



# Study on access to justice in environmental matters particularly in respect to the scope of review in the selected countries of South-Eastern Europe

Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia  
and Montenegro

**April 2017**

This study is produced within the project 'Better Access to Justice in the South-Eastern Europe' implemented by The Regional Environmental Center (REC). The project is funded by the German Federal Environment Ministry's Advisory Assistance Programme (AAP) for environmental protection in the countries of Central and Eastern Europe, the Caucasus and Central Asia and other countries neighbouring the European Union. It is supervised by the German Environment Agency (UBA).



Federal Ministry for the  
Environment, Nature Conservation,  
Building and Nuclear Safety

Umwelt  
Bundesamt





## Contents

A. GENERAL PART (Analytical Summary).....	3
I. Purpose and methodology of the study.....	3
II. General issues.....	4
III. Which authorities' decisions, acts and omissions can be reviewed.....	6
IV. What decisions, acts or omissions can be reviewed.....	7
V. The grounds for review and its intensity.....	8
VI. What are the outcomes of judicial review.....	9
Findings.....	9
B. COUNTRY STUDIES.....	11
1. Bosnia and Herzegovina.....	11
2. The former Yugoslav Republic of Macedonia.....	34
3. Montenegro.....	52





## A. GENERAL PART (Analytical Summary)

### I. Purpose and methodology of the study

1. The purpose of this study is to reveal what decisions, acts or omissions could be the subject of administrative appeal and judicial review in accordance with the domestic legislation implementing Aarhus Convention's article 9. It presents the grounds for their review and the extent to which both procedural and substantive issues may be reviewed. It also addresses the issue whether the courts in the selected countries have only cassation or also reformatory power in cases under this article. The study provides an overview of good practices and challenges on this subject matter with the aim to assist the countries in improving the implementation of article 9, paragraphs 2 to 4, of the Aarhus Convention.
2. Within the focus of the study are the legislation, practice, case-law and academic studies on the subject matter in 3 countries: Bosnia and Herzegovina (herein after referred as BiH), the former Yugoslav Republic of Macedonia (FYROM) and Montenegro (MN). The report has 30 November 2016 as a cut-off date of the information provided.
3. The study is based on the provisions of the Aarhus Convention and is conducted to support the activities carried out under the Aarhus Convention Task Force on Access to Justice. It is developed as complementary study to the study with the same scope prepared for 6 countries: Albania, Armenia, Belarus, Kazakhstan, Serbia and Ukraine (2016). It consists of an analytical summary and three country studies. The findings of the present study were discussed at the tenth meeting of the Task Force on Access to Justice under the Aarhus Convention (27-28 February 2017) and revised.
4. This study is primarily based on analysis of the existing legislation, its implementation, court practices, as well as examples provided by the national experts as part of the questionnaire. The study makes note also of recent relevant development in the legal framework of the three countries.
5. The country studies on legislation and practice were provided by the national experts: Mr. Bojan Bogeovski (the former Yugoslav Republic of Macedonia), Mrs. Maja Kostic-Mandic (Montenegro), and Mr. Ratko Pilipovic (Bosnia and Herzegovina). A synthesis (analytic study) of the provided materials was carried out by Mrs. Tsvetelina Filipova, Senior Expert on Environmental Law and Participatory Governance of the Regional Environmental Center (REC) for Central and Eastern Europe. The Chairman of the Task Force on Access to Justice Mr. Jan Darpo and the UNECE Aarhus Convention Secretariat has provided their comments in the advisory capacity.
6. The questionnaire template, used for the 6 countries mentioned above, was consistently used to ensure comprehensibility and comparability of information. It was distributed to the national experts in English. Based on the questionnaire a national study was prepared for each of the countries, attached hereafter. The main findings of the country studies were made available to relevant institutions and various national stakeholders through e-mails and social media for commenting and input. The received comments were incorporated in the attached country studies.
7. The results of the previous analytical study<sup>1</sup> on Access to Justice in Environmental Matters: Standing, Costs and Available Remedies (2014) were also considered.

---

<sup>1</sup>Available from [http://www.unece.org/env/pp/tfaj/analytical\\_studies.html](http://www.unece.org/env/pp/tfaj/analytical_studies.html) (under heading SEE)





## II. General issues

8. Constitutions of the three countries prescribe that the ratified and promulgated international conventions shall have the supremacy over the national legislation, and shall be directly applicable. However, in Montenegro (MN) and the former Yugoslav Republic of Macedonia (fYROM), public authorities and courts do not apply the Aarhus Convention directly. They are more likely to apply the relevant provisions of domestic legislation (e.g. Law on Environment, law on Free Access to Information, law on EIA, law on SEA and many other statutes) which contain Aarhus Convention provisions. Thus, as reported by the national legal experts, there are very few instances when international law and namely the Aarhus Convention has been directly referred to by the courts and directly applied in concrete cases (BiH).

9. Important development in terms of new relevant legislation adopted in the three countries since the 2014 study include the new Law on Environment of Montenegro (2016). To the existing principles of environmental protection and sustainable development the law adds the new principle of protection of the right to healthy environment and access to justice.

10. In all countries there are specific laws of administrative procedures which set forth the principles for public administration to follow, with recent new laws passed in Montenegro (enter force on 1 July 2017) and the former Yugoslav Republic of Macedonia. Each of the countries have Administrative Procedure Acts. It is worth noting, that in BiH there are such laws on entity level (The Federation of Bosnia and Herzegovina and Republika Srpska) and Bosnia and Herzegovina (BiH) state level. Considering the complex administrative structure of the state of Bosnia and Herzegovina, especially the FBiH entity in which the cantons act as separate states, there are differences in the regulation of specific issues, including those concerning environmental protection.

11. As a rule in the three countries the public (individuals and environmental non-governmental organisations - ENGOs) can submit administrative appeal against decisions, acts or omissions of public authorities to higher public authorities (administrative review/appeal). While in Montenegro the new Law on environment further specified the right to initiate a procedure of decision review before a competent authority, or before the court with relevance to information, public participation in decision-making and access to justice.

12. Without an appeal there is no administrative control of this type, because the second instance procedure may not be initiated or conducted ex officio in the three countries. It is interesting that in the former Yugoslav Republic of Macedonia the appeal needs to be filed to the first instance body (that passed the challenged act) (i.e. separate organisational unit of the public body/authority). If the first instance body considers the appeal to be fully justified, it can replace the challenged administrative act with a new one. If the party is not satisfied with the decision by the first instance body or it does not receive a reply within the legally prescribed deadline, it may file a complaint in front of the special State Commission for Decision-Making in Administrative Procedure and Labour Relations Procedure in Second Instance.

13. The three countries have specific laws on Administrative Disputes laying down the administrative legal proceedings that regulate judicial review procedure in administrative cases (See more in the Chapter I "General information" of the National report for specific country)

14. In all participating countries, individuals and ENGOs have a right to challenge in court the substantive and procedural legality of the decisions of the public authorities if they are subject to judicial review as well as actions or omissions of public authorities. When we talk about lawsuits in the administrative judicial dispute, the court does not have different approach regardless whether the lawsuit was filed by the natural or legal entity (ENGO).





15. In the subject countries, against second instance administrative acts, as well as against first instance administrative acts for which an appeal is not allowed, the party may initiate an administrative dispute (judicial review). There are sectoral laws or concrete procedures that do not prescribe the right to file an administrative complaint but the party still has the right to initiate a dispute/lawsuit in front of an Administrative Court.

16. As a rule regarding legal standing, those whose rights are infringed or who have legal interests for an overturn of certain decision, regardless of whether they have participated in the administrative procedure or not, have legal standing and can initiate a judicial review. There is a notable exception for BiH, where party should have participated in the decision-making process and relevant administrative procedure to be able to challenge the decision in court. On the other hand, concrete practice showed that if individuals or ENGO did not participate in the process of public participation, by invoking article 9 of Aarhus Convention and its direct application, they were granted the right to initiate a lawsuit and participate in the judicial procedure.

Environmental NGOs are considered by default as organisations with legal interest in environmental decisions. On the other hand, an individual must demonstrate infringement of his rights by the concerned decision. In FYROM there is positive case-law where the court recognized the standing to a group of NGOs who were suing the government for not undertaking the necessary activities to control the pollution in one of the most polluted city in Europe, Veles.

17. The public and environmental NGOs in the three countries are mainly given the opportunity to participate in decision making within the EIA, SEA or IPPC procedures for the activities that may have environmental impact, whereas the right to public participation may be utilized at most. It is common that the process of adopting decisions that is based on other sectoral laws (Lex specialis) outside the scope of EIA/SEA/IPPC, does not provide for public participation. Many of the sectoral laws do not even contain provisions on public participation including the laws concerning mining, hunting, GMOs (exception BiH), registration of pesticides and waste and dangerous chemicals import/export. Mining concessions do not provide for public participation (with exception of FYROM).

18. There are elaborate systems of judiciary in all places examined. In some of selected countries (Montenegro, FYROM) there is a separate administrative court to adjudicate the procedural as well as the substantive legality of administrative decisions, acts or omissions. In BiH judicial review of authorities' decisions, acts or omissions in environmental matter is within the courts of general jurisdiction.

19. In Bosnia and Herzegovina, the courts are organised on the state and entity level. BiH has BiH Court. Entities have different disposition of courts, hence Federation of BiH has Supreme Court of FBiH, cantonal and municipal courts, whilst Republika Srpska has Supreme Court, district and municipal courts as courts of general competence and jurisdiction. The district courts decide all administrative disputes according to the seat of the first instance administrative authority. It is specific that in BiH the district courts in RS and the cantonal courts in FBiH are the ones competent to examine administrative disputes.

20. In FYROM, the judicial power is exercised on "three-level" structure: Basic courts, Appellate courts, Supreme Court. Furthermore, the judicial power is vested also in the Administrative Court and the Higher Administrative Court is established by law to decide upon appeals against the decisions of the Administrative Court. Administrative Court of Montenegro has the jurisdiction for deciding in administrative disputes.

21. In this report the term "judicial review" does not cover the review of acts of public authorities by the Constitutional Court as in most of selected countries Constitutional Courts have separate status and specific competence to review or interpret the constitutionality of laws and other legislative (normative) acts. In some countries, Constitutional Courts are independent constitutional bodies and are not considered as a part of judicial hierarchy.





22. Anyone (including NGOs) may submit an initiative for assessment of the constitutionality of a law and/or assessment of the constitutionality or legality of an (environmental) regulation or other common act (administrative act that affects more individuals and/or legal entities). The Constitutional Court may repeal or invalidate a law (or specific legal provision) and other regulation or enactments, if it deems as in non-compliance with the Constitution or the law. Moreover, the Constitutional Court protects the freedoms and rights of individuals and any citizen may request protection by the Constitutional Court if it deems that an individual act or action (by the private or public entity) has infringed his above noted freedoms and rights.

In Montenegro, a Protector of human rights and freedoms (Ombudsman) can take measures for the protection of human rights and freedoms when they are violated by an act, action or omissions of state authorities, state administration bodies, local self-government authorities and local government authorities, public services and other holders of public powers. The ombudsman makes recommendations on how the perceived shortcoming should be remediated (which means that he/she does not issue decisions but provides recommendations which are not binding for public authorities, but which should be applied and as such are not subject to review).

23. Currently, there are no specialized courts for environmental disputes in any of the selected countries. There are also no judges specializing in environmental cases. Macedonian expert reports that most of the judges are familiar with the environmental law despite of the limited jurisprudence in this regards. In BiH courts and entities courts judges still do not have sufficient practice in dealing with cases in the field of environmental protection hence it can be said that there are no judges specialized for the work in this field. In Montenegro, there are no specialized judges and prosecutors in the field of the environment.

24. In all countries the judges are supported by technical/paralegal assistants but the courts do not have staff experts to support the cases on environmental matters. It is stipulated in procedural legislation that relevant specialists and experts can be called to court on specific issues during the consideration of certain cases, where specific expertise is required, depending on the nature of the case. In complex cases, the courts may engage experts to provide expert opinion that will be evaluated together with the other evidences provided in the proceeding. In BiH there are data bases of experts in certain fields. The courts in BiH may hire experts from the list when necessary, however so far no judge hired experts for the cases on environmental protection.

