependence on foreign investments, environmental pollution and bias in the application of the rule of law¹.

Although this work focuses mainly on the right to access environmental information, the regulatory context of the Project is quite complex and overlaps elements of European, International and National Environmental and Investment law. The first chapter of this work provides a concise overview of the Project peculiar characteristics as well as of the regulations applicable in Montenegro for the accessing to environmental information. The Bar-Boljare highway is part of a larger infrastructure development initiative by the European Union which is partly financed and built by Chinese companies. Even though China is not bound by the Aarhus Convention, Montenegro is. Accordingly, chapter one also describes the process of the implementation of the right to access to environmental information in the Montenegrin legal system. The final part of the chapter reflects on the limitations imposed on this right in the context of the Bar-Boljare motorway construction. Specifically, the last part discusses the effects of two ministerial decisions declaring the most relevant documents about the Project as confidential on the basis of the protection of national interests.

The second chapter begins by highlighting two aspects. First, it describes the impact of the motorway on the surrounding ecosystem of Montenegro. The highway is situated upstream from an UNESCO site and crosses the Tara river, one of the main Montenegrin watercourses. Second, it discusses whether the documents containing information on the construction of the motorway can be

¹ European Commission, 'Montenegro 2019 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2019 Communication on EU Enlargement Policy' SWD(2019) 217 final, 85-88.

partially disclosed to the public in light of the environmental information they may contain. In conclusion, the chapter elaborates on whether a case against Montenegro could be brought before the Aarhus Convention Compliance Committee². The findings of this analysis will enable an assessment on whether certain irregularities on the application of the right to access to environmental information can be traced under the Aarhus Convention.

² The Compliance Committee is a non-judicial mechanism for review of compliance by the Parties with their obligations under the Aarhus Convention. A comprehensive explanation of the role of the International body is provided in Chapter 1.2.2 and 2.3 of the dissertation.

CHAPTER 1

1.1 The “Bar-Boljare Highway Project” in Montenegro and its Impact on the Environment

The improvement of the national mobility and regional integration in the Western Balkans is one of the current priorities of Montenegro³. Since the early 2000s, the country has targeted the development of a long-term roadmap for a sustainable road framework and multi-modal transport solutions⁴. However, this goal is inhibited by the current dysfunctional national road network and obsolete rail infrastructure, the inadequacy of which is amplified by the country’s mountainous territory⁵. In this perspective, the Bar-Boljare Highway (the Project) is a complex infrastructural plan that was put forward to tackle this issue. In particular, the Project sets to connect the port of Bar, in Montenegro, to the Serbian border through a 170 km highway as part of the Belgrade-Bar motorway⁶. The inter-country roadwork is carried out with the aim of boosting both the Montenegrin domestic transport infrastructure and the future trade connections with Belgrade, providing a more efficient and safer mobility of goods, services and people⁷.

Although the spatial plans that envisage the highway construction dates back to the end of the 80s and the beginning of the 90s, the independence of Montenegro in 2006, as well as the beginning of the economic cooperation with the European Community (EC)⁸, gave a significant impetus to the implementation of the Bar-Boljare Highway in the country⁹. Indeed, in 2007 Montenegro and the Member States of the EC signed the Stabilization and Association Agreement¹⁰. Among the objectives identified, the Agreement highlights the need of transport system development in Montenegro, in compliance with the EU standards, in

³ European Bank for Reconstruction and Development, ‘Strategy in Montenegro’ (EBRD Publications, 2017) < <https://www.ebrd.com/documents/strategy-and-policy-coordination/strategy-in-montenegro.pdf> >.

⁴ Ibid.

⁵ Ibid.

⁶ Despite being actively implemented from the 21st century, the Belgrade-Bar motorway plan is much older. In 1969 the inter-country roadwork was mentioned for the first time in the planning documents of the Regional Spatial Plan Southern Adriatic. At the time Montenegro was still part of the Socialist Federal Republic of Yugoslavia. See < <http://barboljare.me/en/history/> >.

⁷ Ministry of Economic Development of Montenegro, ‘Detailed Spatial Plan for the Highway: Bar-Boljare’ (2008) < <http://barboljare.me/wp-content/uploads/2017/10/DPP-autoputa-Bar-Boljare-EN.pdf> >.

⁸ The European Community was replaced by the European Union in 1993, when the Maastricht treaty entered into force.

⁹ Montenegro was a federal republic of the Socialist Federal Republic of Yugoslavia. In 2003 due to the ratification of the “Agreement on Principles of Relation between Serbia and Montenegro within the State Union” (Belgrade Agreement), the country joined the Union of Serbia and Montenegro. The deal granted Montenegro a semi-independent status. Thanks to a referendum, limited only to Montenegro, the latter achieved the status of independent state in 2006. See < <http://barboljare.me/en/history/> >.

¹⁰ The Agreement entered into force in 2010 and constitutes the framework of relations between the European Union and the Republic of Montenegro for the implementation of the latter’s accession. See < https://eeas.europa.eu/delegations/montenegro_da/27529/Montenegro%20and%20the%20EU >.

order to enhance European integration and environmental protection in transports¹¹.

In 2008, the Ministry of Transport and Maritime Affairs of Montenegro adopted the “Transport Development Strategy of Montenegro”, which establishes that the traffic integration of Montenegro into the Trans-European Transport Network (TEN-T) is to be achieved through the realization of the Bar-Boljare Highway¹². The TEN-T is a policy programme supported by the European Union. It aims at improving and realising a Europe-wide network of airports, railway lines, inland waterways, ports, roads and train stations. The objectives are to bridge gaps, remove barriers and reduce traffic congestion, as well as to empower economic, social and territorial cohesion in the EU and the countries involved in the EU enlargement process¹³. Indeed, the Montenegrin freeway is to be the shortest connection from Hungary and Romania – through Serbia and Montenegro - to Southern Italy and Albania¹⁴.

The main arrangements for the implementation of the Bar-Boljare highway project were fulfilled through the adoption of the “Spatial Plan of Montenegro by 2020” and the “Detailed Spatial Plan for the Bar-Boljare highway” in 2008¹⁵. The former defines the highway network as well as its scope and usage limitations, while the latter provides the detailed guidelines for the motorway implementation and construction. According to the “Detailed Spatial Plan” the Bar Boljare Highway is planned to be built in four phases, the first of which is under the supervision of the French-Italian Consortium Ingerop Conseil-Ingegnerie Geodata¹⁶. Notwithstanding the initial European involvement in the project, the first section, referred to as Smokovac-Mateševo, is currently under construction and financed by the EXIM Bank of China through a loan agreement¹⁷. Notably, China has emerged as an important infrastructure developer in the Western Balkans¹⁸. Beijing’s involvement in the Montenegrin project was outlined by the

¹¹ Art.108 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part (2010) OJ L108/3.

¹² Ministry of Transport and Maritime Affairs of Montenegro, ‘Transport Development Strategy of Montenegro’ (2008), 25.

¹³ Beyond the construction of new infrastructures, the TEN-T policy encourages the application of digital solutions and new technologies to all means of transportation to reduce environmental impact of transport and to boost energy capabilities. The current TEN-T policy is based on Regulation (EU) n.1315/2013 (2013) OJ L 348, 1-128.

¹⁴ See < <https://www.wbif.eu/project/PRJ-MNE-TRA-005> >.

¹⁵ See < www.barboljare.me >.

¹⁶ The four phases are the following: Phase I: Smokovac – Mateševo; Phase II: Mateševo – Andrijevisa and bypass Smokovac – Tolosi – Farmaci; Phase III: Andrijevisa – Boljare; Phase IV: Podgorica – Djurmani.

¹⁷ Preferential Loan Agreement on Bar-Boljare Highway Section Smokovac-Mateševo Construction Project (2014), Official Gazette of Montenegro n.54/14. Due to its safeguards and governing law clauses, the Preferential Loan Agreement is strongly criticised by certain Montenegrin opposition parties, the public opinion as well as legal and economic experts. According to the Agreement in case of legal disputes Chinese law will be the applicable law and in case of failure to full repayment of instalments EXIM Bank is entitled to partial and temporal control over Montenegrin territories as a remedy.

¹⁸ The analysis underlined that in the Western Balkans China finances infrastructure related to its “Belt and Road Initiative”. Its goal is that “improved transport and energy infrastructure in the [Western Balkans] region will support the flow of Chinese goods from the Chinese-acquired Greek

signing of the “Agreement between the Government of Montenegro and the Government of the People’s Republic of China on the Promotion of Cooperation in Infrastructure Construction” in 2013¹⁹. The building of the first section was formalised through the contractual form of a partnership between public and private sectors (public-private partnership)²⁰. In 2014, Montenegro, China Communications Construction Company Ltd. (CCCC) and China Road and Bridge Corporation (CRBC) signed the “Design and Build Contract for the Bar-Boljare highway, section Smokovac-Uvac-Mateševu”²¹. After the conclusion of the contractual arrangements the contracts were submitted to the Montenegrin Parliament for reference and formalisation. Subsequently, the Law on the Bar-Boljare Highway was enacted in December 2014²². This legal provision regulates the procedural requirements to commence the road infrastructure as well as the economic conditions applicable to the infrastructural project, such as tax and custom duties exceptions for the Chinese Contractors²³.

Although the Project is of evident great strategic importance for the country, it is also expected to have a considerable impact on the environment and the environmental protection obligations that Montenegro is bound to respect. Indeed, the section under construction is located upstream from the Durmitor National Park, a UNESCO World Heritage site in northern Montenegro, which is subjected to strict environmental protection regulations both at domestic and international level²⁴. Another relevant cause for concern relates to the possible effects of the motorway construction on the Tara Canyon. As part of the Durmitor National Park, the Tara river gorge is a natural site of outstanding importance. It is the longest river gorge in Montenegro, the deepest in Europe, and many of its

port of Piraeus further north towards wealthier EU economies”. Mario Holzner, Monika Schwarzappel, *Infrastructure Investment in the Western Balkans: A First Analysis* (2018) joint publication of the Vienna Institute for International Economic Studies (Wiener Institut für Internationale Wirtschaftsvergleiche) and the European Investment Bank. See <https://www.eib.org/attachments/efs/infrastructure_investment_in_the_western_balkans_en.pdf>.

¹⁹ Official Gazette of Montenegro – International Treaties”, n. 13/08. In 2014 Amendments to the said international treaty were made to facilitate the implementation of the highway project (Official Gazette of Montenegro – International Treaties, no. 7/14).

²⁰ The public-private partnership (PPP) is a partnership between an agency of the government and the private sector in the delivery of goods or services to the public. This type of arrangements have been implemented usually in the field of public transportation. See the definition at <<https://www.britannica.com/topic/public-private-partnership>>.

²¹ Design and Build Contract for Bar-Boljare highway Section, Smokovac-Uvac-Mateševu, Official Gazette of Montenegro, n.54/2014. The Government of Montenegro did not conduct any tender procedure, or any other form of public procurement, to chose the contractor for the construction and design of the highway Bar-Boljare, priority section Smokovac-Uvac-Mateševu. According to Article 3(2) of the Law on Public Procurement (Official Gazette of Montenegro, n. 42/11) exemptions from the application of Public Procurement Law are admissible when the project is implemented on the basis of an international agreement.

²² The Law on the Bar-Boljare Highway, Official Gazette of Montenegro n.01 1214/2.

²³ The Law rules the special expropriation procedures, the methods of preparation and review of design documents, the building permit requirements, the requirements for execution of preparatory works, taxes, customs duties.

²⁴ Founded in 1952 the Durmitor National Park has a long history of conservation. International recognition dates back to 1976 when the Tara River Basin became a biosphere reserve under the UNESCO’s Man and Biosphere Programme. See <<https://whc.unesco.org/en/list/100/>>

caves maintain to this day a pristine environment²⁵. In addition, the area concerned by the building site is situated within the Tara Biosphere Reserve, the protection of which is vital to safeguard the unique local flora and fauna²⁶. Remarkably, a big cluster of autochthonous insects and plants is present in the area where the Tara river runs; therefore the preservation of the natural characteristics of the river is important as well. The relevance of the above-mentioned natural sites is legally recognised also at national level. Indeed, in 2004 the Parliament of the Republic of Montenegro adopted a decision to protect the Tara river²⁷. As a consequence, only a free declaration of all Montenegrin citizens by means of a referendum may authorise interventions and works in the Tara river²⁸.

In order to properly assess the possible impact, in 2015 the Montenegrin government commissioned “Interproject” Ltd company to draft the Environmental Impact Assessment for the highway construction, section Smokovac-Mateševo, which was approved by the Environmental Protection Agency of Montenegro at the end of the same year²⁹. The Assessment evaluates both future and ongoing harm caused by the segment of the freeway under construction. While recognising the strengths of the Project, reservations are expressed on the infrastructural work impact on the ecosystem³⁰. First, the study identifies the ongoing risks correlated to air, land and water pollution and the consequent negative effects on health. Second, the report highlights the extent of environmental disruption in the area, pushing for interventions to limit the negative impact of the motorway both during and after its construction.

According to the Environmental Impact Assessment one of the worst impacts is expected to be water, notably groundwater, contamination. This is due to the hydrogeological peculiarity of the soil through which the highway route will run. The ground is mostly composed of limestone with high coefficients of filtration, allowing for “a rapid penetration of polluted surface water from working surfaces and pavements into the wild soil and contact with ground waters, [which] are an important resource of Montenegro”³¹. The most alarming scenario involves the local forests around the highway building site. The Assessment suggests that

²⁵ The Tara Canyon received official protection as a Nature Reserve and Nature Monument in 1977, becoming part of the Durmitor National Park in 1978.

²⁶ World Heritage Centre/IUCN, ‘Report of the joint World Heritage Centre/IUCN Advisory Mission to the World heritage property “Durmitor National Park” (Montenegro), 12-16 November 2018 (World heritage Centre, 2018) < <https://whc.unesco.org/en/documents/174707> >.

²⁷ Ministry of Spatial Planning and Environmental Protection of Montenegro, ‘Questionnaire Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union. Chapter 27 Environment’ (ESI 2009) 151.

²⁸ Ibid.

²⁹ The environmental assessment was approved by the Environmental Protection Agency after the construction of the highway started. The former is dated December 2015 (Decision n.1567/46 of 21st December 2015), while the latter commenced in May of the same year.

³⁰ Interproject Ltd, “Entasis” Ltd, ‘Environmental Impact Assessment Study for the highway Bar-Boljare, section Smokovac- Mateševo’ (2015) available at <<http://barboljare.me/wp-content/uploads/2018/02/Objedinjeno.pdf>>.

³¹ Ibid 391.

these forests should be conversely protected as a biological compensation for the loss of flora and fauna in the highway section area.

To sum up, the highway infrastructural work is very complex, as is the legal framework behind it. Given the protected nature of the site around the first segment of the highway, Montenegro is bound to comply with legal requirements that come from the country's obligations towards International law, EU law and its own domestic laws as well as to its contractual duties towards the Chinese investors and highway constructors. Furthermore, due to the relevant environmental aspects involved in the Montenegrin project, granting access to environmental information is one of the legal requirements Montenegro has to comply with in the Project.

1.2 Access to Environmental Information in Montenegro and the Provisions relevant for the Construction of the Bar-Boljare Highway

The highway project raises economic, political, legal and environmental issues that are strictly intertwined but need separate analysis. In particular, the following sections aim at providing an overview of the legal grounds that regulate the access to environmental information in Montenegro, which are hence relevant in the context of the Bar-Boljare Highway project.

The peculiarity of the Montenegrin legal norms dealing with the access to environmental information is their multiplicity and the fact that they come from different legal sources³². In addition to the right to access to environmental information granted by the Montenegrin Constitution, as well as by the international treaties that contain provisions on this subject, there is a number of laws enclosing provisions, either specific or general, that can be applied to this right, its enforcement and protection³³.

1.2.1 The Constitutional Provisions on Access to Environmental Information and the General Right to Information

In the Constitution of Montenegro, the right to access to environmental information is granted by Article 23, which protects the right to a sound environment³⁴. This Article entitles every person to a timely and complete notification of the environmental conditions. Interestingly, the Constitution shows special attention to environmental protection matters. In the Montenegrin constitutional provisions, the concept of the right to a healthy environment is

³²Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (Evropski pokret u Crnoj Gori, 2014).

³³ Ibid.

³⁴ Article 23 of the Constitution of Montenegro stipulates that "everyone has the right to a healthy environment, to timely and complete notification of its condition, as well as the possibility of influencing when deciding on issues of environmental importance and legal protection of these rights".

explicitly recognised as a human right. This partly stems from the country's commitment to ecology as the basic starting point for its development, as stated in the 1991 Declaration on the Ecological State of Montenegro³⁵. As a consequence, while openly referring to the duty of the state to protect the environment, the 2007 Constitution reiterates Montenegro's designation as an "ecological state"³⁶. Indeed, in its preamble the 2007 Constitution clearly refers to "the conviction that the state is responsible for the preservation of nature, healthy environment, sustainable development, balanced development of all its regions and the establishment of social justice".

If considered in its very nature, the right to a sound environment has mainly economic and social features coupled with a collective right element³⁷. Nevertheless, the Montenegrin lawmaker placed it within the section of the Constitution dedicated to common provisions on human rights and freedoms³⁸. This collocation shows the relevance given by the Legislator to this right³⁹. Indeed, the enjoyment of other human rights are strictly connected to sound environmental protection⁴⁰, which comprehends the right to access to environmental information.

According to the Montenegrin Legislator, Article 23 has two components. The first provides the right for every individual to a healthy environment, whereas the second one underlines the existence of the citizen's duty to protect the environment together with the State⁴¹. Most importantly, the constitutional provision also reiterates the public authorities' duty, by setting limits to activities that may affect the natural protection and sustainable development of the country⁴².

The right to access information about the environment may also benefit from Article 51 of the Constitution, which establishes the right to access to information in general terms but may be relevant for the access to environmental data⁴³. Unlike Article 23, Article 51 sets out a list of restrictions to "the right to know", including for instance limitations on the foreign, monetary, and economic policies of Montenegro⁴⁴. The restrictive grounds enlisted in Article 51 are also

³⁵ The 1991 Declaration of Montenegro was the first of its type, it declared Montenegro an "ecological state". See < <http://www.mgreens.co.me/declaration.htm> >.

³⁶ Article 1(2) of the Constitution of Montenegro states that "Montenegro is civil, democratic, ecological and the state of social justice, based on the rule of law".

³⁷ Müllerová, H. et al., 'Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention' (Prague 2013) *Ústav státu a práva AV ČR* (2013),150.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Müllerová et al. (37)151.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Article 51 of the Constitution is the point of reference of secondary legislation that will be discussed in paragraph 1.2.2.1 and which rules the conditions to request to the state authorities information on environmental matters as well.

⁴⁴ Art.51(2) of the Constitution also adds the following reasons: protection of public health, life, morality and privacy, carrying of criminal proceedings, security and defense of Montenegro.

introduced in national laws as the legal basis for the state authorities' refusal in granting access to environmental information⁴⁵.

However, to prevent abuses of these limitations, the protection of the "right to know" is ensured by the constitutional provisions on the right to equal protection in the legally established procedure and the right of appeal⁴⁶. In addition to administrative procedures and administrative disputes, these rights can be protected in misdemeanour, civil, criminal proceedings and proceedings before the Constitutional Court⁴⁷.

In essence, the Constitution also safeguards the right of the citizens to apply to international institutions to which Montenegro is a party for the protection of guaranteed rights and freedoms⁴⁸. The Constitution of Montenegro sets a hierarchy of legal sources for all branches of law, including the area of environmental protection. The Constitution provides that "confirmed and promulgated international treaties have primacy over law and are directly applicable when relations are regulated differently from domestic law"⁴⁹. Among the conventions endorsed by Montenegro relating to the access to environmental information, within the broader concept of public participation, the most important are: the United Nations Convention on the Impact Assessment in the Transboundary Context of 1991⁵⁰ and the United Nations Convention on the Transboundary Effects of Industrial Accidents of 1992⁵¹. Besides these two conventions, both adopted in 2008⁵², the most important source of rights to access environmental information is the Convention on Access to Information, Public Participation in Decision-making and the Right to Access to Justice in Environmental Matters⁵³, which will now be explained further.

1.2.1.1 Access to Environmental Information and the Participation of Montenegro in the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

In November 2009 Montenegro became a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). It entered into force in the

⁴⁵For instance, this applies to the Law on Free Access to Information discussed in paragraph 1.2.2.1.

⁴⁶ Article 19 and 20 of the Constitution of Montenegro.

⁴⁷ Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32).

⁴⁸ Article 56 of the Constitution of Montenegro.

⁴⁹ Article 9 of the Constitution of Montenegro.

⁵⁰ Convention on the Impact Assessment in the Transboundary Context, 1989 UNTS 309, 30 ILM 800 (1991) < <https://treaties.un.org> >.

⁵¹ Convention on the Transboundary Effects of Industrial Accidents, 2105 UNTS 457, 31 ILM 1330 (1992) < <https://treaties.un.org> >.

⁵² Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32).

⁵³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention") 2161 UNTS 447, 38 ILM 517 (1999) < <http://www.unece.org/env/pp/treatytext.html> >.

country in February 2010 through the Law on the Implementation of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁵⁴.

The Aarhus Convention is a regional convention of the UN Economic Commission for Europe and it is based on the recognition of the linkages between fundamental rights and environmental protection. The Aarhus Convention sets the conditions for the implementation of its three founding pillars: the right of access to environmental information, the public participation in decision-making and the access to justice in environmental matters. The overall objective of the Convention is to contribute to the protection of the right of every person of present and future generations to live in an environment in which his or her health and well-being are safeguarded⁵⁵.

Within the Convention context, the term “environmental information” is defined within Article 2, paragraph 3. The definition set in the provision shall be regarded as a minimum requirement; in fact, Article 2(3) provides for a non-exhaustive list made up of three categories that can be broadened by the parties in the national implementing legislation⁵⁶.