25. The Centre for Training in Judiciary and State Prosecution Montenegro, and in BiH the High Judicial and Prosecutorial Council as well as the Center for education of judges and prosecutors FBiH/RS, offer continuous training to judges. Reviewing the programmes of the Academy for Judges and Public Prosecutors in FYROM for continuous training, it is noticeable that the judges have trainings on the Law on Environment every year, and they are paying special attention to environmental crimes. There is no information on methodologies applied during judicial training. Aarhus Centres and the REC organised training for judges in SEE on an ad hoc basis upon availability of funding.

### **III. Which authorities' decisions, acts and omissions can be reviewed**

26. In the three countries all administrative decisions of public authorities, besides the laws, are subject to judicial review. Individuals and ENGOs have rights to challenge in court decisions, actions or omissions of public authorities, including decision of local self-government. In FYROM, the parties concerned may challenge any administrative activity (or omissions) or administrative act. As a rule, this does not include the decisions of the Parliament that are passed in a form of law. The constitutional legality of law is usually subject to review by the Constitutional Courts.





27. Specific to BiH is that decisions passed by public officials in the procedures of environmental protection may be of first and second instance decisions due to the administrative structure of the country. In the FBiH first instance decisions are passed by cantonal ministries and the second instance are passed by the Federal Ministry of Environment and Tourism. First instance decisions in the Republika Srpska are passed by municipalities, and second instance decisions are passed by the Ministry of Spatial Planning, Construction and Ecology. The first instance decisions are subject to administrative supervision, hence the administrative appeal is possible only to the second instance body provided that the law does not stipulate differently. The second instance decisions are subject to judicial control and lawsuit may be submitted to the district or cantonal courts.

28. Administrative dispute may be initiated by a state prosecutor or another competent authority if an administrative or another act violates the law to the detriment of the state, local self-government unit, institution or other legal entity. However, there is no court practice in this respect regarding environmental law.

#### **IV. What decisions, acts or omissions can be reviewed**

29. As a general rule, in all countries both ENGOs and individuals, as a member of the public, can ask for a review of most of decisions on specific activities relating to the environment, in relation to article 6, paragraphs 1 (a) and (b), paragraphs 10, 11 and Annex I, paragraph 22, of the Aarhus Convention as well as acts or omissions subject to the provisions of article 6 or contravening provisions of national law relating to the environment both before the administrative authorities and court (except those that cannot be appealed by law).

30. The principle of legal remedy guarantees that the public and ENGOs have a right to challenge any administrative activity (or omissions) or administrative act. The public concerned have a right to challenge both the substantive and the procedural legality of the decisions regarding EIA SEA, IPPC. The public concerned and the environmental NGOs may file a complaint. If not satisfied by second instance decision, the complainant may initiate a judicial dispute.

31. An *actio popularis* is available for challenging the substantive and procedural legality of the urban plans as well as building permits.

32. License which is issued in respect of performing commercial exploitation and geological exploration of mineral resources in the form of a decision is final and an administrative dispute may be initiated against it. In FYROM public concerned have a right to participate in the process of permitting (differing from Montenegro and BiH), and the public may directly initiate an administrative lawsuit against the permit for mining (because the Law on Mining does not envisage a right to appeal in second instance). Besides, the EIA study is obligatory for the applicant for mining permit in all countries, thus, the public concerned have a possibility to challenge the decision for approving the EIA study.

33. Similarly, appeal can be filed against a decision to issue permits for hunting to the relevant Ministry/inspectorate. These decisions are final and a party may initiate an administrative dispute against the decision.

34. The public/environmental NGOs may challenge an act or omission by the public authority which contravene environmental laws and may request compensation for damages and/or request injunctive relief.

35. The general principle is that an administrative appeal procedure should be exhausted first, prior to the judicial appeal.

36. As noted above, an administrative review is a precondition for a judicial review. However, there are cases where the administrative appeal is not envisaged in the Lex Specialis. In these cases, the public concerned may initiate a judicial review (administrative lawsuit) against the challenged administrative act or activity (for instance, hunting, mining in BiH).





37. Judicial review may be initiated if the competent authority has not issued an appropriate administrative or another act on the request, or the appeal of the party. 'Silence of administration', as the institute, relevant to the 3 countries, stipulates that when the second instance body is silent, (for instance, an appellate authority has not issued a decision on the appeal against the decision of the first instance) the party may initiate an administrative dispute as if the appeal was rejected. In addition, when the first instance body does not issue a decision, and the second instance is silent, the party has the right to submit the appeal to the second instance body. It is unclear to what extent the institute of 'silence of administration' covers the concept of omission since the silence might be a deliberate lack of response or reaction to a request.

#### **V. The grounds for review and its intensity**

38. When reviewing the legality of administrative decisions, courts in all countries have the legal power to review both the procedural and substantive legality.

39. The review from the point of procedural and substantive law in practice might not always lead to the review of the substantive legality though. The court looks primarily into the procedural legality, in order of priority, by assessing the compliance of certain acts and actions to the requirements of the procedural law. For instance, in BiH practice in administrative disputes, the judges first look at whether there has been a violation of procedural law during the course of administrative proceedings. The legal expert reported, that so far, in the practice of the courts, there was only one case when the court engaged in discussion about the merits of the case. In Montenegro similarly, past practice in cases concerning the environment showed that the judgment by the courts in administrative court cases are almost always based on pointing out procedural errors with the instructions contained in the judgment, and that the competent authority should be corrected. The court rarely goes to the substance of the case.

40. In the judicial disputes before administrative courts, the Administrative Court examines the legality of administrative or other act within the scope of the complaint, but is not bound by the reasons stated in the complaint.

41. As a rule in the participating countries, the administrative court decides based on the facts that are determined in the administrative procedure or based on the facts that the court will determine as described below. The Administrative Court will review the facts that are determined in the administrative procedure, i.e. whether the factual situation is fully determined, whether from the determined facts wrong factual conclusions were drawn, whether the procedural requirements were followed. If it is obvious that the factual situation was not fully determined or that the returning of the case back to first instance will cause irrevocable damage to the complainant (or if once the Court returned back the case to first instance but the relevant authority did not follow the court's instructions), the Court is obliged by the procedural law to determine the factual situation himself on a hearing where the parties are invited as well, and pass a final judgment (full jurisdiction dispute).

42. The Court conducts a judicial review on the basis of the evidence on which the party bases its claim or which refutes the statements and evidence of the opposing party. The court decides which evidence is to be considered to determine the relevant facts.

43. In the most common case, one expert witness is invited and, if the expert inquiry is complex, two or more expert witnesses may be ordered. Expert inquiry may be entrusted to the relevant professional institution (hospital, chemical laboratory, faculty etc.) If there are specialized institutions for specific types of expertise, such expertise will be entrusted primarily with those institutions. In BiH there is no records of engagement of expert on environmental cases.







44. Experts' conclusions and reports are considered as evidences on the basis of which a decision is adopted. One open issue is whether in principle such experts' reports can be challenged following the procedure of challenging the validity and credibility of other evidences.

## VI. What are the outcomes of judicial review

45. In the general case, the administrative courts decide by judgement on subject matter by: dismissing the appeal as unfounded and by confirming a second instance decision or upholding the appeal and revoke a second instance decision.

Usually courts may:

- state the legality of the decision or some of its provisions as well as the legality of the acts or omissions;
- cancel the decision or some of its provisions (recognise the administrative decision null or void);
- put an obligation on the public authority to issue a decision which satisfies the requirements of legislation or to take certain actions;
- put an obligation on the defendant to refrain from taking certain actions.

46. In all countries courts have certain *reformatory* powers in deciding cases on environmental matters. In FYROM, if the court accepts the lawsuit and its merits it will annul the examined administrative act and, if the factual situation is clearly determined, will decide the administrative matter itself. In cases when, *inter alia*, the relevant law was wrongly applied and the court annulled the administrative act but the responsible public body did not act in accordance with the instructions and opinion of the court's judgment, or if the public authority adopted new administrative act that is against the reasoning of the court, the court would adopt decision that in full would replace the administrative act. Similarly, in MN, if the competent authority, following the annulment of the act, does not adopt the act in accordance with the judgment of the court, the court shall annul the challenged act and, as a rule, decide the matter by a judgment. Such judgment shall replace the act of the competent authority.

47. The courts may order the legal entities and individuals to take the necessary remedial action, including the suspension of certain activities and/or payment of claims. The lawsuit does not suspend the enforcement of the challenged administrative act, except if injunctive relief is requested and approved.

48. Judicial decisions are obligatory for all and may not be subject to extrajudicial control and everyone is obliged to respect the executive judicial decision. The competent authority is thereby bound by the legal opinion of the court, as well as by the remarks of the court regarding the procedure. A failure to execute court decision in all countries constitutes an administrative offence, crime or could be a subject to disciplinary liability. Court decisions rendered in an administrative dispute are executed by an authority responsible for enforcement of an administrative or other act.

## Findings

49. Once ratified the Aarhus Convention becomes part of the national law, however there are very few cases when public authorities and courts would apply the Aarhus Convention directly. They are more likely to apply the relevant provisions of domestic legislation, even in cases when the Convention grants more advanced protection of certain rights (BiH right of appeal of decision making procedure in which a person/entity did not take part in).

50. Individuals and ENGOs have a right to challenge the substantive and procedural legality of the decisions, acts or omissions in a form of administrative appeal. The second instance review procedure may not be initiated or conducted ex officio.





51. It is common to all the countries that in case of judicial review as a rule, those individuals and ENGOs have legal standing whose rights are infringed or who have legal interests for an overturn of certain decision, regardless of whether they have participated in the administrative procedure (with certain limitation in BiH noted above).

52. In the three countries there is a wide range of different types of decisions on specific activities relating to the environment. Some of the decisions cannot be challenged by public directly within an administrative appeal, but can be challenged in front of the court. In some countries concessions on mining, licences for hunting, permits for transport of dangerous chemicals and pesticides and hazardous waste cannot be subject to administrative appeal based on the *lex specialis* but may be challenged in judicial procedure in front of court.

53. The individuals and environmental NGOs are mainly focused on EIA, SEA or IPPC procedures for the activities that may have environmental impact, whereas the right to public participation may be utilized at most. Many of the sectoral laws do not provide for public participation including the laws concerning mining, hunting, GMOs (exception BiH), registration of pesticides and waste and dangerous chemicals import/export.

54. When reviewing the legality of administrative decisions, the courts in all countries is empowered to look into the procedural and substantive legality of administrative decisions. However, as it was indicated in some countries, the review in practice is often restricted to the procedural legality of the case and rarely the courts rule on the merits of the case (substantial legality).

55. In the administrative judicial dispute, administrative court examines the legality of administrative or other act within the scope of the claim in the complaint, but is not bound by the reasons stated in the complaint in all the countries.

56. In the general case, the administrative courts decide by judgement on subject matter by dismissing the appeal as unfounded and by confirming a second instance decision or upholding the appeal and revoke a second instance decision.

57. Administrative Courts have “*reformatory*” powers. If according to the judgement of the court a new decision should be adopted, the legal opinion of the court as well as remarks of the court regarding the procedure must be considered in the further decision-making procedure and the court can control the decision of the public authority in order to check the conformity with its judgement. In case the responsible public body did not act in accordance with the instructions and opinion of the court's judgment, or if the public authority adopted new administrative act that is against the reasoning of the court, the court would adopt decision that in full replaces the administrative act.





## B. COUNTRY STUDIES

### 1. Bosnia and Herzegovina

Prepared by Mr. Ratko Pilipović, national expert, email: klokopot@gmail.com

#### I. General information

##### 1. Legislation relating to the environment

Bosnia and Herzegovina Constitution is deemed as constitutional part of the General Framework Agreement for Peace, known as Dayton Peace Accord, signed on 22 November 1995 in the US city Dayton, Texas. Constitution text represents Annex 4 of the adopted peace agreement thus creating Bosnia and Herzegovina (hereinafter referred to as BiH) as a complex and decentralized state with two entities Federation of Bosnia and Herzegovina (hereinafter referred to as FBiH) and Republika Srpska (hereinafter referred to as RS).