For the purposes of this dissertation, it is useful to point out that, in the list of Article 2(3), environmental information includes any information - in any material form - on the state of built structures, inasmuch as they affect, are or may be affected by the state of the elements of the environment⁵⁷.

The right to access to environmental information is provided for in Articles 4 and 5 of the Aarhus Convention (the so-called “first pillar”). The Contracting Parties are obliged to ensure access to information, but also to collect and share information about the environment. Hence, the duty to inform is additional to the right of access provided for in the Convention, which conceives these obligations as a passive and active right to information⁵⁸. Article 4 provides for the active right to information, which ensures the public the possibility to request environmental

⁵⁴ Official Gazette of Montenegro, International Treaties, n. 03/09.

⁵⁵ The seventh preambular paragraph of the Aarhus Convention recognises that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”.

⁵⁶ UNECE, ‘The Aarhus Convention: An Implementation Guide (second edition)’ (UNECE, 2014), 35-39.

⁵⁷ The full definition states that environmental information is “any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”.

⁵⁸ Počuča M., Mladenov M., Mirković P., The Analysis of The Aarhus Convention In the Context of Good Environmental Governance (2018) 65(4) Economics of Agriculture 1615-1625.

information owned by public authorities. According to the same article the public does not have an obligation to express a legitimate interest for their request⁵⁹. The provision also clarifies that any piece of environmental information shall be made available within one month after the submission of the request. Yet, if the data requested is complex and significant in amount, the deadline to supply it can be extended⁶⁰.

The right to access to environmental information, however, is not an absolute right. Claims for environmental information might be refused in accordance with the reasons stated by Article 4. For instance, the Aarhus Convention provides as possible reasons for refusals the fact that the Parties' authorities do not possess the required information or that the information disclosure would entail certain confidential areas related to public safety or trade secrets⁶¹. Nevertheless, the contracting Parties are obliged to interpret reasons for rejection in a restrictive way as well as to assess the significance of the public interest involved and whether the requested information is linked to environmental emissions⁶².

As already mentioned, Parties must progressively set a system for data collection and dissemination of environmental information⁶³. Although these measures already exist in environmental law in many countries, the Convention has the effect of elevating them to the rank of multilateral procedural guarantees⁶⁴. This obligation derives from the passive right to access environmental information laid down by Article 5 of the Convention, concerning the collection and dissemination of environmental information by state authorities. According to Article 5, the Parties are obliged to provide mandatory systems to collect information on proposed and existing activities which might have a relevant impact on the environment⁶⁵. Furthermore, in case of activities having a relevant environmental impact, Article 5 states that the parties of the Convention shall request periodic reports on it⁶⁶. The above-said requirements are also applicable to the private sector⁶⁷.

It must be noted that, according to Article 4 and Article 5 of the Convention, the duties established in the aforementioned legal provisions are implemented within the framework of national legislation, which allows the Parties considerable flexibility in choosing which information could be denied⁶⁸. In practice, the implementation of the Convention relies entirely on the interpretation of the terms of the Convention by the Parties. They are required to submit reports on the state

⁵⁹ Article 4(1)(a) of the Aarhus Convention (53).

⁶⁰ Ibid.

⁶¹ Art.4(3) and art.4(4) of the Aarhus Convention.

⁶² Art.4(4) of the Aarhus Convention.

⁶³ J. Ebesson as cited in Maryse Grandbois and Marie-Helene Berard, *La Reconnaissance Internationale des Droits Environnementaux: Le Droit de L'environnement en Quete D'effectivite* (2003) 44 Les Cahiers De Droit, 427.

⁶⁴ Ibid.

⁶⁵ Počuča M, Mladenov M, Mirković P. (58) 1619.

⁶⁶ Article 5(1)(b) of the Aarhus Convention.

⁶⁷ Art. 5(6) of the Aarhus Convention.

⁶⁸ Mason, M, 'Information Disclosure and Environmental Rights: The Aarhus Convention'(2010), 10(3) Global Environmental Politics 10-31.

of the environment, access to information, public participation, and access to justice at meetings of the Parties, but the Convention does not put in place a proper system of compliance⁶⁹. Article 15 deals very briefly with compliance mechanisms, leaving it to the Conferences of the Parties to adopt, by consensus, optional arrangements of a non-confrontational, non-judicial and consultative nature, to review compliance with provision for appropriate public participation. The imprecise terms of the legal provision and the resulting non-binding commitments mean that States may consider their obligations as optional⁷⁰.

This notwithstanding, a number of mechanisms were adopted, resulting in the establishment of a Compliance Committee, a reporting system and an information centre for the strengthening of the capacity note⁷¹.

Several observers deem the Aarhus Convention as an improvement in the democratisation of the environmental debate⁷². It also marks an important step towards the full recognition of the fundamental right to a sound environment, and the universalization of procedural safeguards⁷³.

To sum up, the process of transposition of the Aarhus Convention enhances the recognition of access to information as a fundamental right, which is also essential to promote meaningful public participation and access to justice. If effectively applied, the right to information strengthens both a more transparent, accountable public administration and a more “environmentally aware, informed public”⁷⁴.

1.2.2.1 The Implementation of the “First Pillar” of the Aarhus Convention in Montenegro

In Montenegro the legal framework for access to environmental information in addition to the Constitution and the Aarhus Convention consists of several laws, some of which are general and some others specifically related to the environment⁷⁵. In Montenegro, state authorities and national courts do not enforce the Convention directly, since, as a practice, they are more likely to apply the rules of domestic legislation⁷⁶.

The implementation of the right to access to environmental information, as provided for by the Convention, has been done through amendments of existing Montenegrin laws, rather than the adoption of *ad hoc* legislation. The Law on Free

⁶⁹ Grandbois M, Berard M.H, ‘La Reconnaissance Internationale des Droits Environnementaux: Le Droit de L’environnement en Quete D’effectivite’ (2003) 44 Les Cahiers De Droit, 427.

⁷⁰ Ibid 448-449.

⁷¹ Grandbois and Berard (69).

⁷² S.T. McAllister as cited in Maryse Grandbois and Marie-Helene Berard (69) 448.

⁷³ Thorp, T, ‘The Right to Know and the Duty to Disclose: Pathways to Effective Monitoring, Reporting, and Verification within the Constitutionalism of Climate Justice’, 30 Pace Envtl. L. Rev. 158-159.

⁷⁴ Ibid.

⁷⁵ Kostić-Mandić, ‘Primjena Aarhuske Konvencije u Crnoj Gori-pristupi pravdi’ (32).

⁷⁶ Kostic-Mandic M., ‘Access to Justice in Environmental Matters: Standing Costs and Available Remedies in relation to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters’ (Analytical Studies UNECE, 2014) 78-94<https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf >.

Access to Information is the most important general source of law on access to environmental information⁷⁷. The current legal provision is the result of the amendment process of the 2005 version of the Law, which was not harmonised with the Convention, when the latter was ratified. For instance, while the 2005 version provided a test to determine whether the disclosure of information would cause a significant damage compared to the relevance of the public interest to access to information, it did not contain any rule on restrictive interpretation of the grounds for refusal⁷⁸. Consequently, the Law was firstly amended in 2012⁷⁹ and once again in 2017. Despite these recent changes in the text, the reform process is not deemed to be concluded. In 2019 the government presented a new amendment proposal of the Law to the Parliament. The new version has not entered into force yet, since public consultations on the new amendment draft are being held in the country⁸⁰.

This overview of the different amending phases of the Law was meant to demonstrate the evolving nature of the implementation of the right to information in Montenegro. From now on this section focuses more on the details of the legal text in force.

The current legislation treats the right of access to information as a general right, which is guaranteed at the level of the principles and standards contained in international human rights documents⁸¹. Article 2 of the Law on Free Access to Information states that access to information held by the authorities is grounded on the principles of transparency of the work of the public authorities, free access to information, the public's right to know, and equality. Similarly, it is enforced at the level of the standards provided by the international treaties on human rights and freedoms, and generally accepted rules of international law⁸². Furthermore, in compliance with Article 4 of the Aarhus Convention the new Law on Free Access to Information in Montenegro sets a specific procedure to acquire public information⁸³. The Law guarantees any natural or legal person the right to access information stored in any form by local and national authorities, state

⁷⁷ Kostić-Mandić, *Primjena Aarhuske Konvencije u Crnoj Gori-pristupi pravdi* (32).

⁷⁸ "The urge for harmonisation refers in particular the Law on Free Access to Information and its Article 9 paragraph 2 with the Article 4(4) "of the Aarhus Convention. Kostic-Mandić M., 'Harmonisation of the Montenegrin Environmental Legislation with the European Union Law' (2011) 10(3) *Natura Montenegrina* 328.

⁷⁹The 2012 amendment introduced a new supervisory body, called Agency for the Protection of Personal Data and Free Access to Information that works on the appeal process of freedom of information requests.

⁸⁰ When the thesis was written, possibilities to extend the public debate were requested to the Montenegrin authorities due to the outbreak of the Coronavirus emergency. The public debate should have ended on 4th of April. It is not clear how this event is going to affect the amendment process of the Law on Free Access to Information. See <https://www.transparency.org/news/pressrelease/montenegro_public_debate_on_access_to_information_law_must_be_delayed >.

⁸¹ Art.1 of the Law on Free Access to Information, Official Gazette of Montenegro n.68/05,44/12, 30/17.

⁸² Art.2 of the Law on Free Access to Information.

⁸³Ministry of Sustainable Development and Tourism of Montenegro, 'Aarhus Covention Implementation Report' (UNECE,2017) www.unece.org/env/pp/reports_trc_implementation_2017.html >.

enterprises, and any other body that exercises public powers⁸⁴. Requests must be in writing, including via email⁸⁵ and the applicant has the right to choose the form of access to the requested information⁸⁶. According to Article 21 the applicant can require direct inspection of the original or a copy of the information in the premises of the authorities, the delivery by the authorities of a copy of the information directly by mail or electronically, and either transcribe or scan the information in the premises of the authorities⁸⁷. The public entities addressed by the information request shall decide on the issuing of the information within 15 working days⁸⁸.

The Law on Free Access to Information also sets out the grounds for restricting access to information. According to Article 14 access to information is restricted in order to protect certain types of interests⁸⁹. For instance, reasons to reject an information request may be based on the protection of trade secrets and competition, as well as the security, defense, foreign, monetary and economic policy of Montenegro⁹⁰. In cases of restriction to public access to information the Law on Free Access to Information maintains the public interest test, as already present in the provisions of the 2005 version of the Law. The obligation to assess the public interest involved derives from Article 4, paragraph 4 of the Convention⁹¹. The latter was transposed in the Montenegrin law by establishing that access to information will be limited if disclosure of the information would significantly jeopardize the abovementioned state interests. Similarly, information is limited if the information disclosure could cause adverse effects on state interests that are of greater importance⁹². Yet, there are exceptions to this rule in case of prevailing public interest, that is to say when the requested information is about a threat to the environment⁹³.