BiH Constitution, FBiH Constitution as well as constitutions of the 10 Federal cantons did not provide concrete definition of rights for the environmental protection. RS Constitution regulated this issue as one of the human rights and obligations in its Article 35 as follows: *“Men have right to the healthy environment. Everyone is, in accordance with the law, obliged to protect and develop environment.”*

Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters was ratified by the BiH Presidency on the 26 June 2008 upon the agreement from the Parliamentary Assembly on 17 June 2008 as published in the Official Gazette of BiH, Annex 8/08, and it was implemented in the *Law on Free Access to Information (BiH Official Gazette no. 28/00, 45/06, 102/09, 62/11, 100/13, RS Official Gazette no. 20/01, FBiH Official Gazette no. 32/01, 48/11)*, which relies on the first pillar of Aarhus Convention, and has been implemented and there pillars (access to information, public participation in decision making and access to justice in the environmental issues) have been implemented and as such applicable in the legislation of BiH.

The law that has been more applied in the practice than the *Law on Environmental Protection (RS Official Gazette no: 71/12 and FBiH Official Gazette no: 33/03, 38/09)* is the *Law on Free Access to Information* which enables access of all relevant information that are under jurisdiction of public administration bodies hence this law implemented the first pillar of Aarhus Convention which then enabled legal access to information, including information on environmental protection. Pursuant to these laws, information may be demanded by natural person - a person regardless of citizenship, nationality and residence and legal entity regardless of its head office residence. The law stipulates free access to information as a rule and prescribes that the required information form, may be in written, audio, visual, electronic or some other form as well as material containing facts, opinion, data or any other forms i.e. copy. Furthermore, information may be requested from the following authorities i.e. executive bodies Council of Minister, entity governments, canton governments, District Brcko government, municipalities and cities' officials; legislative bodies i.e. BiH Parliament/Entity Assembly, Canton and District Brcko Assembly, Public Prosecutor and Public Attorney Offices; bodies performing public function pursuant to the Law (public institutions, institutes and other entities founded by the governing bodies; legal entities under supervision or owned by authorities (it is not specified whether legal entities with minority share owned by the government are obliged to disclose information) and legal entities financed by the public funds. In order to receive information, pursuant to these laws, one needs to submit written request in one of the official languages of BiH, explained the way that request contains enough details on the nature or content of the required information and signed and stamped in case that the legal entity is submitting the request. Request does not need to contain the reason. The laws stipulated free access of information as a rule, whilst prescribing special cases related to the information with regard to defence, safety and public security protection.

The Aarhus Convention and its pillars has been implemented in the laws regulating the area of environment. The *Law on Environmental Protection in RS* prescribed one of the basic rules as the basis of the law i.e. the rule of public participation and access to information. Furthermore, Chapter IV (articles 33.-42.) concretely regulates





public participation, access to information and access to justice in the cases regarding the environmental protection. *The Law on Environmental Protection in FBiH* also stipulates that one of the basic principles of the law is the principle of public participation and access to the information. Chapter VI (Articles 30-40) regulates public participation, access to information and access to justice for the cases regarding the environmental protection.

Furthermore, natural protection has been regulated by the *Law on Nature Protection (FBiH Official Gazette no. 33/03)* which in the Article 4 stipulates that legally prescribed measures ensure special conditions regarding the public participation in the area of nature protection, establishing the planning system, managing information and financing nature protection. *The Law on Nature Protection (RS Official Gazette no.: 50/02, 34/08 and 59/08)* in Article 14 prescribed that bylaws shall stipulate issues of monitoring, collection, registration and analyses of data, facts and other relevant information on the condition and using nature and measures undertaken by management bodies, administrative bodies, enterprises, etc.

Concrete areas of environmental protection have been regulated by the separate set of laws passed on the entity level. Therefore, geology or survey area is regulated by the *Law on Geological Surveys FBiH (FBiH Official Gazette, no. 9/10)* which in the articles 28 and 29 regulates issuing of permits for geological survey and participation of the public. *The Law on Geological Surveys (RS Official Gazette no. 51/04)* does not refer directly to the Aarhus Convention. The procedure of permit issues has been developed but it does not entail public participation.

Mining as an area is closely related to geological research and is governed by the *Mining Act (FBiH Official Gazette, no. 26/10)*, and it stipulates management of mineral raw materials, among other things, and ensuring public participation in decision-making relating to mineral resources. *The Mining Act of the Republika Srpska (RS Official Gazette, No. 59/12)* does not directly touch any of the pillars of the Aarhus Convention. Article 5 regulates the strategy for mineral raw materials management, but it is not covered by public participation.

Spatial planning and construction field is regulated by the *Law on Spatial Planning and Land Utilization in FBiH (FBiH Official Gazette no. 2/06, 72/07, 32/08, 4/10, 13/10, 45/10)* which stipulated in the article of the Law that spatial planning is based on the publicity and free access to data and documents of importance for planning pursuant to this law and special provisions. The Decision on Access to Planning Documents that is regulated by Article 23 of this Law also contains provisions on the public debate. *The Law on Spatial Planning and Construction (RS Official Gazette, no: 40/13, 6/15)* in the Article 2 stipulates that planning is also based on the principles of publicity and free access to data and documents important for spatial planning.

Field of waters is regulated by the *Law on Waters (FBiH Official Gazette, no. 70/06)*. Articles 98 -106 are regulating issues of establishing and functioning of water information system, and general objectives of establishing Water Information System stipulate exchange of information both internal and external, entailing foreign and international institutions. Special objectives are as follows: development of true and reliable information from the water management system. Further on, Articles 107 – 139 of the FBiH Law on Waters regulate issuing of water acts, article 140-151 stipulates issues of limitation of land owners' and beneficiary rights and article 199-202 regulates issues of inter-entity cooperation of inspection offices. *Law on Waters (RS Official Gazette no. 50/06)* in the Article 2 prescribes that law purpose is to ensure public participation in decision making regarding waters, including public access to true, correct and timely information on waters, activities undertaken by persons using or contaminating water and activities undertaken by official bodies. Articles 26-27 regulated issues with regard so river basins and establishing measures for each basin pursuant to the Framework Water Agreement. Article 28 prescribes jurisdiction of the Agency for Water which has obligation to prepare and publish timely schedule and work program to develop plan and program including list of consultations that needs to be done (three years prior to work beginning) timely review of important issues in the area of water management in the river basin (at least two years prior to the period encompassed by plan and program), and copies of drafts of plans and programs managing river basin (at least one year prior to the beginning of the period encompassed by the plan and program). Article 29 of the Law on Waters regulates issue of working of Agency for Waters and necessity to consult the public of their work. The Agency has obligation to publish every act to prescribe objections and to enable public insight in the documents and information that have been used in the development of the Draft Plan for managing river basins. This type of publishing is performed via public information means as well as through the units of local administration up to the level authorized for the particular





territory. There is also an obligation to publish information in the electronic form. According to this article, Agency may organize collection of information from the public in the form of round tables so as to adopt information with regard to planning and management of the river basin. According to Article 33, the Ministry is obliged to publish the Plan on River Basin Management in the Official Gazette of the Republika Srpska. Article 119 stipulates information delivery from the Information system as described in the Article VII of the Law. Article 130 prescribed the procedure of advertisement, reporting and consultations of interested parties and the public when it comes to the issuing of water legal regulations. Special provision which stipulates in details participation of the public in the waters field is the *Provision on the Methods of Public Participation in the Water Management (RS Official Gazette no: 35/07)*.

Forest area in BiH is regulated by the *Law on Forests (FBiH Official Gazette, no: 20/02, 29/03 and 37/04)*. The Law regulates issues of permits for deforestation and construction in the forest vicinity. Pursuant to the Article 57 of this Law, Federal Management, that is, cantonal administration (article 59) are obliged to inform the public on the condition of forests and development of forestry as well as to publish professional and popular publications on forest condition and its importance. Article 18 regulated that Cantonal Management was in charge for preparation and development of cantonal forest development plans and they are to be passed by the cantonal ministries. All interested organizations and individuals have right to the access of information i.e. monitoring plan development thus enabling total public access to the plans. *Law on Forests (RS Official Gazette, no: 75/08)* prescribed that item encompassing estimate of the impact to the environment represents a preventative measure to the environmental protection based on the development of studies and implementation of consultations with public presence. The same article describes forest management entailing strategic and regional planning, law and provisions preparations, defining forest policy and management strategies, data base and records management, integration in the European forestry trends and information and public relations.

Air is regulated by the *Law on Air Protection FBiH (FBiH Official Gazette, no: 33/03 and 04/10)* which in the Article 32 regulates the issue of public access to information. With regard to that, Article 1 of this Law stipulates that federal and cantonal bodies are obliged to ensure public participation in the documents preparation for spatial planning and other plans impacting air quality as well as preparation of policies for air quality, as well as action plans on air in determining sites by issuing permits and inspection of emission sources. Furthermore, pursuant to the Article 11, non-technical resume study on air must be published following the end of the procedure and in a way to be adjusted to the surroundings of the potential construction facility or will have impact to the environment, in the period of two months, the least. Federal Ministry is in charge of access to all information on the emission via public announcement, pursuant to the Article 26 of this Law. Article 29 stipulates that action plan on air protection is available to the public to enable public objections/comments prior to the passing. *The Law on Air Protection (RS Official Gazette no.: 124/11)* in the article 17 prescribes mandatory public information with regard to the reports on the air quality conducted by the Republic Administration in charge of hydrological and meteorological affairs and supervising units of the local administration. Chapter IV of the Law on Air Protection regulates issues with regard to the public participation in Strategy development, development of plans and programs whilst chapter VII regulates obligations of the authorized bodies to inform and report the public on the air quality as well as obligations with regard to the air quality. The same chapter prescribes the method of reporting as well as timely deadlines.

And the last area of waste management is regulated by the *Law on Waste Management (FBiH Official Gazette, no: 33/03 and 72/09)*; which besides criminal provisions, does not refer to the pillars of the Aarhus Convention. *The Law on Waste Management (RS Official Gazette no. 53/02 and 65/08)* in the article 8 prescribes consultation with the representative of association for environmental protection during Development of the Draft Strategy for Waste Management that is to be published in the Official Gazette of the RS. Article 10 prescribes the mandatory cooperation between local community units during the development of the local plan with association representatives tackling issues of environmental protection. The same is referring to the period of 6 years and is being presented to the public every year.

Environmental protection covering criminal law in BiH is regulated on the entity level and on the state level is separated in chapters. *FBiH Criminal Law (FBiH Official Gazette no.: 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 42/11)* and *BiH Criminal Law (BiH Official Gazette no: 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06,*





32/07 and 8/10) in the chapter XXVI prescribed criminal acts against environment, agriculture and natural resources.

*RS Criminal Law (RS Official Gazette no.: 49/03, 70/06, 73/10)* in the chapter XII prescribes Criminal acts against environment.

When it comes to the citizens legal protection of the environment, laws that are applicable are as follows: *Law on Civil Procedure (RS Official Gazette no58/2003, 85/2003, 74/2005, 63/2007, 105/2008, 45/2009, 49/2009 i 61/2013)*, *Law on Civil Procedure of the FBiH (FBiH Official Gazette no: 53/03, 73/05, 19/06 i 98/15)* and the *Law on Obligations (SFRJ Official Gazette, br. 29/1978, 39/1985, 45/1989 - decision USJ and 57/1989 and Official Gazette RS no. 17/1993, 3/1996, 37/2001, 39/2003 and 74/2004)*. Therefore, the Law defines claims and lawsuits due to the illegal damage and claims due to the illegal operations. The novelty in the Law on Civil Procedure of the RS is the Lawsuit for the Protection of Public Interest according to which associations, bodies or other illegal organizations within their registered or prescribed activities may submit lawsuit against natural person or legal entity who violates collective interests and rights hence those interests may refer to environmental protection and must be severe violations or endanger by action.

## 2. General principles of public administration

### **General legal framework for the functioning of public administration in BiH Bosnia and Herzegovina:**

The Administrative Procedure Act (Official Gazette No. 29/02, 12/04, 88/07 and 93/09)

The Law on Administrative Disputes (Official Gazette No. 19/02, 88/07, 83/08 and 74/10)

### **The Federation of Bosnia and Herzegovina**

The Administrative Procedure Act (Official Gazette of FBiH No. 2/98 and 48/99)

The Law on Administrative Disputes (Official Gazette of FBiH No. 9/05)

### **Republic of Srpska**

The Law on Administrative Procedure (Official Gazette No. 13/02, 87/07 and 50/10)

The Law on Administrative Disputes (Official Gazette No. 109/05)

As already mentioned, Bosnia and Herzegovina is a complex state that according to the General Framework Agreement for Peace in BiH (better known as the Dayton Peace Agreement, signed on 21.11.1995) consists of two entities, the Federation of Bosnia and Herzegovina and the Republika of Srpska Brcko, which was the subject of litigation and international arbitration, was proclaimed a district, so that the state of Bosnia and Herzegovina is administratively divided into two entities and Brcko District.

Overview of the constitutional and political system of BiH is necessary in order to better understand the overall situation with regard to the adoption and implementation of certain laws and their enforcement thereof. Taking into account extremely complex administrative structure of the state of Bosnia and Herzegovina, especially the FBiH entity in which the cantons act as separate states, it is clear why there are differences in the regulation of specific issues, including those concerning environmental protection. The fact that at the state level there are 9 ministries and 32 ministries function at the entity level (16 in FBiH and 16 in RS), while there exist 130 ministries at the cantonal level with 142 municipalities having their legislative and executive apparatus, clearly shows the complexity of institutional framework in BiH.

The executive power in BiH is carried out by the Presidency of Bosnia and Herzegovina, as well as collective Head of State and Council of Ministers, which makes a kind of government. The Council of Ministers has nine members, i.e. the Chairman and two Vice-Chairmen who are also ministers, and six other ministers. According to the Law on Ministries and other government authorities, there are nine ministries at the state level: Ministry of Foreign Affairs; Ministry of Foreign Trade and Economic Relations; Ministry of Civil Affairs; The Ministry of Finance and Treasury; The Ministry for Human Rights and Refugees; Ministry of Justice; The Ministry of Communications and Transport; Ministry of Security and the Ministry of Defence.





FBiH Entity administrative division consists of ten cantons that are administratively divided to municipalities. Those are: 1. Unsko-sanski; 2. Posavski; 3. Tuzlanski; 4. Zeničko-dobojski; 5. Bosansko-podrinjski; 6. Srednjobosanski; 7. Hercegovačko-neretvanski; 8. Zapadno-hercegovački; 9. Sarajevski and 10. Livanjski kanton (Canton 10). It is important to emphasize that each canton has its legislative, executive and judicial authority. RS entity is administratively one unit which internally is divided into the regions i.e. 1. Banja Luka; 2. Doboje; 3. Bijeljina; 4. Pale i 5. Trebinje 6. Prijedor. Regions further divide to smaller administrative units i.e. municipalities and there are 63 municipalities in total.

BiH administration as well as entities is functioning on the principles of the public administration that are defined in the laws regulating administrative procedure. Therefore, the following principles were defined: the principle of legality; the principle of protection of the rights of the parties and protect the public interest; the principle of efficiency; Mace truth; the principle of hearing the parties; the principle of free evaluation of evidence; the principle of independence in solving; Principle Two Instances or the right to appeal; the principle of finality and the decision; the principle of judicial economy; Principle of providing assistance to unskilled client; the principle of use of language and script.

Reviewing the afore-mentioned principles from the aspect of the Aarhus Convention implementation, we hereby mention two principles: the principle of two instances in resolving disputes or rights to dispute. This principle leans on the Aarhus Convention since it stipulates that the party has the right to complain against the decision passed in the first instance court. Only the law may prescribe that complaint is not permitted in certain cases and if legal protection is provided in different way. Furthermore, this principle prescribes that if there are no second degree administrative bodies, complaint may be submitted only if permitted by the law and this law shall stipulate which bodies will act upon it. This principle defined the situation of “administrative silence” – lack of response from an administrative body, hence it is stated that the party has right to complain when first degree bodies pass decision upon their request or do not pass decision in the procedure initiated as official duty and in the interest of the party. The principle of finality and legally binding, as another principle that is closely related to the implementation of the Aarhus Convention, states that a decision against which no appeal may be lodged, nor an administrative dispute, could be annulled, repealed or amended only in cases prescribed by law. These two principles enabled implementation of the Aarhus Convention in full.

**3. Decision-making procedure relating to the environment in the following areas (please indicate the type of decision, whether the public should be informed about the procedure and its documentation, has a right to participate, there is a time limit for comments to be submitted). Please elaborate your answer in light of article 6, paragraphs 1 (a) and (b), paragraphs 10 and 11, article 7 and Annex I, paragraph 22, of the Aarhus Convention.**

The public, according to the definition by the Law of Environmental Protection in RS and FBiH, entails one or more natural persons or legal entities, their associations, and groups affected by the decisions on issuing or revision of permits and who have interest in bringing such decisions.

Pursuant to the Article 39 of the Law on Environmental Protection RS and Article 36 of the Law on Environmental Protection FBiH, the public shall be informed via public media on possibilities of participation in the procedures of evaluation on the impact on the environment, issuing ecological permits and suggested activities that could have significant impact to the environment. Information via public media entails provision of information on proposed activities including information on i.e. initiating procedure, possibility of public participation, time and place for public dispute if planned, to official bodies who can provide important information and where public can access important information, issues and deadline for submitting objections or questions, condition of environment relevant for the proposed bills; fact that the activity is subject to the entity or cross border evaluation of impact to environment; proposal of solution for issuing environmental permits. In the process of public access to documentation, during 30 calendar days from the first day of insight, interested party may submit comments, suggestions or proposals issues of observations, opinions and suggestions of the public authorities are not obliged to adopt, but are required to register.





## **(a) Construction requiring Environmental Impact Assessment or OVOS/Expertise**

### **Republika Srpska**

Environment Impact Assessment represents identification, determination, analyses and evaluation of direct and indirect projects' impact with regard to the elements and factors such as people, flora and fauna, land, water, air, climate, landscape, material goods, cultural heritage, mutual relations amongst them (Article 60). It is being conducted for the projects that may have the impact on the environment taking into consideration its nature, size or site. During the procedure decision on the impact study should be acquired and it should be done in two phases: during the preliminary impact assessment where the decision is to be made on the necessity of implementation, volume, and the procedure itself. (Article 61)

In the process of considering and deciding on the request for the preliminary environmental impact assessment, the Ministry as competent decision-making body, is required to submit a copy of the application and provide insight into the attached document for consultation with the following entities that are obliged within 30 days to submit their views as follows: a) the administrative body in charge of construction in the local authority in whose territory the project would take, in cases where the Ministry is responsible for issuing location conditions; b) administrative bodies and organizations responsible for protection of the environment, the implementation of the project may have substantial impact, such as: bodies responsible for the protection of nature, bodies responsible for protection of cultural-historical and natural heritage, authorities responsible for agriculture, forestry, water management authorities responsible for the protection of health, other interested bodies and the body responsible for the protection of the environment of the other entity and Brcko District, if it is a project with a significant impact on the environment of the other entity or Brcko District, or another state. (Article 65)

In accordance with Article 69 and 70 of the Law on Environmental Protection (RS) the applicant is obliged, within 15 days from the submitted request, to send public notices on the submitted request in one daily newspaper distributed on the entire territory of the Republika Srpska. This notification allows public access to documents that are available in a local self-government in the territory where is a planned project. A public hearing on the submitted application must be held within 60 days from the date of submitting the application on issuance of the decision approving the study of impacts to the environment, a call to the public should be published at least 15 days prior to the public hearing. A public hearing conducted by the ministry, as noted above, the applicant is required to organize the same. At the public hearing, applicant is required to keep minutes, which the organizer of public debate must submit to the competent Ministry within eight days of the event. Comments shall be published 30 days from the date of the public hearing, and submitted to the Ministry. Ministry has obligation within the 15 days to give its evaluation and if necessary an additional deadline of 30 days for potential amendments to the Study.

*Regulations on the projects that carried out assessment of the environmental impact and the criteria for deciding on the need for and scope of the assessment of environmental impact (RS Official Gazette no. 124/12).* The competent ministry is in charge of those. Also, there are projects for which the Ministry in each case decides on the need for studies of environmental impact. However, the Ministry also has the authority to decide in individual cases on the need to conduct impact studies for projects that do not meet the prescribed threshold, if it considers that the project could have a significant impact on the environment. In all other cases, the projects are listed below thresholds.

### **Federation of Bosnia and Herzegovina**

Environmental impact assessment involves the identification, description, evaluation, direct and indirect impact of the project or activity on: people, flora and fauna; land, water, air, climate and space; material assets and cultural heritage, the interaction of the above factors. Environmental impact assessment can be carried out in two phases; prior environmental impact assessment and studies on the impact on the environment. (Article 57). The competent Ministry shall submit the application referred to in paragraph 1 of this Article with the accompanying documentation to the competent authorities and interested parties as is the case in the Republika







Srpska, in order to provide suggestions and objections. The deadline for submission of suggestions and objections is thirty days from the receipt of the request (Article 58).

When it comes to public participation, it is regulated by Article 61 of the Environmental Protection Law FBiH, which stipulates that the public is invited via the press in the Federation, and that the instructions and that comments from the public should be submitted to the competent Ministry within 30 days of informing the public.

Unlike the Republika Srpska, a public hearing is organized by the competent Ministry (Article 62) in the space closest to the location project and the public is informed at least 15 days before the hearing.

*Regulation on plants which require an environmental impact assessment and plants and facilities allowed to be constructed and commissioned only if they have environmental permit (FBiH Official gazette no. 19/04) that the competent Federal Ministry decides on the subjects listed in this Regulation, and that in all other cases, decision shall be made by the competent cantonal Ministry. This refers to the plants and installations under the Federal Ministry of Physical Planning and Environment mandatory procedure. The Ministry carries out an environmental impact assessment in the process of issuing environmental permits. The Ministry decides whether it is necessary to have environmental impact assessment in the process of issuing the environmental permit (Article 1 of the Regulations)*

#### **(b) Permit(s) allowing releases into the environment**

Ecological permit shall represent a document entailing measures for prevention or when that cannot be accomplished, decrease of emission into the air, water, land and prevention of waste to realize high level of environmental protection. Competent bodies for issuing ecological permit, pursuant to the Rulebook on Facilities that can be built and operated only with ecological permit, is the Ministry for Spatial Planning, Ecology, Construction and in all other cases, local administration units.

##### **Republika Srpska**

After receiving an application for the environmental permit, the competent Ministry has an obligation to inform the public about the content of the Request for environmental permit in one of the daily newspaper distributed throughout the territory of the Republika Srpska. In addition to the competent Ministry, local authorities at the territory where the object for which the Environmental Permit was issued is situated, also inform the public and present the application and attached documents, to which the public may, within 30 days from the date of publication submit their opinions and suggestions. (Article 88). Upon completion of the public review, the Ministry will make decision on the environmental permit within 60 days of receipt of the application for issuance. The competent Ministry shall, besides delivery of the permit to the Applicant, deliver the permit to the inspection body and one unit of local administration within 15 days from the day of passing. Besides that, the public shall be informed on the decision in one of the papers distributed in Republika Srpska and on the internet page within eight days from the day of decision delivery. This information should contain decision content, basic reasons for the decision. Issued ecological permit shall be valid for five years. (Article 90).

##### **Bosnia and Herzegovina Federation**

The Law on Environmental Protection did not regulate the area of public participation in permit issuing but established public participation postulates in the article 36 and 37 pursuant to the Aarhus Convention.

#### **(c) (City) Planning procedures**

##### **Republika Srpska**

The spatial planning documents shall be deemed documents which determine the organization, purpose and method of use and management of space, and the criteria and guidelines for the protection and spatial planning (Article 2, paragraph 1, item of the RS Law on Spatial Planning and Construction. There are two types of spatial planning, strategic and executive:

The strategy papers are adopted for a period of 20 years and these are:

- Spatial Plan of the Republika Srpska
- Spatial plan of special purpose of the Republic of Serbian





- Joint spatial plan for the territory of two or more units of local government
- Spatial plan of local governments
- Urban plan

Executive documents are made for a period of 10 years and these are:

- Zoning Plan
- Zoning Plan for special purpose areas
- Regulatory Plan
- Urban Plan
- The Allotment Plan (Article 25 of the Law)

After receiving the application for the environmental permit, the competent Ministry has an obligation to inform the public about the content of the Request for environmental permit in one of daily newspaper distributed throughout the territory of the Republika Srpska. In addition to the competent Ministry, local authorities at the territory where the object for which the Environmental Permit was issued is situated, also inform the public and present the application and attached documents, to which the public may within 30 days from the date of publication, submit their opinions and suggestion (Article 88). Upon completion of the public review, the Ministry will gather opinions and suggestions of the public and decide upon environmental permit within 60 days of receipt of the application for issuance.