The Law also sets out that the application for access to information will be rejected if it is incomplete or illegible. This may happen when additional information requested by the authority is not produced by the applicant within the

⁸⁴ Asanishvili M, 'Freedom of information in Montenegro - Analysis of the legal framework, practice and implementation of ECHR case law and other international standards with recommendations for improvement' (MANS, 2017) <<http://www.mans.co.me/en/wp-content/uploads/fai/FreedomOfInformation-Internship.pdf>>.

⁸⁵ Art.18 of the Law on Free Access to Information.

⁸⁶ Art.21 of the Law on Free Access to Information.

⁸⁷ Ibid .

⁸⁸ Art.31 of the Law on Free Access to Information. If compared to the Law adopted in 2005 the time limit has been extended with the new amendments. According to the 2005 version the legal provision prescribed that public information should have been issued within 8 days (not working days).

⁸⁹ Art.14 of the Law on Free Access to Information.

⁹⁰ The grounds to restrict public access to information are provided also by Article 51 of the Constitution of Montenegro.

⁹¹ Art.4(4) of the Aarhus Convention provides that disclosure of information may be refused if the latter would have adverse effect on interests enlisted in the same article. At the end of the provisions, Art.4 (4) states "The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."

⁹² Art.16 of the Law on Free Access to Information.

⁹³ Art.17(1)7 of the Law on Free Access to Information.

deadline; or if the submitted information is incomplete⁹⁴. If the authority is not in possession of the requested information it shall, without delay, turn to the competent authority for that request, if it is known, and notify the applicant accordingly⁹⁵.

The analysis of the access to environmental information, as provided by the Law on Free Access to Information, should also take into account the obligations arising by the EU candidate status of Montenegro⁹⁶. As a candidate country to the EU, Montenegro is required to harmonize its legislation with the EU *acquis*⁹⁷. The 2017 amendments to the Law were approved to make the country compliant with the EU directive on reuse of public sector information⁹⁸. Since the new law provisions may fall also within the obligations stated in Article 5 of the Aarhus Convention, a brief summary of the legal changes is hereby given⁹⁹.

With the new law, the re-use of public information and the right to re-use such information is allowed¹⁰⁰. Further, an open-source portal is established as an e-government portal subsystem. In this platform authorities have to publish proactively information to which access is allowed according to the legislation on free access to information¹⁰¹.

Restrictions to access the aforementioned information are applicable¹⁰². Article 1 of the Law on Free Access to Information specifies that the right to access and reuse information shall not apply when information is confidential, in compliance with the regulations ruling classified information¹⁰³, as well as when information is confidential and held by international organisations and other countries or by authorities which acquired them by international organisations or foreign countries¹⁰⁴.

The Law also represents the primary basis to legally protect the right to information in the field of environmental protection¹⁰⁵. It provides for the possibility

⁹⁴ Ministry of Sustainable Development and Tourism of Montenegro (83).

⁹⁵ Art.20(4) of the Law on Free Access to Information.

⁹⁶ Pavlović D., Large T., (ed) 'Right to Know: A Beginner's Guide to State Secrecy' (Erste Foundation, 16 October 2019) < <http://www.erstestiftung.org/en/right-to-know/> >.

⁹⁷ The EU adoption of the Aarhus Convention will be further discussed in this chapter.

⁹⁸ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and re-use of public sector information OJ L 172/56 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1024_ >. The Directive was transposed within Chapter 10 (Information Society and Social Media) of the EU Access Negotiations.

⁹⁹ In particular, Article 5(4) provides that "Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks".

¹⁰⁰ Zdragovic M., Crnogorac M., 'Montenegro: Important Amendments to the Law on Free Access to Information' (Schonherr Attorney at Law, 18 August 2017) < <https://www.schoenherr.eu/publications/publication-detail/montenegro-important-amendments-to-the-law-on-free-access-to-information/> >.

¹⁰¹ Ibid.

¹⁰² Art.1(2) of the Law on Free Access to Information.

¹⁰³ For instance, the Law on Classified Information (Official Gazette of Montenegro, no.14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15).

¹⁰⁴ Art. 1 provides also for a third restricting case, namely to the "parties in judicial, administrative and other legally prescribed procedures, to whom access to information from those procedures is ruled by this Law".

¹⁰⁵ Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32)12.

to appeal against an administrative decision refusing access to information, to begin an administrative dispute and to claim misdemeanour responsibility to prevent the exercise of the right to information¹⁰⁶.

The implementation of the Aarhus Convention is also achieved through the Law on State Administration, which grants the right to public access to information¹⁰⁷. According to this legal provision, the work of State administration organs is public¹⁰⁸. Consequently, the administrative bodies are obliged to inform the public about their work through public information, as well as in other appropriate ways¹⁰⁹. It also obliges the State administrative entities to provide public insight into their work¹¹⁰. In addition, Article 53 guarantees the right of both a domestic and foreign natural and legal person to free access to information owned by the public administrative body¹¹¹, as provided in Article 4 of the Aarhus Convention. Other general legal sources to claim the right to access to information exist in the Montenegrin system¹¹². However, they are not analysed in this chapter, given its specific purpose and the dissertation focus on the right to access to environmental information¹¹³.

While the main and most used legal provisions about the right to access to information, as conceived in the Aarhus Convention, are to be found in the Law on Free Access to Information, the right is protected also by environmental laws¹¹⁴. Prior to the formal ratification of the Convention, Montenegro started to change its legal and policy framework in the area of environmental and sustainable development¹¹⁵. In 2008 the Law on the Environment established the Environmental Protection Agency (EPA)¹¹⁶. This contributed to the separation of law and policy making from implementation. Nowadays the former tasks are attributed to the Ministry of Sustainable Development and Tourism, while the EPA is in charge of the implementing function¹¹⁷. The Law on the Environment provides for everyone the right to be informed about the state of the environment and to participate in the decision-making processes whose implementation could

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Art. 6 of the Law on State Administration (Official Gazette of Montenegro n.22/08, 42/11, 78/18)

¹⁰⁹ Art.6 of the Law on State Administration.

¹¹⁰ Ibid.

¹¹¹ Art.53 of the Law on State Administration.

¹¹² Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32).

¹¹³ Brief reference of the Law on Classified Information is given in the next paragraph, related to the ministerial decision on restrictions to access to information. Other legal sources which provide the right to access to information are, for example, the Law on Local Self-Government (OG, 88709, 3/10, 38/12, 10/14, 57/14, 3/16, 2/2018, 34/2019), Law on Media (OG, n. 53/2011, 6/2013, 55/2016, 92/2017), Law on General Administrative Procedure (OG, n.32/11, 56/14, 20/15, 40/16, 37/17).

¹¹⁴ Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32).

¹¹⁵ UNECE, 'Third Environmental Performance Review of Montenegro' (United Nations, 2015) Environmental Performance Review series no.41 <<http://www.unece.org/environmental-policy/environmental-performance-reviews/enveppublications/environmental-performance-reviews/2015/3rd-environmental-performance-review-of-montenegro.html>>.

¹¹⁶ Ibid 11. Since 2017 the Agency changed its name to Natural and Environmental Protection Agency.

¹¹⁷ UNECE, 'Third Environmental Performance Review of Montenegro' (115) xx.

affect the environment.¹¹⁸ The Law on the Environment is considered as fundamental in managing and protecting the environment through principles and institutional frameworks compliant with the country's international obligations¹¹⁹. It describes the roles of state and local self-government bodies "in planning, implementation, monitoring and reporting, and also defines the sources of financing for environmental protection"¹²⁰. As regards the implementation of the "first pillar", Chapter XI of the Law is dedicated to the right to information of the public¹²¹. According to Article 66, the access to environmental information is provided in accordance with the Law on the Environment and the law regulating free access to information. Article 67 provides the definition of what shall be considered as environmental information, such as measures contained in strategic documents, regulations, plans, activities that may directly or indirectly influence certain areas of the environment¹²². Furthermore, the information shall be available on electronic databases and website of the EPA, which is obliged to inform the public without delay in cases of immediate danger for human health and/or the environment, regardless of whether human activity or natural phenomena caused the danger¹²³.

As pointed out in the general law provisions on access to information, grounds for refusals are provided by the Law on the Environment as well. Namely, the request from a natural or legal person may be rejected in cases established by the law regulating free access to information and if the request relates to information, documents or other data in the phase of drafting¹²⁴. Nevertheless, the request to access environmental information cannot be refused if it is related

¹¹⁸ Kostić-Mandić, 'Primjena Arhuske Konvencije u Crnoj Gori-pristupi pravdi' (32).

¹¹⁹ UNECE, 'Third Environmental Performance Review of Montenegro (115) 11.

¹²⁰ Ibid.

¹²¹ Art.7 of the Law on the Environment (Official Gazette of Montenegro no.54/16) defines the public as "one or more physical or legal entities, their associations, organisations, or groups" and the public concerned as "the public which the decision-making process in the issues pertaining to the environment affects or is expected to affect, including NGOs dealing with environmental protection".

¹²² Art.67 states that "Environment information includes:

- the state of certain areas of the environment, such as: Air, water, sea, land, nature, biological and predion diversity (...)
- Environmental impact factors: substances, energy, noise, radiation, radiation including radioactive waste, waste, emissions and other emissions in the environment, which or may affect environmental areas;
- Measures contained in strategic documents, regulations, plans, programs, environmental agreements, activities that may directly or indirectly influence the certain areas of the environment, as are measures or activities established for their protection;
- Reports on the implementation of international agreements relating to the protection of environmental;
- Cost analysis and other financial analyses that are applied as part of the measure and activities with the aim of protecting and improving the state of the environment;
- Information relating to the conditions of the quality of life of people, their health and cultural heritage and built objects in the extent to which they are affected, or may affect the state of individual segments of environment (...). A legal entity that performs activities in the field of environment may store information on Environment on behalf of the State administration bodies, the bodies of the administration or the local government bodies".

¹²³ Art.68 of the Law on the Environment.

¹²⁴ Art.70 (1) of the Law on the Environment.

to polluting emissions in the environment¹²⁵. As provided by the Law on Free Access to Information itself, as well as the Law on the Environment, state authorities refusals may be challenged before the competent authorities¹²⁶.

Once again, the EU's role in the amendment of existing Montenegrin legislation cannot be ignored. Notably, the implementation of the Aarhus Convention in the Montenegrin legal framework has been speeded up by the EU accession path in which the Balkan country is involved. In the area of environmental and human rights protection, Montenegro is required to be fully harmonised with the EU *acquis* and jurisprudence, considering the country's negotiation phase to join the EU¹²⁷. The Decision 2005/370/EC on the conclusion of the Aarhus Convention by the European Community was adopted on 17 February 2005, making the European Union, at the time the European Community, a Party to the Convention since May 2005¹²⁸. Consequently, according to the case-law of the Court of Justice of the European Union (CJEU), the provisions of that Convention are now part of the EU legal order¹²⁹.

The Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information was enacted in 2003, implementing the "first pillar" of the Convention¹³⁰. Montenegro holds the provisions of the directive implemented within the Law on the Environment¹³¹, but further legislative provisions may be linked to this directive. These are summarized below and may be a relevant legal basis to access to environmental information also within the Bar-Boljare Highway context.

The Law on Nature Protection stipulates that administrative bodies are obliged, at the request of interested legal and natural persons, to submit data on the state and nature protection, except for confidential information¹³².