Local governments are responsible for:

- Spatial plan of the local government units
- Zoning plan of a special purpose local governments
- Urban plan-for cities and urban settlements
- Zoning plan-for spatial units, subunits or individual zones within the urban area of local self-government
- Regulatory Plan for pre-built urban areas and in areas of common interest of local governments, if it is determined by the urban plan.
- Urban design-for areas that are built as a whole or are already substantially built, in areas where the need for the formation of groups of buildings or architectural and urban complexes, in areas that have special cultural and historical importance, for areas that have special natural character, as well as for other areas, if required documents higher order or a wider area
- The plan for the parcelling-contact zones of cities and centers of local governments, which are in great territorial expansion and suburban villages in the transformation and objects of public utilities infrastructure (Article 26).

Regardless of the fact, whether those are strategic or implementation documents, the Law defined unique procedure of preparation, development and passing of the spatial planning documents. During spatial planning, the public is getting involved in the stage following the development consent, or changes and amendments to the spatial planning. The bearer of preparation is then obliged to prepare at least two media outlets and publish an invitation to interested parties who are owners of real estate in the scope of spatial planning documents. They must submit their proposals and suggestions for specific planning solutions on the land or buildings, within 15 days (Article 42). Before establishing the draft spatial planning document, the bearer of preparation at this stage involves the public in the debates attended by the Council members and representatives of the bodies and entities responsible for water supply and wastewater disposal, electricity, heat and cooling energy, telecommunications and postal services, management of public roads in the village and outside the village, protection of the cultural and natural heritage, fire protection, waste management, environmental protection, land consolidation and seismic activity. Such a call is submitted at least seven days before the hearing with all necessary documents. After accompanying comments, opinions and suggestions of those faces on the preliminary draft approach to drafting. (Article 46).

The draft, as such, is determined on the relevant Assembly, and it stipulates place, time and manner of presentation of the draft for public review. Public inspection lasts at least for 30 days. The public is notified through an advertisement published in at least two public information media, twice, with the first notice published eight days before the start of the public review, and the other 15 days of the presentation of the draft of spatial planning documents for public inspection. This draft is exhibited in the premises of the competent authority for spatial planning, in the premises of local communities, in the premises where documents were drafted, in the premises where professional discussions are held, in the premises of local communities, at the





places where zoning plan, regulation plan, urban project and allotment plan are presented. At each place where it is exposed, the public must be informed with more detailed information, explanations and assistance in the formulation of objections that can be obtained from the holder of preparation and drafting documents.

Comments, suggestions and opinions are written in a notebook with numbered pages, which is in the room where the plan is exposed or in writing submitted to the person preparing documents and forwarded to the project leader. (Article 47).

Further on, the project leader is obliged to consider all objections, proposals and opinion delivered during the public debate and prior to determining proposal for spatial planning to have stance and to deliver the same in the written form to the preparation executor and persons who sent their proposals, objections and opinions. Therefore, the proposal of the document is determined based on the draft that was published with all objections, proposals and opinions. In the document proposal, decisions from the draft cannot be changed except for those with serious objections, proposals or opinion. Furthermore, the stance of the project leader is discussed at the public debate within 30 days from the day of closing public debate and where all representatives of preparation and execution sides are invited. This public debate requires public invitation in at least one daily paper available for the territory of Republika Srpska three days prior and on the day of discussion where all interested parties can participate. (Article 48).

If the proposal of spatial planning documents, developed based on accepted suggestions, comments and opinions and submitted during the public review, differs significantly from the draft document, the holder/bearer of preparation is required to organize a new public review. During the public consultation, new suggestions, comments and opinions can be made but only on the part of the document that has changed after the first public consultation. This process can be performed up to two times, after which a new decision can be made in the form of amendment or supplement to physical planning documents (Article 49). Proposal of spatial planning documents shall be established in accordance with the conclusions of the hearing no later than 30 days, after which the competent Assembly shall decide on the draft spatial planning documents within 60 days after the proposal. The same has the status of public document and exposes a graphical and textual part of the permanent public display at the administrative authority for urban planning and is published on the website of the competent authority. (Article 50). Thus, the public participation process is completed.

### **Bosnia and Herzegovina Federation**

FBiH entity pursuant to the *Law on Spatial Planning and Land Utilization in FBiH* recognizes slightly different documents for spatial planning called Planning documents that entail organization, using and purpose of the land, and measures and directives for environmental protection.

Planning documents are:

- Spatial Plan:
- Spatial Plan of the Federation of Bosnia and Herzegovina (hereinafter: Spatial plan of the Federation) - FBiH Parliament –responsible
- Spatial Plan of the Canton-responsible -legislative body of the Canton
- Spatial plan of areas with specific characteristics of Parliament of FBiH,
- Spatial Plan of the municipality (except for the municipalities that are part of the cities of Sarajevo and Mostar); responsible for making the legislative body of the Canton
- Urban plan cantons or municipalities - the competence of the cantonal legislature or municipality
- Detailed planning documents
- Regulation plans,
- Urban projects. (Article 6)

When it comes to public participation in the Federation of Bosnia and Herzegovina, its share is not defined by law but by Article 7 of the *Decree on unique methodology for preparation of spatial planning documents (FBiH Official gazette no. 63/04, 50/07)*. Thus, according to the Regulation at all stages of preparation and development of spatial planning documents, at all levels of spatial planning in the Federation it is necessary to provide for public participation. Holder of preparation (and / or the Council plan) is obliged to draw up a program of public involvement in the process of preparation and development of all physical planning documents. Such a program





of public involvement is an integral part of the program and plan activities for the preparation of spatial planning documents. The program involving the public precisely define ways of involving the public (organizing lectures, panel discussions, public hearings and other forms of public involvement) in all stages of preparation and development of spatial planning.

**(d) Licensing /permitting procedures for mining**

Laws regulating this area are neither envisaging public participation nor access to justice.

**(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes).**

**Hunting**

Laws regulating this area are not stipulating public participation nor access to justice.

**GMO**

Bosnia and Herzegovina adopted the *Law on Genetically Modified Organisms (BiH Official Gazette no. 23/09)*, following the principles of information and participation of the public in the initiated procedures of license issuing for limited needs in the closed systems as well as publishing approval for intentional introduction of GMO in the environment. Therefore, competent bodies have obligation, pursuant to the Article 17, to present to the public every activity entailing limited use of GMO for the activities of directed risk. For this level of risk, the third level of control and protection of human life, health and environment is planned. Fourth level of control is planned for the activities of great risk as well as for the intentional introduction of GMO in the environment. Therefore, competent bodies may publish public call and present to the public content of the request, technical documentation, risk assessment and GMO council opinion. The deadline for publishing is 30 days, and permit issuing requires also explanation with the objections and opinion of the public (Article 17). However, the law itself did not regulate access to justice, therefore the public have right to legal remedies in case of the issuing of Decision which permits the above-stated activities pursuant to article 9 of the Aarhus Convention and the laws regulating administrative law.

**Pesticides, chemicals**

*The Law on Biocides (RS 37/09)*

*The Law on Chemicals (OG RS 25/09)*

*Traffic Law Poison (FBiH 2/92, 13/94)*

Laws regulating this area are not the issue of public participation not access to justice.

**4. The structure of the judiciary in your country (types of judicial bodies, jurisdiction in judicial review of authorities' decisions, acts or omissions in environmental matter).**

**Judiciary structure in BiH and entities:**

The Law on High Judicial and Prosecutorial Council (BiH Official Gazette 25/04, 93/05, 32/07, 48/07, 18/08)

BiH Law on Court– consolidated text (BiH Official Gazette 49/09, 97/09)

Republika Srpska Law on Courts (RS Official Gazette no. 37/12, 44/15)

Federation BiH Law on Courts FBiH Official Gazette no. 38/05, 22/06, 63/10)

**Bosnia and Herzegovina Court System**

Considering the complexity of the Bosnia and Herzegovina, it may be said that courts in BiH are divided to state and entity level. BiH level has Constitutional Court of BiH and BiH Court. Entities have different disposition of courts hence Federation of BiH has Constitutional Court of FBiH, Supreme Court of FBiH, cantonal and municipal courts, whilst Republika Srpska has RS Constitutional Court, Supreme Court, district and municipal courts as courts of general competence and jurisdiction.

When referring to the court competences, they differ depending on the level of the individual court. In cases of environmental protection (Decision approving assessment study and ecological permit) administrative





competence of courts are in charge, since these procedures are of administrative character. Therefore, the following system of courts is presented as follows:

### **Bosnia and Herzegovina**

The Constitutional Court of Bosnia and Herzegovina decides on appeals of individuals and legal entities if the appellant considers that some of the guaranteed constitutional rights are threatened.

### **Bosnia and Herzegovina Court**

Administrative competence

In the administrative matters, the court is competent at first instance to decide upon the following:

- actions taken against individual and general final administrative acts, including administrative silence, the institutions of Bosnia and Herzegovina adopted in the exercise of public authority, in accordance with the law of Bosnia and Herzegovina;
- the requirements for the protection of the rights and freedoms of citizens guaranteed by the Constitution of Bosnia and Herzegovina where these rights and freedoms were violated by a final act of the institutions of Bosnia and Herzegovina with no other judicial protection.

The BiH Court is particularly competent to review the legality of individual and general enforceable administrative acts adopted under State law, in the exercise of public duties and authorities of Bosnia and Herzegovina, for which the law does not provide judicial review. Apart from jurisdiction to adjudicate in the first instance, the Court has jurisdiction to decide on extraordinary legal remedies against the first instance judgment of the Court issued in administrative cases.

### **Federation of Bosnia and Herzegovina**

**Constitutional Court of Federation BiH** decides upon appeals to natural persons and legal entities if appellant considers one of his constitutional rights endangered.

### **Federation BiH Supreme Court**

FBiH Supreme Court is competent:

- to decide on regular legal remedies against the decisions of the cantonal courts, if it is provided by law;
- to decide on extraordinary legal remedies against final decisions of the courts as provided by law;
- to decide on legal remedies against the decisions of its Council, unless the law provides otherwise.

### **Cantonal courts in the Federation of Bosnia and Herzegovina**

The Cantonal Court in Bihac

Cantonal Court in Gorazde

Cantonal Court in Livno

Cantonal Court in Mostar

Cantonal Court in Novi Travnik

Cantonal Court in Odzak

The Cantonal Court in Sarajevo

Cantonal Court in Siroki Brijeg

Cantonal Court in Tuzla

Cantonal Court in Zenica

Cantonal courts decide in all administrative disputes, as well as the requirements for the protection of the rights and freedoms established by the Constitution, if such freedoms and rights were violated by a final individual act or action of an official in the administrative bodies, or the responsible person in the company, institution or other legal entity when the protection of these rights no other judicial protection.





## Republika Srpska

### Republika Srpska Constitutional Court

Constitutional court decides upon appeals to natural persons and legal entities provided that appellant considers one of his constitutional rights endangered.

### Republika Srpska Supreme Court

- decides on regular legal remedies against the decisions of the 5 district courts, if it is provided by law;
- decides on extraordinary legal remedies against final decisions of the courts as provided by law;
- decides on legal remedies against the decisions of its Council, unless the law provides otherwise.

### Republika Srpska District Courts

- The District Court in Banja Luka
- The District Court in Bijeljina
- The District Court in Doboj
- The District Court in Eastern Sarajevo
- The District Court in Trebinje

*The district courts* decide all administrative disputes according to the seat of the first instance administrative authority, as well as the requirements for the protection of the rights and freedoms established by the Constitution, if such freedoms and rights were violated by a final individual act or action of an official in the administrative bodies, or the responsible person in the company, institution or other legal entity, when the protection of these rights are not provided by other judicial protection.

In Republika Srpska, there are 27 municipal courts which have no authority to resolve claims relating to environmental protection in addition to serve filing the civil remedy to protect the interests of natural or legal persons.

### Are there judges specializing in environmental cases?

BiH courts and entities still do not have practice in dealing with cases in the field of environmental protection hence it can be said that there are no judges specialized for the work in this field.

### Do the courts have technicians of their own?

There are data basis of experts in certain fields. Based on those, courts do not have their own experts but hire experts from the list when necessary. When it comes to the experts, there are those specialized in environmental protection, forestry, agriculture, mining, geology, geodetic, construction and architecture areas and those are fields directly or indirectly connected to the environmental protection. Their engagement is based on the invitation from the party. So far no judge hired experts in environmental protection for the cases.

### Do judges have education and training in environmental law and the Aarhus Convention?

Major role for judges training is played by High Judicial and Prosecutorial Council (HJPC) which has an aim to continuously contribute to the strengthening of the rule of law in BiH, ensuring independent, impartial and professional judiciary hence enabling equal access to justice and equality of all citizens before the law. HJPC competences are defined by the Law on HJPC, and one of the competences and tasks is continuous education of judges and prosecutors. Therefore, this body has been continuously organizing and implementing seminars in various fields. However, environmental protection is not sufficiently present; thus, those seminars are not included. Cooperation between OSCE in BiH and HJPC few years ago enabled logistics of newly founded Aarhus Centres in BiH (Banja Luka, Tuzla and Sarajevo) organizing several seminars on the topic and presenting judges and prosecutors with the basis and application of the Law on Free Access to Information specified for environmental protection. Beside HJPC there are entities' public institutions including Center for education of judges and prosecutors FBiH/RS and OSCE has cooperation with Federal Center on presentation of the Aarhus Convention but stronger cooperation with them and with RS Center was never established.





**Please indicate if you know what training methodologies and tools are used?**

Non-applicable.

**5. Does the public (individuals and ENGOs) have a right to challenge in court the decisions on specific activities relating to the environment, in relation to article 6, paragraphs 1 (a) and (b), paragraphs 10, 11 and Annex I, paragraph 22, of the Aarhus Convention?**

The public, according to the definition by the Law of Environmental Protection in RS and FBiH, entails one or more natural persons or legal entities, their associations, and groups affected by the decisions on issuing or revision of permits and who have interest in such decisions. The environmental non-governmental organisations (ENGO) shall be considered as association or foundation promoting environmental protection. Pursuant to the RS and FBiH Laws on Environment Protection, it is necessary to make difference between interested party (stakeholders) and interested public. Interested party is a physical entity with residence or legal entity with address registered in the area that will be impacted by the decisions regarding the environmental protection.

If an individual who has direct interest or ENGO tackling environmental protection participate in the procedure of public participation for EIA or environmental permit, the Law then allows ENGO and individuals to assume the role of active party, hence participate in the procedure of commenting to the EIA or environmental permit. They have the rights to legal remedies, including appeals to the second instance bodies or initiation of an administrative dispute. On the other hand, concrete practice showed that if an individual or ENGO did not participate in the process of public participation, article 9 of the Aarhus Convention enabled the right to actively participate in these processes.

Both interested parties and public respectively may participate in the process of decision making in the area of environment protection. Interested parties show their interest to participate in the procedure by the mere fact that the decision made will directly impact environment they live in. Interested public justifies its interest in the procedure by making life environment for one of their statutory objectives.

Provided that individuals or NGOs participate in the process of public participation in decision making in the area of environmental protection, then the laws on environmental protection provided the option of using legal remedies following the passing of such decision. However, it often happens that ENGOs for some reason fail to respond within the deadline in public participation, which is the precondition to use legal remedies against such decisions. When NGOs find out about the decision that is made, they have a right to use legally prescribed deadline to dispute the decision on the higher instance pursuant to article 9, paragraph 2, of the Aarhus Convention.

Pursuant to the Law on Environmental Protection in the RS and the Law on Environmental Protection of the Federation of BiH, decisions tackling permit issuing for the Assessment Study may be "invoked" by the court in the administrative court dispute. Furthermore, depending on the permit issuing body, the procedure may be as follows: if the permit is issued by the local government unit in RS or canton in the FBiH, the appeal against it to the second instance body is permitted i.e. RS Ministry of Spatial Planning Construction and Ecology and FBiH Ministry of Environment and Tourism. Once the competent ministries decide upon the appeal, the lawsuit to the courts may be submitted in cases for administrative disputes at the district courts in the Republika Srpska and cantonal courts in Federation. The same is when the decision on assessment study and ecological permit is issued by the competent ministries hence district and cantonal courts have jurisdiction.

Audits and renewal of environmental permits in Republika Srpska are regulated by the Rules of Procedure for Audit and the Renewal of the Environmental Permit (RS Official Gazette no. 28/13). This RoP stipulates that the review is initiated ex officio, if it is determined that the pollution is higher than the existing emission limit values specified in the permit. In that case, it determines the new values in the permit. Review is issued in case of significant changes in the best available techniques that allow significant reduction of emissions without higher costs; when there is a situation that the safety of work and activities required the use of other techniques; when there is a danger of pollution or harm to human health, and when changes in regulations on environmental protection are made. Rules did not prescribe public participation and access to justice in terms of renewal and





revision of environmental permits. Article 6 specifies that any new decision should be placed on the website within eight days from delivery of the decision. Thus, active ENGOs and individuals in process of revision of environmental permits, in accordance with article 9 of the Aarhus Convention are allowed to access to justice and the right to legal remedies.

Renewal of environmental permit in the Federation of Bosnia and Herzegovina is regulated by the Law (Article 74) according to which the competent ministry is considering or amending environmental permit for reasons of pollution generated by the operation and installation that are so significant that they must change the existing emission limit values, then if there have been significant changes in the best available technologies that allow a significant reduction of emissions without major cost and safety of the work and activities require the use of other technologies. The law does not prescribe a duty public involvement in the process of revision and renewal such as publication of the decision on the website.

Access to information on the issue of genetically modified organisms in the legislature, established the *Law on Environmental Protection (Official Gazette of the Republic of Srpska 7/12, 79/15, Official Gazette of the Federation of Bosnia and Herzegovina 33/03, 38/09, Official Gazette Brcko District of Bosnia and Herzegovina*

*24/04, 1/05, 19/07, 9/09)*. Thus, in the FBiH this Law in Article 30 stipulates that environmental information within the legally prescribed forms may be requested on the issue of genetically modified organisms. The Act also states in Article 104 that the activities concerning genetically modified organisms are considered as dangerous. The RS law refers in Article 14 to the genetically modified organism as a dangerous substance that can look for information in a form prescribed by law. Based on this, Bosnia and Herzegovina adopted the Law on Genetically Modified Organisms, published in the Official Gazette No. 23/09, which follows the principles of information and public participation in the procedures of issuing a limited use in closed systems, as well as authorization for the deliberate release GMOs into the environment / environment. In this regard, the competent authority has an obligation to comply with Article 17 and enable public to have access to any activity that involves limited use of GMOs. Accordingly, the competent authority shall issue an invitation to consultation and make publicly available content of the application, content of technical documentation, risk assessment, and opinion of the GMO panel. The time limit in which the public can provide comments is 30 calendar days, and the issuance of approval by the competent authority is obliged to enter in the explanation and comments on public remarks and opinion. (Article 17). However, the law still does not regulate access to justice against GMO decisions. FBiH does not have its law on GMO hence the laws on the BiH level are applied. Republika Srpska adopted the Law on GMO (SG RS no 103/08) and it did not implement pillars of the Aarhus Convention, public participation and access to justice.

**6. Does the public (individuals and ENGOs) have a right to challenge in court acts/omissions by public authorities “which contravene provisions of its national law relating to the environment” (article 9, paragraph 3, of the Aarhus Convention)?**

Regardless whether those are activities contrary to the provisions of the domestic law or activities as stated in the item 5, public, individuals and eNGOs have right to dispute all decisions of competent bodies passed in the procedures with regard to environmental protection. When it comes to omissions, acts or failure to act by private persons, decisions that can be disputed in the procedures with regard to environment are those of competent bodies but tackling private persons. When it comes to omissions, acts or failure to act of private persons in the concrete projects, such failure to act may be disputed only in civil proceedings where the personal interest has been undermined. Besides, it is possible to hire inspection bodies in order to check whether permitted parameters are respected in concrete activities, which entails initiating of administrative procedure.

**II. Who can be reviewed?**

**7. Decisions of which public authority under article 9, paras. 2 and 3, of the Convention are subject to judicial and administrative review? Are all decisions of these authorities subject to judicial review? If not, which decisions or public authorities are not subject to such checks and on what grounds?**







Decisions passed by public officials in the procedures of environmental protection may be of first and second instance decisions. In the FBiH first instance decisions are passed by cantonal ministries and the second instance are passed by the Federal Ministry of Environment and Tourism. First instance decisions in the Republika Srpska are passed by municipalities and second instance decisions are passed by the Ministry of Spatial Planning, Construction and Ecology. The first instance decisions are subject to administrative supervision hence the appeal is possible to the second instance body provided that the law does not stipulate differently. The second instance decisions are subject to administrative-judicial control hence lawsuit may be submitted to the district or cantonal court. Acts, first and second-instance decisions passed in the environmental protection procedures (EI and environmental permits) are subject to the administrative supervision in the second instance or administrative court supervision.

### III. What decisions, acts or omissions can be reviewed?

**8. What public authorities' decisions/acts/omissions are subject to judicial and administrative review in the areas of decision-making as indicated below that can be initiated by the members of the public meeting the criteria laid down in the national law? Are there differences of criteria for eNGOs and individuals? Is there time-limit for decisions/acts/omissions to be reviewed? Please elaborate in light of article 9, paras. 2 and 3, of the Aarhus Convention.**

#### **Republika Srpska**

The third pillar of the Aarhus Convention is properly reflected when compared to the previous two pillars. Therefore, when it comes to the first pillar, every person thinking that his/her request for access to information has not been considered, or unfoundedly refused, totally or partly inadequately answered, has a right to initiate procedure to protect his/her rights. (Article 41.)

The law further tackles representatives of a stakeholder or bodies which participated in the procedure of decision making and public participation, to be able to use legal means against such decision and it also deals with the behaviour contrary to the environmental protection. Representatives of interested parties or parties that participated in the public procedure of passing EIA or environmental permit have right to use the legal remedies against such decisions. These representatives also may instigate procedure before the bodies in charge so as to protect their rights in case someone acts against the principles of environmental protection (Article 42).

#### **Federation of Bosnia and Herzegovina**

Environmental Protection Law of the Federation of Bosnia and Herzegovina is implementing the provisions of the Aarhus Convention in its entirety. When it comes to the access to justice, it prescribes that this particular item can be applied in relation to the other two pillars. Thus, pursuant to the first pillar, it provides that an applicant whose request for information is not considered, or is unfairly denied, or in part inadequately answered, has the right to institute proceedings to review the decision before an appellate authority, in accordance with the provisions of the Administrative Procedure Act. (Article 38).

Furthermore, the law defines and access to justice in terms of implementing the second pillar of the Aarhus Convention and, in its provisions, stipulates that representatives of interested stakeholders who participated in the trial have the right to appeal against the decision or part of the decision. The law still refers to the principles of environmental protection. It stipulates that representatives of stakeholders, interested parties or bodies, besides right to participate in the cases of permit issuing or impact assessment, have a right to initiate the procedure of protection before the competent bodies if someone behaves contrary to the principles of environmental protection. In this sense, the law further develops actions that the court may order during its decision-making and thus provides that the court may order the legal entities and individuals to take the necessary remedial action, including the suspension of certain activities and / or payment of claims; then oblige the legal entities and individuals to pay the fees in the Federal Fund for Environmental Protection; and to impose provisional measures (Article 39).

**(a) Construction requiring Environmental Impact Assessment or OVOS/Expertise.**





Both laws did not specify in detail the provisions pertaining to the study of the environmental impact that those decisions in which the public took part, allowed access to justice, but in its general provisions as set out above gave the right to file legal remedies and legal protection.

**(b) Permit(s) allowing releases into the environment**

Both laws did not stipulate in details in the provisions referring to the ecological or environmental permit that against such decisions, with the public participation, access to justice is allowed however they provided in the general provisions the right to submit the legal remedy and legal protection.