Furthermore, the Law on Environmental Impact Assessment contains a special chapter dedicated to information, record keeping and disclosure (Chapter III). The law provides for a deadline by which the competent authority is obliged to make available to interested organizations and the public, complete documentation on the conducted impact assessment procedure, upon written

¹²⁵ Art.70(2) of the Law on the Environment.

¹²⁶ Art.70(3) of the Law on the Environment.

¹²⁷ Müllerová, H. et al. (37) 163.

¹²⁸ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (2005) OJ L 124/1.

¹²⁹ Milieu Consulting Sprl, 'Study on the EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Final report September 2019' (2019) Study made on behalf of the DG Environment of the European Commission <https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf >.

¹³⁰ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41/26.

¹³¹ Raicevic M., 'Aarhus Convention and Montenegrin Laws (Department for Environment Ministry of Sustainable Development and Tourism, 2013) < <https://www.eu.me/en/> >.

¹³² Art.102 of the Law on Natural Protection, Official Gazette of Montenegro n.54/16.

request¹³³. The law also contains a provision on the handling of requests for access to information, which envisages that data relating to emissions, accidents, monitoring results and inspection cannot be declared as classified¹³⁴. The law also provides for misdemeanours for violations of the obligation to notify transboundary impact, keeping of prescribed records, and making available documentation on the impact assessment process conducted¹³⁵.

The Law on Integrated Prevention and Control of Environmental Pollution, in the part dealing with the responsibilities of the competent authority, provides public access to the contents of permit applications, permits issued, the monitoring results and the operator's recording of monitoring results¹³⁶. Regarding access to information, the Law clarifies that restrictions on access to information do not apply to information on emissions, accidents, monitoring and inspection results¹³⁷.

In conclusion, whereas the "first pillar" of the Aarhus Convention is already present in the 2007 Constitution of Montenegro, the EU accession perspective has boosted the transposition of the international Convention principles. However, even though the right to access to environmental information may have been implemented satisfactorily in the Montenegrin legal system, further alignment with the EU *acquis* seems to be needed¹³⁸. It is clear that in the field of environmental legislation steps have been taken to grant the "first pillar", albeit the main point of reference remains the Law on Free Access to Information. The latter addresses the general right to information, rather than the environmental one and, together with the Law on Classified Information, it is a strong legal instrument containing restrictions on disclosure of information also in the environmental field¹³⁹. On the whole, the Law on Free Access to Information seems to remain one of the main legal basis to challenge refusals of disclosure of environmental information, although legal remedies are offered by the environmental legislation as well. Indeed, prior to the adoption of the Law on Free Access to Information, the Montenegrin case law on environmental protection was infrequent¹⁴⁰.

¹³³ Art.31 of the Law on Environmental Impact Assessment, Official Gazette of Montenegro, n. 75/18. The deadline is namely 15 days from the receipt of the request by the competent authority.

¹³⁴ Art.31 of the Law on Environmental Impact Assessment.

¹³⁵ Art.36 of the Law on Environmental Impact Assessment.

¹³⁶ Art.5 of the Law on Integrated Prevention and Control of Environmental Pollution, Official Gazette of Montenegro, n. 54/09, 40/11, 42/15, 54/16.

¹³⁷ Art. 22 of the Law on Integrated Prevention and Control of Environmental Pollution.

¹³⁸ Commission Staff Working Document Montenegro 2019 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy (2019) COM/2019/260 final.

¹³⁹ The Law on Classified Information (Official Gazette of Montenegro, no.14/08, 76/09, 41/10, 40/11, 38/12, 44/12, 14/13, 18/14 and 48/15) will be discussed in paragraph 2.3.

¹⁴⁰ Müllerová, H. et al.(37)159. For instance, afterwards the Administrative Court of Montenegro started issuing several decisions concerning the right of access to information in environmental matters.

1.2.3 The Ministerial Measures Adopted for the Construction of the Bar-Boljare Highway with an Impact on the Access to Environmental Information

So far, it has been shown that a variety of legislative measures applies and may be relevant to the Bar-Boljare Highway. Such diversity might reflect the fact that the highway construction brings together many interests both at national and international level. We have seen that the project is related to the achievement of transport development related objectives both at the EU and Montenegrin level. Yet, this dimension overlaps with Beijing's interests and legal duties arising from the contractual relationship between the Balkan country and the Chinese investors and contractors. Later it has been argued that although the economic and infrastructural related laws may play a relevant role in the legal framework of the Project, the Aarhus Convention shall be considered within this framework as well. Indeed, given the findings of the Environmental Impact Assessment and the fact that a UNESCO Heritage property is placed in the premises of the highway, the environmental interest at stake in this project must not be ignored. Moreover, as explained in the previous section, in the last decades the right to access to environmental information has been implemented significantly within the Montenegrin legislation, to the point of acquiring constitutional value. However, the previous sections also showed that exceptions can be applied to this right in accordance with Article 4 of the Convention. Now, in addition to the regulations considered above, it is important to deal with other measures Montenegro has taken within the motorway context. Even though these measures have mainly shown economic objectives, they might also influence the right to access to environmental information and be related to environmental matters as well. As said before, all dimensions must be taken into account in the Bar-Boljare highway project, as different types of legislative provisions intersect. This section focuses on two ministerial decisions that declared as confidential relevant information about the Bar-Boljare Highway.

In 2016 and 2017, with two decisions the Ministry of Transport and Maritime Affairs of Montenegro declared all the relevant information about the Project as confidential, so that even the exact route of the motorway is not publicly available¹⁴¹.

Even though differences in the reasonings may be found in the 2016 and 2017 legal texts, both have as their legal basis the Law on Classified Information, which allows a state authority to classify data. Furthermore, in both legal instruments all relevant documents have been classified as "*interno*". According to the Law on Classified Information information is considered as "*interno*" in case its disclosure would be averse to the exercise of a state authority power. In Article 19 of the same Law the status of "*interno*" has an expiration period of two years from the entering into force of the legal provision declaring the secrecy of the document information. This term however can be changed or deleted in compliance with Article 19.

For what concerns the types of acts declared as confidential the decisions included data on finances, implementation reports of the highway construction,

¹⁴¹ MANS Investigative Center, 'Highway Project Under the Veil of Secret. Case Study' (MANS, 2018) < www.mans.co.me/en/wp-content/uploads/2019/02/StudijaSPIautoputENG.pdf >.

disputes, administrative acts and technical documentation. More precisely, in August 2016 the first decision was adopted and provides for the confidentiality of approvals, consents, opinions, resolutions, certificates, instructions, notices, announcements, requests, proposals of the Contractor (CRBC)¹⁴². The same confidential status is applicable to the aforementioned list of documents issued by the Engineer¹⁴³, the Project Manager¹⁴⁴ and the Employer¹⁴⁵. Furthermore, the status of confidentiality was extended to the notice of claims by the Montenegrin government, CRBC's reports on the progress of the work, as well as plans for control and examinations of work¹⁴⁶.

The criteria for the classification of data is given in the last paragraph of the decision. Namely, the Ministry claimed that the secrecy of the above list of documents is necessary, since its publication "could jeopardise the contractual position of the authorities and the legal procedures related to the implementation of the Contract on the Design and Construction of the Bar-Boljare highway"¹⁴⁷. No other reason is provided in the document.

In 2017 with a second decision the Ministry of Transport and Maritime Affairs amended the previous legal deed¹⁴⁸. With the new legal instrument, the formerly classified list of documents remained in force, but the choice for the data secrecy was further explained and justified. The Ministry renewed the existing concerns by which the disclosure may jeopardise the contractual position of the Country. It also added that Montenegro urged the need for confidentiality due to trade secrets, intellectual property rights, protection of competition, as well as due to the interest of performing official duties¹⁴⁹. Moreover, the decision stated that the disclosure of the above list of documents may influence the implementation of the Employer's plans regarding the project, more specifically of both the section under construction and the future stages. The decision also underlines CRBC is under a duty to confidentiality as a contractual obligation. As a matter of fact, according to section 1.12 of the Contract on the Design and Construction of the Bar-Boljare Highway, the Chinese company is obliged to keep the information of the Contract confidential and must not publish or reveal it, for example to the

¹⁴² Decision of the Ministry of Foreign Affairs and Maritime Affairs of Montenegro, N. 34-451 / 2016-1 of 1 August 2016, paragraph 1.

¹⁴³ The Engineer/Supervisory Authority of the Project is the French-Italian Consortium Ingerop Conseil-Ingegnerie Geodata.

¹⁴⁴ The Project Manager is Monteput LLC, the state-owned company in charge of managing the highway and accessory roads to the buildings site.

¹⁴⁵ The Employer is the Montenegrin government.

¹⁴⁶ The above list provides the confidential documents which may be relevant to access to environmental information, it does not enlist all the documents of which the Ministry decided the confidentiality. Other relevant documents might be: data on the construction site, decisions of the Dispute Resolution Commission, information on the claims of the Contractor, criteria for measurement and assessment of subsequent and unforeseen works and minutes of meetings.

¹⁴⁷ This is an unofficial translation from Montenegrin to English.

¹⁴⁸ Decision of the Ministry of Transport and Maritime Affairs of Montenegro, n. 34/17-01-2229/1 of 7 April 2017.

¹⁴⁹ The decision specified that the interests in performing the official duties are in connection with the "consultations within and between the authorities related to the definition of opinions, the creation of official documents and the proposals of issues solutions, as well as in relation to the work and decision-making of collegial bodies" (unofficial translation).

media, without prior written consent of the Montenegrin government¹⁵⁰. In addition, according to the Ministry's interpretation the obligations derived from section 1.8 of the Contract restrict the number of entities that have the right to access to the documentation on the construction site¹⁵¹. Therefore, it seems that the government considered the necessity to put limitations on access to information by the public as inevitable.

In its conclusions, by considering all the aforementioned circumstances, the Ministry justified the secrecy of data by claiming that the disclosure of any document enlisted in the text of the 2017 Decision would cause adverse consequences "for an interest which is of greater importance than the public opinion's interest to access the information [enlisted in the Decision]"¹⁵². Consequently, for what concerns the access to environmental information, it is up to governmental discretion to notify the citizens any violation of environmental protections obligations of the Chinese Contractor CRBC and its subsidiaries¹⁵³. Thus, the opportunity to active participation and involvement of the citizens in the preservation of the public good may be limited. Furthermore, pursuant to Article 9 of the Law on the Bar-Boljare the review of the documents related to the motorway project shall be done by the State Design Review Panel. With a governmental decision appointing the Panel in 2015, the activity of such committee was declared as trade secret and all its members have an obligation of professional confidentiality¹⁵⁴. The same conditions apply to the State Technical Audit Board, which oversees the construction works of the motorway section Smokovac-Mateševo¹⁵⁵.

To conclude, the extent of the secrecy of the documentation related to the highway could have diverse implications. While it may contribute to protect the national interests linked to the Highway plan, it could heavily impact the transparency standard of the Project and, as a result, the right to access to environmental information as provided by the first pillar of the Aarhus Convention.