**(c) (City) Planning procedures**

Laws did not define legal remedy permitted for the decision adopting spatial planning document however in the entity constitutions it is defined that against such decisions, adopting spatial planning documents, constitutional review may be evoked before the Constitutional Court.

**(d) Licensing /permitting procedures for mining**

Laws did not stipulate participation of the public or right to legal remedies.

**(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes)**

**Hunting**

Laws in both entities in their provisions did not implement the second and third pillar of the Aarhus Convention.

**GMO**

Laws in this area did not allow legal remedies.

**Pesticides, chemicals**

The Law on Biocides (RS 37/09)

The Law on Chemicals (OG RS 25/09)

Traffic Law Poison (FBiH 2/92, 13/94)

Laws in their provisions did not implement the second and third pillar of the Aarhus Convention.

**(f) Other decisions/act/omissions not covered by above in light of article 9, para. 3, of the Aarhus Convention.**

This means that permitting, concessions, licenses under these laws can be challenged via administrative or judicial procedure, general laws should apply here.

**9. Is an administrative appeal required for the decisions/acts/omissions indicated in question 8 prior to judicial review? What is the relationship between administrative appeal and judicial review?**

Laws on Administrative Procedure, which regulate basic principles of administrative procedures, prescribed the principle of two instances. Therefore, the appeal to the second instance body is permitted in first instance cases of environmental protection. When the second-instance body decides negatively upon the appeal, there is a possibility of initiation of administrative dispute. On the other hand, the second-instance decision cannot be appealed by applying the principle of finality. Filing of a complaint and initiation of an administrative dispute against such decision is allowed.

In order to initiate the administrative dispute, it is necessary to exhaust all legal remedies that are permitted and to create the conditions for the initiation of an administrative dispute. This means that if it is a first instance decision, it may be appealed to the second instance body and once the case is solved, there is a possibility to initiate administrative dispute. In addition, there are situations when the competent authority does not address a particular issue in the legal deadlines, and on the basis of that, the institute "silence of the administration" is created. This institute stipulates, that if the first instance and second instance bodies do not solve case within the statutory time limits, the party has the right to initiate an administrative procedure, observing the provisions of the law that stipulated that if the appeal lodged by a party at whose request the first instance body has not issued a decision, the appellate authority shall request the first instance authority to state the reasons why the





decision was not issued within the deadline. If it finds that the decision was not made within the deadline for legitimate reasons, or the party is to be blamed, it will determine the first instance authority deadline for issuing a decision. This deadline shall not be longer than a month. If the reasons for delay are not justified, the second instance body shall require the first instance body to issue the decision. Furthermore, the law stipulates that if the appellate authority can solve the matter pursuant to the case file, it will pass decision and if not able, it will conduct the procedure and with its decision, resolve the matter. Exceptionally, if the second instance authority finds that the procedure may be faster and more efficiently implemented by the first instance authority, it shall order to do so and that the collected data is delivered within a specified period, after which it will solve a matter. This decision is final. (*Article 231 Law on Administrative Dispute RS, Article 243. Law on Administrative Procedure FBiH, Article 234 Law on Administrative Procedure BiH*).

Silence of administration, as the institute, stipulates that when the second instance organ is silent, so that the law lays down that if the appellate authority has not issued a decision on the appeal against the decision of the first instance, within 60 days or within the special shorter deadline, and fails to do so and in further period of 15 days repeated request, the party may initiate an administrative dispute as if the appeal was rejected. The law also prescribed when the first instance body does not issue a decision, and the second instance is silent, the party has a right to submit the appeal to the second instance body provided that first instance body did not pass decision upon request within 60 days or the special shorter deadline. Administrative dispute may be initiated against the decision of a second instance body in a situation and under circumstances as described above. (Article 17 of the Law on Administrative Dispute RS, Article 21 of the Law on Administrative Dispute RS BiH, Article 20 of the Law on Administrative Dispute RS FBiH)

**10. Which system of jurisdiction is competent to verify these decisions/acts/omissions indicated in question 8? Please indicate if different for individuals or eNGOs.**

The appeal is submitted to the next higher level authority, and a lawsuit is filed to the competent court for resolving disputes in the administrative court proceedings. Both appeal and lawsuit should fulfil certain preconditions. The law prescribes that appeal is to be submitted within 15 days from the day of decision delivery. The appeal is then sent by mail to the body which passed the first instance decision. It then questions whether the same is permitted, timely or stated by the authorized person. When all suppositions are determined, it starts resolving the cases upon appeal and if it finds that they are not all fulfilled, it will discharge the appeal (Article 219 of the Law on Administrative Procedure RS, Article 231 of the Law on Administrative Procedure FBiH, Article 222 of the Law on Administrative Procedure BiH).

The action as a remedy against the decisions of the second instance authority shall be submitted within 30 days of the adoption of an administrative act and to the competent court. Before it starts debate, the court checks whether all documents are filed in a timely manner and in sufficient number of copies. (Article 19 of the Law on Administrative Dispute RS, Article 22 of the Law on Administrative Dispute BiH, Article 21 of the Law on Administrative Dispute FBiH).

The appeal to the Constitutional Court is launched only after they have exhausted all legal remedies, including an appeal, complaint, Exclusive Remedies with the judgment in an administrative dispute. The appeal shall be filed in order to protect the rights guaranteed in constitution within six months after the receipt of the decision of the competent court. After deciding on the appeal, the last instance where natural and legal persons may exercise their right is the European Court of Human Rights.

The law makes no distinction between individuals and ENGOS.

**11. Which kind of legal recourse is open against these decisions indicated in question 8? What are the relevant legal proceedings in this matter?**

Talking about legal resources, we should have in mind the principle of two-instance procedure. All first-instance decisions can be contested by complaint to the administrative court. Besides, the Laws on Administrative Procedure of RS, FBiH and BiH prescribed extraordinary legal remedies that may be used in the administrative





and administrative and court procedures. Administrative procedure prescribes two kinds of extraordinary legal remedies, case renewal and annulment of procedures (annulment or modification of decision).

Case renewal is an extraordinary legal remedy that may be used by individuals and NGOs, parties in the procedure. This legal remedy may be used against final decision. The law prescribes 11 reasons to initiate procedure, and during the current practice, the most common is the first prescribed reasoning i.e. if new facts are known or there is a possibility to use new proves that would lead to different decisions or when facts or proves were exposed or used in the previous procedure.

Special cases of annulment, termination or modification are other types of remedies that can be used by the administrative authority and the Public Attorney i.e.: 1. Changing and cancelling the decision regarding the administrative disputes, 2. Request for protection of legality 3. Cancellation and abolition of the right of supervision 4. Abolition and change of the final decision with the consent or at the request of party in the process 5. Abolition of emergency 6. Pronouncing decision annulled and void. Past practice has shown that the administrative bodies commonly used extraordinary remedy to repeal and modify final decision with the consent or at the request of clients. An attorney also has the possibility to control the work of administration, with extraordinary remedies but so far it is not known that it happened.

Administrative procedure as a kind of administrative and judicial review recognizes two kinds of extraordinary remedies that can be used in administrative court dispute which cannot be appealed: request for extraordinary review of court judgments and the second proposal for repetition of the procedure. Individuals or NGOs who are parties in the course of the proceedings, rarely use these opportunities, but when they do, it is usually a request for extraordinary review of court judgments.

#### IV. The grounds for review and its intensity

##### **12. Which control does the judge exercise on public authorities' decisions that are being challenged? Does the judge monitor substantive and procedural legality (e.g. the formal requirements of law, legal proceedings and/or reasons for these decisions)?**

When the judge receives the lawsuit, pursuant to the provisions of the Law on Administrative Procedures, he/she evaluates whether the lawsuit is timely submitted, or submitted by unauthorized person, whether the disputed act is administrative act. Further on he/she needs to assess whether that administrative act violates the right of appellant or his personal interest based on the law and whether it is possible to file the lawsuit against such act. The judge needs to see whether the case is subject to the administrative dispute and whether there was final verdict on the same matter in that particular administrative dispute. (*Article 22 the Law on Administrative Disputes RS, Article 25 of the Law on Administrative Procedures FBiH*). In case that there was one of the mentioned elements, the judge shall reject the lawsuit by decision.

Past practice in administrative disputes showed the judges when solving cases, first look at whether there has been a violation of procedural law during the course of administrative proceedings, hence if they find such injury, judgments made in administrative and court proceedings require that such defects and deviations are removed. So far in the practice of the courts, there was only one case when the Court engaged in discussion about the merits and which will be presented in detail in chapter 6.

##### **13. What is the basic philosophy of the courts' control of administrative decisions? Do the courts rely in the evidence that is produced by the other parties to the proceedings, or do they have a responsibility of their own to investigate the case in line with the so called inquisitorial principle?**

The Court resolves the dispute based on the facts that are established in the administrative proceedings. When the court at the hearing establishes different facts in relation to the facts established in the administrative procedure or violations of the rules of procedure, it shall annul the disputed act and the first instance act if it contained the same deficiencies, and itself solve the administrative matter (dispute of full jurisdiction) (*Article 29 RS Law on Administrative Dispute and Article 33 of the FBiH Law on Administrative Dispute*).





**14. For which kind of public authorities' decisions does the judge have limited control (e.g. only towards facts, procedural rules, errors in the applied laws or irrelevant matters taken into considerations, other)? In contrast, for which kind of public authorities' decisions does s/he exercise thorough control?**

There is no difference in the court work when compared to decisions that may have limited or detailed control. Administrative legal court acts pursuant to the principles of legality, and it examines legality of disputed act within the limits of request from the lawsuit but not limited to the reasons from the lawsuit.

**15. While exercising judge's power of judicial review how does the judge keep himself informed (appointment of experts, specialized and contradictory investigation, resort to universities, international sources consultation, etc.)?**

When making decisions in the judicial-administrative dispute, as previously stated, judges make decision on the basis of legality, and Law on Administrative Dispute stipulating that their judgments may have correctional or inquisition character (full jurisdiction dispute). However so far there was no case that judges hired experts or some other external body to assess facts and evidences stated in the lawsuit, concerning merit of the case, thus deciding in the full jurisdiction dispute.

**16. Do the courts have different approaches on e-NGOs' lawsuits and lawsuits of individuals?**

When we talk about lawsuits in the administrative – judicial dispute, the court does not have different approach regardless whether the lawsuit was filed by the natural or legal entity (ENGO). Furthermore, Law on Administrative Dispute stipulates that right to the instigation of administrative dispute have both natural and legal entity, if it is considered that administrative act violates some right or direct legal interest based on the law. (*Article 2 Law on Administrative Dispute RS and FBiH*).

**V. What are the outcomes of judicial review?**

**17. Do the courts have only cassation or also reformatory rights in cases under article 9 of the Convention? (Generally speaking, what is the outcome of a successful challenge of an administrative decision?)**

**Relevant regulations:**

The Law on Administrative Disputes of Bosnia and Herzegovina (BiH Official Gazette no. 19/02, 88 / 07.83 / 08.74 / 10)

The Law on Administrative Disputes FBiH (FBiH Official Gazette no. 9/05)

The Law on Administrative Disputes RS (RS Official Gazette no.109/05, 63/11)

Law on the Court of Bosnia and Herzegovina-consolidated text (BiH Official Gazette no. 49/09)

The jurisdiction in administrative litigation, in resolving cases based on the decisions of second instance body (ministry), have district courts in the Republika Srpska, Cantonal Courts in the Federation of Bosnia & Herzegovina and the Court of Bosnia and Herzegovina. Laws that regulate area of administrative disputes, regulate also the type of decision that the courts can bring upon completion of the procedure.

Pursuant to the stated laws, the court has right to accept the lawsuit or reject the same as unfounded. If the lawsuit is accepted, the act against which the lawsuit was filed is being annulled. Such a verdict returns the case to the competent body which passed disputed act to be decided again. Besides this, the court has also right to resolve administrative procedure in a way to completely replace disputed act. At the end, it has right to decide when the party, which initiated administrative dispute, is in the situation of „administrative silence“. (*the Law on Administrative Disputes BiH, Article 37, Law on Administrative Disputes FBiH, Article 36, Law on Administrative Disputes RS, Article 31*).