¹⁵⁰ Section 1.12 states "the Contractor shall treat the details of the Contract as private and confidential and shall not publish or disclose the same or any particulars thereof in any trade or technical paper or in communication with representatives of any media or elsewhere without the previous consent in writing of the Employer".

¹⁵¹ Section 1.8 provides that "all the documents relating to the Works or variations thereof, either in the original or a copy shall be available for inspections by competent authorities and personnel legally authorised by the Employer to carry out inspections and supervision" .

¹⁵² Unofficial translation from Montenegrin to English.

¹⁵³ Section 4.18 of the Design and Build Contract for Bar-Boljare Highway Section: Smokovac – Uvac – Mateševo provides that the CRBC shall take all reasonable measures to avoid damages to the environment during the highway construction and to take away the residual waste from the construction site and landfills.

¹⁵⁴ Art.7 of the Decision n. 08-43/2 of 18 March 2015 on the Appointment of the State Review Panel for technical documentation available at < <https://barboljare.me/en/by-laws/> >.

¹⁵⁵ Art.7 of the Decision n. 08-1043 of 14 May 2015 on the Appointment of the State Technical Audit Board For The Construction Works On The Bar-Boljare Highway, Priority Section Smokovac-Uvac-Mateševo, available at < <https://barboljare.me/en/by-laws/> >.

CHAPTER 2

Chapter 1 focused on the legal framework relevant to the application of the right to access to environmental information in the context of the Bar-Boljare highway project (the Project). Chapter 2 is about the challenges faced when effectively exercising such right, with the possibility to bring a case before the Aarhus Convention Compliance Committee.

2.1 Irregularities Registered in the Highway Building Site and Their Impact on the Environment

According to the Constitution of Montenegro every citizen is entitled to live in a sound environment and has the duty to protect the national ecosystem¹⁵⁶. As believed by various civil society actors in Montenegro, despite the strategic importance of the Project, its collocation next to the Durmitor National Park and the Tara Biosphere Reserve, both holding UNESCO status, raises the risk of harmful impact on the surrounding ecosystem¹⁵⁷. In particular, questions have been raised about the protection of the canyon and the floodplain of the Tara river, as such unique characteristics of the watercourse seem to be crucial to the preservation of protected species¹⁵⁸. In spite of the stringent regulation to safeguard the river, as well as the public involvement to secure the national environment from irreparable harm derived from human activities, the impact on the Tara threatens to be more severe than expected, according to some Montenegrin environmental NGOs¹⁵⁹. Such threat is due to the construction of two bridges included in the Bar-Boljare motorway project¹⁶⁰. Indeed, during the works on the bridges "Tara 1" and "Tara 2", the Tara riverbed was heavily altered¹⁶¹. If compared to the conditions of the riverbed before the highway constructions, satellite images showed that the riverbed was channelled and narrowed for about eight kilometres¹⁶². The action plan on the regulation of the Tara river, developed by the constructor CRBC, explains that the regulation of the river is necessary in order to reduce the torrential flow pressure on the

¹⁵⁶ Art.23 of the Constitution of Montenegro.

¹⁵⁷ Radulović Z, 'Montenegro: la devastazione del Tara' (Osservatorio Balcani Caucaso Transeuropa, January 3, 2019) < <https://www.balcanicaucaso.org/aree/Montenegro/Montenegro-la-devastazione-del-Tara-191610> >.

¹⁵⁸ World Heritage Centre, IUCN, 'Report of the joint World Heritage Centre/IUCN Advisory Mission to the World heritage property "Durmitor National Park" (Montenegro), 12-16 November 2018' (World Heritage Centre, 2018) < <https://whc.unesco.org/en/documents/174707> >.

¹⁵⁹ Radulović Z, 'Monténégro: une autoroute qui détruit le lit sauvage de la Tara' (Le Courrier des Balkans, 8 February 2019) < <https://www.courrierdesbalkans.fr/Montenegro-une-autoroute-qui-detruit-le-lit-sauvage-de-la-Tara> >.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² The aerial footage video is available at < <https://www.youtube.com/watch?v=MfAwRSCjaQI> >.

columns of the bridges "Tara 1 and 2"¹⁶³. However, since the documents that determine the construction of the bridges as well as the highway sections routes are classified, it is difficult to assess the respect of the building plans and the limitations on the exploitation of the Tara river.

In 2018 drone footage by a Montenegrin NGO¹⁶⁴ revealed that the Chinese constructor CRBC had disposed huge quantities of construction waste from the drilling of tunnels and excavation in the riverbed¹⁶⁵. CRBC justified the disposal on the riverbank as a measure to protect the local inhabitants and their properties from the riverbed overflowing¹⁶⁶. Nevertheless, economic grounds may have influenced such choice as well. In practice, CRBC would have had to bear higher costs if it had opened two landfills further from the building site¹⁶⁷. Interestingly, provision 4.18 of the Design and Build Contract between the Ministry of Transport and Maritime Affairs of Montenegro and China Road and Bridge Corporation states that "the Contractor [CRBC] shall continuously keep the [building] site clean from construction and produced residual waste"¹⁶⁸. According to the same provision, if CRBC shows to be in breach of the contractual obligation, it should be liable for damages. In principle, the 2015 Environmental Impact Assessment (EIA)¹⁶⁹ prohibited the disposal of construction waste near the Tara river and its banks¹⁷⁰. However, after one year the Plan for the Regulation of the Tara River was approved, providing for the possibility to dispose excavation material on the riverbanks¹⁷¹. This new approval seems to be in contrast both with the EIA and with the provision 4.18 of the Contract, which explicitly banned such activities.

Some residents have also denounced that public authorities have temporally disposed waste material in their private lands¹⁷². As the soil was previously used for agricultural purposes, the local farmers fear that when their land will be returned by the public authorities, it will not be suitable for farming anymore.

In 2018 another wastewater issue was discovered in the motorway building site, more specifically due to the excavations of the highway tunnels in the

¹⁶³ Čalović Marković V., Milovac D., Mrdović I., 'Second Report on the construction of Bar - Boljare Highway' (MANS, 2019).

¹⁶⁴ The Network for the Affirmation of the NGO Sector (hereinafter MANS). MANS is a Montenegrin NGO that fights against corruption and organized crime in Montenegro. It is also monitors the implementation of legislation and government policy.

¹⁶⁵ Grdinić L, Milovac D, Da li će Tara preživjeti auto-put? (2019) MANS < <http://www.mans.co.me/da-li-ce-tara-prezivjeti-auto-put/> >.

¹⁶⁶ China Road and Bridge Corporation, Construction Waste Management Plan No. ET/008-02/2015/V7 of 8th July 2015 as cited in Grdinić and Milovac (166).

¹⁶⁷ By contract CRBC must bear the costs for waste disposal.

¹⁶⁸ Art. 4.18 of the Design and Build Contract for Bar-Boljare highway Section, Smokovac-Uvac-Mateševo, Official Gazette of Montenegro, n.54/2014.

¹⁶⁹ As previously mentioned in Chapter 1, the EIA has been drafted by "Interproject" Ltd and approved by the Environmental Protection Agency in 2015, in accordance with the Law on the Environmental Impact Assessment (Official Gazette of Montenegro, No. 80/05, 40/10, 73/10, 40/11 and 27/13).

¹⁷⁰ Environmental Impact Assessment (30) 356.

¹⁷¹ Čalović Marković, Milovac and Mrdović (163).

¹⁷² Center for Investigative Journal Montenegro, 'Silk Road or Silken rope' (Vijesti, 2019), online documentary available at < www.cin-cg.me/en/silk-road-or-silken-robe/ >.

premises of the Jabuka stream¹⁷³, which is a tributary branch of the Tara river. Local NGOs' investigations documented the CRBC's discharge of drilling wastewater directly into the tunnels, which converged first into the Jabuka stream and then into the Tara river, without water treatment. Interestingly, the EIA establishes that quarterly reports on the water quality shall be performed during the construction works by CRBC, which is obliged to submit the measurements results to the French-Italian Consortium Ingerop-Geodata, the Montenegrin government, and to the relevant inspection department of Montenegro, at their request¹⁷⁴. Upon access to information requests submitted by local NGOs, it was discovered that reports on the water samples from the area nearby the highway construction site, performed by the Institute of Public Health and the Institute for Hydrometeorology and Seismology, identified defective samples in various occasions during 2017 and 2018¹⁷⁵. The samples showed that the water characteristics did not comply with the terms of quality and sanitary-technical conditions for the discharge of wastewater in public sewage set by the applicable national law¹⁷⁶. Local NGOs claimed the public authorities to be silent on this fact, although the EIA established that the water quality reports, and in general all the information on the environmental state owned by public authorities, shall be public¹⁷⁷. In this perspective, the government and the competent public institutions shall communicate environmental information via their website at least once a year¹⁷⁸.

In 2019 the NGO MANS, together with other environmental NGOs, claimed that another illegal landfill was opened by CRBC near Drcka river. Notably, the Drcka stream is one of the Tara river tributaries, hence the pollution of Drcka may damage Tara and affect the protected flora and fauna of the Tara Biosphere Reserve, which is part of the UNESCO program "Man and Biosphere"¹⁷⁹.

In such context, allowing access to environmental information is the real urgent need, rather than limiting it to the public. Through public disclosure appropriate measures to protect the UNESCO World heritage sites could be shared with the government and effective public debate could be start on the matter. Environmental experts argue that much of the Tara river biological quality is permanently lost due to the undergoing infrastructural work¹⁸⁰. This might mean

¹⁷³ Grdinić L, Milovac D. (165).

¹⁷⁴ Interproject Ltd, 'Environmental Impact Assessment Study for the highway Bar-Boljare', section Smokovac- Mateševo, (2015) 393-394.

¹⁷⁵ Grdinić L, Milovac D. (165).

¹⁷⁶ The analysis performed on the water samples highlights the presence of particles incompatible with the "Regulations on quality and sanitary and technical conditions for dispensing wastewater in bodies of public sewage, banks and built-in laboratory quality of waste water, minimum number of laboratory and content of reports on determined quality of waste water" (Official Gazette of Montenegro n.45/08, 9/10, 26/12 and 59/13).

¹⁷⁷ Environmental Impact Assessment (30) 393.

¹⁷⁸ Environmental Impact Assessment (30) 402-403.

¹⁷⁹ A description of the UNESCO Man and Biosphere Program in Montenegro can be found at the following link <<http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/montenegro/tara-river-basin/>>.

¹⁸⁰ Miloš Rudović, 'Evropski stručnjak Roel Slutveg o zaštiti suze evrope: Tara ne smije da čeka ni dan, kamoli osam godina' (Vijesti, 10 November 2019)

that the remediation expected to take place after the conclusion of the priority section of Smokovac-Uvac-Mateševo shall be anticipated. It might be necessary to change the EIA planned remediations, since they were based on the assumption that environmental and construction procedural rules would have been respected. Yet, the evidence gathered by the Montenegrin NGOs and the available technical documentation seem to prove the opposite.

2.2 The International Pressure on Montenegro to Comply with its Environmental Obligations

The fact that the Bar-Boljare highway building site is upstream from the Durmitor National Park, where the Tara river also runs, underlines the deep interconnection between the respect of environmental construction regulations and the protection of the status of the UNESCO site. The evidence of the devastation of the Tara river started to attract worldwide attention thanks to the activity of the Montenegrin civil society actors exposing the issue. As a consequence, the exploitation of the Tara river has been the subject of concerns not only in Montenegro but also at international level. For instance, in 2018 the European Parliament adopted a resolution on Montenegro, stressing the need for public availability of timely and accurate information on the impact of the highway construction on the river Tara¹⁸¹. The Parliament also called for the stopping of all activities of waste dumping and riverbed alteration¹⁸².

In 2019, while the European Commission strongly linked the river preservation to the continuation of the negotiations process of Montenegro to join the EU¹⁸³, the World Heritage Centre (WHC) published its findings on the 2018 mission to the Durmitor National Park. The latter is worth mentioning, because during the visit in Montenegro the WHC officers were able to visit the highway building site and assess the environmental conditions of the river Tara. On the one hand, the WHC criticises the solution adopted for the construction of the highway route due to its location at the heart of the floodplain area of the Tara River¹⁸⁴. On the other hand, the report confirms that in the area where the Tara has been regulated its floodplain feature has been destroyed. The WHC officers note that had the floodplain area not been built up, no river regulation works would have been needed and the impacts on the riverine ecology would have been

<<https://www.vijesti.me/vijesti/drustvo/408602/tara-ne-smije-da-ceka-ni-dan-kamoli-osam-godina>>.

¹⁸¹ European Parliament, Resolution of 29 November 2018 on the 2018 Commission Report on Montenegro (2018/2144(INI)).

¹⁸² Ibid.

¹⁸³ Commission, 'Montenegro 2019 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2019 Communication on EU Enlargement Policy' SWD(2019) 217 final.

¹⁸⁴ World Heritage Committee, 'Decision 43 COM 7B.19 adopted during the 43rd session of the World Heritage Committee' (Baku, 2019).

lower. In addition, the mission observes that the construction works are being implemented without safeguards for the riverine environment and it notices that waste and deposited materials are abandoned in the area also beyond the construction site. Considering the abovementioned findings, the WHC warns that the results of the environmental monitoring are not reported promptly with the instructions to the construction company and supervisors of the Project. It follows that the potential downstream impacts on the World Heritage site are currently unclear and might influence the preservation of the UNESCO status of the Durmitor National Park in the future.

What emerges from the remarks of both the EU institutions and the WHC is the insufficient information provided on the environmental impact of the motorway construction. In this perspective, the limitation imposed on the access to information regarding the highway project may be a major obstacle to ensure both the accountability for the irregularities and the exercise of the right to access environmental information by the civil society stakeholders. This notwithstanding, the ministerial decisions on classified status of the highway-related documents might be legitimate, but they should grant proportionality and, for instance, give the possibility to access the documents considered as environmental information. Pending all the above-mentioned factors, the ministerial reasonings justifying the need for information confidentiality might seem disproportionate. In fact, Art. 4 of the Aarhus Convention requires the application of the proportionality principle when restrictive measures related to the access to environmental information are issued. On the contrary, from the wording of the ministerial decisions, the imposition of the ban does not provide for specific conditions or circumstances in which it is possible to access environmental information.

2.3 Could a Case against Montenegro be Brought Before the Compliance Committee of the Aarhus Convention?

The availability of environmental information about the on-site inspections and the technical documentation about the Project is one of the major concerns related to the motorway impact on the ecosystem of Montenegro. Whilst the public authorities' may not have shown a proactive attitude to disclosure, the members of the society seem to struggle to get access to the highway documents because of their confidential status. These factors may express reservations about the State's compliance with the obligations set by the Aarhus Convention in Article 4 and 5. In such perspective, the Montenegrin authorities' application of Article 4, paragraphs 3, 4 and 6, might be subject to scrutiny before the Aarhus Convention Compliance Committee.

The Committee's review of a Party's compliance may be triggered in various ways. Among these, communications from the public concerning a Party's abidance by the Convention have been the most used option to bring compliance issues before the Committee¹⁸⁵. Such action might be a viable solution for Montenegrin members of the public to challenge the respect of the "first pillar" of the Aarhus Convention in the Bar-Boljare highway context. A

¹⁸⁵UNECE, 'Guide to the Aarhus Convention Compliance Committee' (2nd ed, UNECE, 2019) 25.

communication shall fulfil a set of formal criteria to be acceptable by the Committee¹⁸⁶. In addition, before applying to the Committee the members of the public should have tried to use the available legal remedy at national level, unless their application is “unreasonably prolonged or do[es] not provide effective and sufficient means of redress”¹⁸⁷.

2.3.1 The National Remedies Used by the NGOs to Counter the Limitations to the Right to Access to Environmental Information

In the Montenegrin legal system, according to the Law on Free Access to Information, any natural or legal person may challenge a decision refusing or restricting the exercise of the abovementioned right before the Agency for the Personal Data Protection and Free Access to Information (the Agency), which is an independent supervisory authority¹⁸⁸. If the party is not satisfied with the Agency’s decision, in case of either the Agency’s administrative silence, or confidentiality of the information requested, the members of the public can directly appeal before the Administrative Court of Montenegro¹⁸⁹.

After the irregularities in the motorway building site were discovered, in 2018 four requests to access to information were filed by the local NGO MANS to the Administration for Inspection Affairs (the Administration).¹⁹⁰ Two of them concerned data on environmental inspections and irregularities registered by the inspection controls on the building site of the first section of the Bar-Boljare Highway. Upon refusals by the administrative authority to disclose such information due to its confidential status, the NGO appealed before the Agency. The latter annulled the unfavourable acts and ordered the Administration to provide a new decision. Nonetheless, the information disclosure was rejected by the Administration of Inspection Affairs a second time, claiming a lack of public interest in disclosing the information due to trade secrets¹⁹¹. Notwithstanding the direct appeal of the NGO before the Administrative Court of Montenegro, the reluctance of the Administration to disclose information about the highway inspections endured¹⁹².

In addition, in 2016 and 2017 MANS appealed twice before the Administrative Court of Montenegro to challenge the refusal to publish reports

¹⁸⁶ In accordance with paragraph 20 of the annex to Decision I/7, the Committee will not consider any communication that it determines to be: a) anonymous, b) an abuse of the right to make such a communication; c) manifestly unreasonable, d) incompatible with the decision on review of compliance (decision I/7) or with the Convention, e) concerning a State which is not a Party to the Convention, f) concerning a Party which has opted out.

¹⁸⁷ UNECE, Aarhus Convention Compliance Committee Decision I/7 on Review of Compliance with the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/MP.PP/2/Add.8), para.21.

¹⁸⁸ Kostić-Mandić, ‘Access to Justice in Environmental Matters’ (76) 84.

¹⁸⁹ Ibid.

¹⁹⁰ MANS, ‘Inspekcija sakrila informacije o nadzoru radova na rijeci Tari. Studija Slučaja Autoput’ (2019) <www.mans.co.me/wp-content/uploads/2020/05/Postupanje-inspekcija-u-slucaju-Tare-studija-slucaja-autoput.pdf>.

¹⁹¹ Ibid.

¹⁹² MANS (190).

and documentation related to the regulation plans of the Tara river in the highway section Smokovac-Mateševo¹⁹³. Such rejections were made by Monteput LLC, the state-owned company in charge of the motorway project management. In both cases the company refused to provide information related to the environment due to the confidential status of the documents as well as the lack of a prevailing public interest in disclosing the requested data¹⁹⁴. The Administrative Court ruled in favour of the NGO and annulled the unfavourable decisions, as no explanation or acceptable argument was given by the company to justify the refusal¹⁹⁵. However, the same NGO claimed that the judgements were not fully and timely implemented by the company¹⁹⁶.

Moreover, MANS, together with other NGOs, submitted various initiatives to tackle the lack of information and accountability for the protection of the Tara river. First, the Administration for Inspection Affairs was requested to perform supervision inspections on the building site near the Tara river to assess the respect of national environmental regulations¹⁹⁷. Second, the Committee on Tourism, Ecology and Spatial Planning of the Parliament of Montenegro was asked to schedule a meeting with the NGOs and government representatives to discuss about the environmental irregularities registered in the highway building site¹⁹⁸. Nevertheless, according to the promoting NGOs such initiatives failed to achieve the desired outcome. For instance, disclosure of the Administration's inspections findings was later refused, because sharing such information was deemed by the administrative authority to jeopardise the planning of the future monitoring¹⁹⁹.

The Montenegrin NGOs addressed the issue through criminal law as well. In Montenegrin legislation, any natural or legal person has the right to initiate a criminal proceeding before either a state or private prosecutor²⁰⁰. Furthermore, according to the Criminal Code of the Country, withholding information on the state of the environment, necessary for the assessment of environmental hazards, is a criminal offence²⁰¹. In 2018 MANS, along with other five NGOs, filed

¹⁹³ Access Info Europe, MANS, 'Highway Project under the Veil of Secret' (2018), Case study available at < www.mans.co.me >. According to the Law on Free Access to Information any legal or natural person has the right to access to information owned by state enterprises (see note 82).

¹⁹⁴ Ibid. As mentioned in section 1.2.2.1, Art.16 of the Law on Free Access to Information provides the possibility to refuse disclosure of information if there is a chance that disclosure of the information would cause adverse effects on the interest that is of greater importance than the interests of the public to know this information. However, according to Article 17 (1) of the same Law such rule may not apply if the documents requested contains information about a possible threat to the environment.

¹⁹⁵ Administrative Court of Montenegro, ruling n.1658/16 and n.3675/17.

¹⁹⁶ A third time, in 2018, Monteput LLC refused to grant access to the requested information. The decision was challenged again by MANS before the Administrative Court and according to the documents available on the issue, the proceeding is going on. See note (193) 11.

¹⁹⁷ Grdinić L, Milovac D (165) 16.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Kostić-Mandić, 'Access to Justice in Environmental Matters' (76) 85.

²⁰¹ Art.317 of the Criminal Code, Official Gazette of Montenegro n.70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 and 49/2018.

a criminal complaint to the Supreme State Prosecutor Office of Montenegro²⁰². The complaint was against the officers of both the Ministry of Transport and Maritime Affairs and the Ministry of Sustainable Development and Tourism. The complaint also challenged the action of the inspectors of the Administration for Inspection Affairs of Montenegro for violations of their official duties. However, after Prosecutor's investigations no misdemeanour was identified and in April 2020 the complaint was dismissed²⁰³.

2.3.2 Other Remedies Yet to Be Explored by the NGOs

In the Montenegrin legal system, the NGOs may still enforce other legal remedies related to protection of the right to access to environmental information. First, the Law on Free Access to Information provides for misdemeanour responsibility of legal entities that prevent the exercise of the right to access to information, for which a payment of a fine is envisaged²⁰⁴. Second, resorting to the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) could be another viable solution. The Ombudsman has the authority to determine whether in the process of obtaining the information, there has been a violation of the right to access to information of a particular person²⁰⁵. It may also intervene in cases of non-enforcement of court decisions by public authorities²⁰⁶. Furthermore, such body has direct access to all the official documents, regardless of their confidential status. The Ombudsman has also the right to evaluate the lawfulness of the restrictions imposed on the disclosure of certain information by public authorities. Yet, from the analysis of the available documentation related to the Project, it seems that these remedies have not been enforced yet²⁰⁷. Third, as a last resort, filing a complaint before the Constitutional Court might be possible for the Montenegrin civil society stakeholders²⁰⁸. Such proceeding may be initiated only upon the exhaustion of all the available domestic remedies and may challenge the violation of Article 23 of the Montenegrin Constitution²⁰⁹. No

²⁰² Grdinić L, Milovac D (165) 17.

²⁰³ MANS, 'Studija slučaja – postupanje crnogorskog tužilaštva u slučaju devastacije rijeke Tare' (MANS, 2020) < <http://www.mans.co.me/studija-slucaja-postupanje-crnogorskog-tuzilastva-u-slucaju-devastacije-rijeke-tare/> > accessed 18 June 2020.

²⁰⁴ Art.47 of the Law on Free Access to Information.

²⁰⁵ Kostić-Mandić M, 'Ostvarivanje ljudskog prava na pristup informacijama o životnoj sredini' (2019) Crnogorska akademija nauka i umjetnosti, 9-10.

²⁰⁶ Ibid.

²⁰⁷ During the thesis drafting it emerged that administrative appeals before the Administrative Court and the Agency of the Personal Data Protection and Free Access to Information are the preferred remedies of the society stakeholders when unfavourable decisions on the right to access to environmental information are implemented. Plus, the reports of the Ombudsman available on its website seems to confirm that the authority was not involved in cases concerning the right to access to environmental information about the Bar-Boljare Highway.

²⁰⁸ Kostić-Mandić, 'Ostvarivanje ljudskog prava na pristup informacijama o životnoj sredini' (206)10.

²⁰⁹ Article 23 provides the citizens' right to a healthy environment and to timely and complete notification of its condition.

constitutional complaint, though, has been hitherto filed due to violations of the right to access to environmental information²¹⁰.

2.3.3 Evaluation

In the legal system of Montenegro domestic remedies are still available to the members of the public. This fact may lead to the conclusion that it might be too soon to bring a case before the Compliance Committee.

At the same time, it should be noted that the exhaustion of domestic remedies is not a strict requirement to bring a case before the Compliance Committee. Given its non-judicial nature, when assessing the preliminary admissibility of the communications a soft approach should be adopted²¹¹. The Committee may therefore evaluate that the remaining legal remedies are not sufficient means of redress or their application might be too prolonged. Moreover, in Montenegro most of the proceedings against violations to the right to access to environmental information are initiated by NGOs, which often exercise non-judicial remedies, rather than judicial ones, to avoid representation and other litigation costs²¹². Indeed, with the exemption of the humanitarian organisations, NGOs are not exempted from the payment of the court fees²¹³. Therefore, the Committee might consider the efforts made so far by the Montenegrin NGOs to enforce the “first pillar” of the Convention as sufficient to accept a communication.

Be that as it may, assuming that in the future a case is brought before the Compliance Committee, it seems that the NGOs could have some chances to win the case. In fact, the government decisions to classify the Project technical documentation seem to put constraints on the exercise of the active and passive rights of access. While being true that Article 4 provides for derogations to the right to access environmental information to protect national interests, this possibility shall be interpreted restrictively²¹⁴. The Compliance Committee has provided interpretation of such concept in one of the past cases. The exploitation of the Tara river in the section of the highway Smokovac-Mateševó presents in fact similarities with another case of the Compliance Committee involving the disclosure of classified technical documentation related to the exploitation of a gold mine near an archaeological site in Romania²¹⁵. On that occasion the Compliance Committee clarified that documents with classified status that may affect the state of the environmental elements of a cultural site shall be disclosed at least on the parts related to the environmental impact²¹⁶. Considering the presence of the Tara Biosphere Reserve, an UNESCO protected area, in the

²¹⁰ The Constitutional Court of Montenegro regularly publishes its judgements and pending cases on its website. Until July 2020 no cases on the right to access to environmental information appeared to be brought before the Court.

²¹¹ See, for example, Kazakhstan ACCC/C/2011/59; ECE/MP.PP/C.1/2013/9 and Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1.

²¹² Kostić-Mandić, ‘Ostvarivanje ljudskog prava na pristup informacijama o životnoj sredini’ (206) 10.

²¹³ Law on Court Fees, Official Gazette of Montenegro n.76/2005.

²¹⁴ Art.4 (4) of the Aarhus Convention.

²¹⁵ Romania, ACCC/C/2012/69, ECE/MP.PP/C.1/2015/10.

²¹⁶ Ibid par. 60-61.

building site of the motorway, the wording of the Committee may be applicable to the Montenegrin case too. This might be the case at least with reference to those parts of the relevant documents that relate to the environmental impact, such as the work plan and the monitoring reports of the bridges construction in the Tara river floodplain.

Furthermore, previous findings of the Aarhus Convention Compliance Committee may provide insights to scrutinize the legitimacy of the justifications provided by the ministerial decision of 2017. Indeed, the justification of the confidentiality of the highway documents seems the core tool used by the public authorities to justify refusals to disclose environmental information in the past years. In the explanatory part of the decision, the ministerial act states that a certain category of documents²¹⁷ could not be disclosed, as they were non-final and non-binding for the parties of the Project. Thus, their disclosure would damage the contractual positions of the parties, namely the Montenegrin government and CRBC. However, with respect to article 4, paragraph 3 (c), of the Aarhus Convention, the authorities may refuse to grant access to material which is in the course of completion “only if this exemption is provided under national law or customary practice”²¹⁸. Although the Aarhus Convention does not define the meaning of “material in the course of completion”, the Committee clarified this concept in its finding on communication ACCC/2010/51. Namely, the expression “material in the course of completion” applies to “the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared”²¹⁹. Plus, the existence of intellectual property rights was used as justification to avoid the disclosure of all the documents enlisted in the ministerial deed²²⁰. The categories adopted to define the classified documentation may allow to consider as confidential also those monitoring reports of which the EIA provided for the public disclosure. However, such action might not be in compliance with Article 4, paragraph 4 (e) of the Aarhus Convention, as documents that are prepared for public disclosure cannot be restricted on grounds of intellectual property²²¹.

As a consequence, should the case go before the Compliance Committee, the following breaches might be found:

- Montenegro may have failed to comply with Article 4, paragraph 6 of the Aarhus Convention, by classifying the highway documents without giving

²¹⁷ The documents mentioned are approvals, consents, opinions, resolutions, certificates, instructions, notices, announcements, requests/orders, minutes of meetings, proposals of the Contractor (CRBC), Engineer (Consortium Ingerop-Geodata), Representative of the Investor (Monteput LLC), as well as the Audit plan for technical documentation and audit reports of the State Review Panel for the Audit of Technical Documentation.

²¹⁸ Romania ACCC/C/2010/51, ECE/MP.PP/C.1/2014/12, para.82.

²¹⁹ Ibid para.85.

²²⁰ Decision of the Ministry of Transport and Maritime Affairs n. 34/17-01-2229/1 of 7 April 2017, para.7.

²²¹ Romania ACCC/C/2005/15, ECE/MP.PP/2008/5/Add.7, para. 28 and Romania ACCC/C/2012/69, ECE/MP.PP/C.1/2015/10, para. 58.

the possibility to disclose the remaining environmental information without prejudice to the information exempted;

- Montenegro may have acted outside the scope of Article 4, paragraph 3(c) of the Aarhus Convention, by classifying non-final documents of the Project related to an entire decision-making process;
- Montenegro may have acted outside the scope of Article 4, paragraph 4(e) of the Aarhus Convention, by classifying all the documents about the Project, including the monitoring reports the EIA provided for public disclosure, on grounds of intellectual property.

CONCLUSIONS

This thesis analysed the application of the right to access to environmental information in the context of the Bar-Boljare highway construction in Montenegro. In international law such right constitutes one of the key concepts underpinning the inclusion of society in the decision-making processes affecting states' ecosystems. Moreover, as highlighted through the specific case of Montenegro, the right to access to environmental information is also granted at the national level by the Constitution.

From an environmental perspective, the Bar-Boljare motorway will run across sensitive areas of Montenegro. Indeed, it is located upstream from an UNESCO heritage site, the Durmitor National Park. Plus, the building site of the first of the four highway sections crosses the riverbed of the Tara, a national watercourse, important for its biodiversity. These features require the country to comply with strict environmental obligations in the development phase of the Project.

Chapters one and two discussed the Aarhus Convention, of which Montenegro has been a member since 2009, and in particular the implementation of the "first pillar" at the national level. Although the right to access to environmental information is safeguarded by several laws within the Montenegrin legal system, limitations can be imposed to such right in order to protect selected interests. In this regard, the dissertation analysed the effects of the 2016 and 2017 decisions of the Ministry of Transport and Maritime Affairs, which classified relevant documents related to the Project to protect national interests. Furthermore, examples of irregularities registered by NGOs in the highway building site were addressed, as well as the reactions of some international actors to the limited data available on the issue.

Overall, the application of the right to access to environmental information revealed some shortcomings. Much of the debate seems to derive from the numerous interests involved in the infrastructural project. For instance, while the Chinese contractors have financial interests in the project, the Montenegrin government maintains political, economic and strategic ones. Similarly, Montenegro has environmental and legal obligations towards, first of all, its citizens, but also towards the international and regional organisations to which the Balkan country is a party or in access negotiation with. In an effort to balance all these aspects, it seems that the public interest in accessing environmental information may be one of the most negatively affected. This element could suggest the Montenegrin incomplete or partial compliance with the Aarhus Convention. To shed light on this issue, the final part of chapter two assessed whether a case against Montenegro could be brought before the Aarhus Convention Compliance Committee. The analysis showed that it might be too soon to implement such action. Indeed, the relevant Montenegrin NGOs should first try to exhaust all national-level legal remedies before being able to successfully address the Committee. However, due to the non-judicial mandate of the International body, the aforementioned requirement may be subject to a flexible interpretation. Consequently, the Compliance Committee may find the efforts made so far by the Montenegrin NGOs as sufficient to accept the case, even without full exhaustion of domestic remedies.

Furthermore, the existing caselaw of the Aarhus Convention body may hint the Montenegrin non-compliance with the Convention. In particular, the caselaw of the Committee might suggest that Montenegro acted outside the scope of Article 4, paragraphs 3, 4 and 6.

Considering that the first section of the highway is under construction and the remaining ones still have to be built, it would be important to clarify how the confidential information can be withheld from the public in a more proportionate way than it is nowadays. In that regard, the Compliance Committee may provide useful indications to the Montenegrin authorities in setting boundaries to the classification of the environmental information.

To conclude, an unanswered question remains for future researches on the Project. The next section of the highway is being financed also through a loan of the European Bank for Reconstruction and Development, a European financial institution operating with EU standards. Thus, it may be interesting to analyse whether Montenegro will continue to implement the current practice relating to the disclosure of environmental information, or whether it will develop a different approach.

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