Judgments of courts in Bosnia and Herzegovina, which decide the administrative lawsuits, generally have a remedial character, from the fact that the judicial decisions taken in such proceedings indicate the error of the competent authority that issued the act, and such judgments give instructions in which direction to adopt a new





act. On the other hand, there are rare cases in which the court decided to discuss the merits of the case which would, if there are grounds, pronounce judgment that fully replaces such an act. Past practice in cases concerning the environment showed that the judgment by the courts in administrative court cases are almost always based on pointing out procedural errors with the instructions contained in the judgment, and that the competent authority should be corrected. The court rarely goes to the substance of the case.

#### **18. What are the limits of discretion by public authorities after the court decision?**

After the judgment is passed which stipulates and gives instructions in the direction of correcting errors or reopening of the procedure with the competent authority, the competent authority shall have 30 days to issue a new administrative act in accordance with the specified instructions. Past practice has shown that such periods are not respected and that the new act may be passed after 60 days, and that court instructions in the verdict are not respected. In such situations, the competent authority in the new act usually repeats the mistakes that it committed in the previous period or not following the instructions of the court, passes a completely different act from what is ordered. Such an act is again subject to administrative and judicial review.

#### **VI. Case-law**

#### **19. Please, if possible, briefly describe relevant case-law.**

##### **Environmental Impact Assessment for construction of small hydro power on the river Hrčavka**

The stated analyses represent participation in the procedure of approval of the Environmental Impact Assessment planned for the construction of hydropower station on the river Hrčavka in the National Park Sutjeska

##### **Document Chronology with Description**

*Information on the submitted Request for Assessment approval published in the daily paper Glas Srpske on the 19<sup>th</sup> of March 2013;*

*Public discussion on the Impact Study draft organized in the municipality Foca on the 5<sup>th</sup> of April 2013;*

*Objections from the 7<sup>th</sup> of May 2013 from the ENGO Centre for Environmental Protection on the impact study draft for the hydropower construction project MHE Hrčavka 1, Hrčavka 2 and Hrčavka 3*

Pursuant to the information, during the stated discussion, the association Centre for Environmental Protection (CEP) submitted objections with regard to the approval of the Impact Study. The objections detailed reasons why the stated study was not in accordance with the law, which was later stated in the lawsuit filed against Decision approving the Study.

*Order from the 17<sup>th</sup> of June 2013 of the Ministry to adjust the Study in accordance with the objections submitted during the public inspection lasting from the 15<sup>th</sup> of March to 10<sup>th</sup> of May 2013.*

Pursuant to the objections on the Impact Study during the procedure, the Ministry ordered to deliver filled in Study with the opinion of the competent bodies and comments pursuant to the Minutes from the Public Discussion. The Impact Study was then adjusted in accordance with the recommendations on the 26<sup>th</sup> of June 2013.

*Decision of the RS Ministry for Spatial Planning, Construction and Ecology on approval of the Impact Assessment Study no 15.04-96-8/13 from the 29<sup>th</sup> of July 2013*

This decision approves the Impact Assessment Study of projects MHE Hrčavka 1 (S-H-2), 2, (S-H-1) and 3 (S-H-3) on the river Hrčavka, municipality Foca. Installed power of the hydro power station Hrčavka 1 (S-H-2) is 0,367 MW, MHE Hrčavka 2 (S-H-1) is 3,337 MW and MHE Hrčavka 3 (S-H-3) is 1,07 MW. The project investor is DRINA HIDRO ENERGY d.o.o. Ugljevik. Impact Assessment Study has been developed pursuant to the provisions of the Law on Environmental Protection and bylaws passed pursuant to the Law and author of the Study was PROJEKAT a.d. Banja Luka, the institution authorised by the above stated ministry.





*Lawsuit from the ENGO Centre for Environmental Protection, Banja Luka no. 154/13 from 30.08.2013. against the Decision of RS Ministry for Spatial Planning, Construction and Ecology on Approval of the Impact Assessment Study no 15.04-96-8/13 from 29<sup>th</sup> of July 2013*

The Appellant, Environmental Protection Centre, pursuant to the legal remedy, filed the lawsuit against the second-instance decision of the Ministry. The lawsuit states that the particular site does not have spatial plan and that the previous plan expired hence such decision was not in accordance with the law. Besides that, the lawsuit states in details that the impact assessment study was not done in details with all necessary analyses and states flora and fauna world to be affected by the hydro power construction and explaining via alternative Study developed by the appellant.

*Decision of the RS Ministry for Spatial Planning, Construction and Ecology on approval of the Impact Assessment Study no 15.04-96-8/13 from 30<sup>th</sup> of January 2014 on changes of approval for the impact assessment study no 5.04-96-8/13 from 29<sup>th</sup> of July 2013*

Decision no 15.04-96-8/13 from 30<sup>th</sup> of January 2014 was changed hence the no 0.367 MW was amended to 0.35 MW, no 3.337 MW was amended to 3.7 MW, no 1.07 MW was amended to 0.90 MW. The same decision respondent party claims that they enclosed along with the Investor request („DRINA HIDRO ENERGY“ d.o.o. Ugljevik), Expert Study from the authorised institution “PROJEKT“ Banja Luka concluding that required change would not cause other changes of the conditions as stated in the decision hence based on the presented evidences, reasons for changes in the Decision are justifiable.

*Amendments to the lawsuit of the ENGO Environmental Protection Centre, Banja Luka no. 46/14 from 18<sup>th</sup> of February 2014 against the Decision of the Ministry for Spatial Planning, Construction and Ecology of Republika Srpska no. 15.04-96-8/13 from 30<sup>th</sup> of January 2014 in the changes of decision on the approval of the Impact Assessment Study no 15.04-96-8/13 from 29<sup>th</sup> of July 2013.*

The appellant/ plaintiff in the complaint alleged that when the decision number 15.04-96-8 / 13 of 30.01.2014 was made, the respondent has applied the provisions of Article 250 of the Law on Administrative Procedure which regulates the issue of eliminating or modifying final decision with the consent or at the request of parties. This extraordinary remedy as such is being applied in explicit situations where the customer has acquired a right of final decision, and the authority that issued the decision considers this to be incorrectly applied the substantive law; hence on that basis such a decision may be modified or changed, so as to adjust the decision with the law. The law suit alleges that in fact the matter is in the change of the installed capacity of turbines, and it certainly has a new environmental impact, so that the respondent could not find a basis for the application of Article 250 of the Law on Administrative Procedure. The prosecutor, in the amendment to the complaint, further points out that the defendant was obliged to order the interested party redrafting of Impact Study in the part which refers to the changes in the installed power and its impact to the environment instead of free assessment that such change did not require other changes in the decision hence based on evidence provided, reasons for changing the decision are justified.

*District Court Banja Luka verdict no. 11 0 U 012628 13 U from 19<sup>th</sup> of February 2015.*

The verdict of District Court of Banja Luka took into consideration the lawsuit thus cancelling the disputed acts. The court in its judgment, inter alia, stated that the respondent should have, among other things, when making decision, taken into consideration the two *lex specialis*, National Parks Act and the National Park Sutjeska Act, which provisions are in conflict with the Law on Environmental Protection because of special protection regime for national parks of the first degree which permits only those activities that are undertaken for the purpose of scientific research and controlled education and other activities prescribed by the Act. The Court also stated in its judgment that the lack of a valid Spatial Plan of National Park Sutjeska is deficiency that should be taken into account in the decision-making, and that in this respect the respondent had no valid legal basis for the approval of the Study. Without such a plan, it cannot be determined whether the construction of energy related facilities is done in the area, and the protection regime of the first, second or third degree.





Besides, the court in its verdict states that the fact that there was no Spatial plan as the reason that the respondent did not have the basis to approve the Study and such plan should determine measures and development for each zone separately which is not possible at the moment due to the lack of the stated document. The court additionally added that if the Decision on Approving the Impact Assessment was approved than the new Spatial Plan would have to be amended to the construction activities.

Besides the above stated reasons, the court calls upon the statement that the Law on National Parks prescribed that areas determined as the first degree protection regime should be strictly protected hence enabling natural succession and other ecological processes, preservation of habitat, communities and flora and fauna with insignificant impact of human presence. The court further exclaims that the approved study states that changes expected on ihtiofanui (fish) are such that it would change habitat conditions provoked by the separation constructions necessary for water catchment construction.

Also, court further points out that according to the same study, expected changes can be manifested through the loss or reduction of certain species, which need necessary free watercourse migration during reproduction. In the view of the court, the final study left out a detailed analysis of the impact of the construction of facilities to all animal species, which resulted in irregular and incompletely established facts. Referring to the amendment of the claim/lawsuit number 46/14 from the 18th of February 2014 the court noted that the defendant/respondent in this part correctly stated that Article 250 Law on Administrative Procedure is not applicable, and that the respondent on the basis of changes in installed capacity was required to implement the new procedure in which it would determine whether and to what extent changes in installed capacity leads to impact on the environment. Accordingly, the Court annulled the previous decision and ordered the respondent to adopt a new administrative act which will eliminate these drawbacks whilst accepting understanding and observations of the court.

*Conclusion of the RS Ministry for Spatial Planning, Construction and Ecology no. 15.04-96-8/13 from 2<sup>nd</sup> of March 2015.*

The Conclusion no.15.04-96-7/13 from the 13<sup>th</sup> of May 2015: the procedure for approval of the Environment Impact Assessment Study for the project MHE "Sutjeska 2a and 2b", municipality Foča and Gacko (installed power MHE Sutjeska 2a 4, 77 MW and MHE Sutjeska 2b 3,27 MW), initiated upon the request DRINA HIDRO ENERGY d.o.o. Ugljevik shall be interrupted. The same conclusion continues: "the procedure shall be continued following the adoption of the Spatial Plan Proposal for the area of special purpose National Park Sutjeska."

*ENGO Environmental Protection Centre Banja Luka no. 90/15 from 03.04.2015 versus RS Ministry for Spatial Planning, Construction and Ecology Decision no 15.04-96-8/13 from 2<sup>nd</sup> of March 2015*

The appellant exclaims that the stated verdict, District Court calls upon the Article 50 of the ZUS which in the chapter VI, BINDING NATURE OF THE VERDICT, stipulated that "once the court annuls the disputed administrative act or disputed first-instance act; the case shall be returned to the initial phase prior to passing of the act. If the new act should be passed, the competent body is obliged to pass it without further delay, and 30 days from the day of verdict delivery. Competent body is thus obliged by the legal understandings of the court and objections on the procedure. By passing of the disputed act, the respondent did not apply the principle of the mandatory nature of the judgment according to which (recommendations no. 11 0 U 012629 13 U from 14.04.2015.) they were obliged to return the case in the previous condition, prior to the passing of the Decision no.15.04-96-7/13 from 29.07.2013. This practically mean that the respondent side is obliged to pass decision annulling the Environment Impact Assessment Study for the project of building MHE on the river Sutjeska and not the Conclusion which stops the procedure.

*Request to the RS Ministry of Spatial Planning, Construction and Ecology no. 15.04-96-8/13 from 26.02.2015. for extraordinary examination of the Banja Luka District Court judgment no. 11 0 U 012628 13 U from 09.02.2015.*

Using the right to an extraordinary remedy, the Ministry has initiated the procedure of emergency reviewing of the court decision before the Supreme Court of the Republika Srpska. It states that the adoption of the spatial plan has not affected the making of the disputed decision on the study of influence since the Law on National Parks RS prescribed that it may allow the construction of power plants, if it is in the interest of the Republika Srpska. In this connection, it is not necessary to determine what will be the concrete mode of protection of these







facilities. It is further pointed out that the court had no grounds for assessment of the environmental impact of the spatial plan, as a planning basis required construction permit in accordance with the Law on Spatial Planning and Construction. The petition further states that the study was made very professionally, which means that all measures to prevent such occurrences and to changes were undertaken.

Pursuant to the above-stated, this case has two proceedings. One is before the Banja Luka District Court, case no. 15.04-96-8/13 from 02.03.2015. which ceased the case until the passing of the new Spatial Plan NP Sutjeska, and the second is lead before the Republika Srpska Supreme Court versus District Court verdict no. 11 0 U 012628 13 U from 09.02.2015 whose initiator is the RS Ministry for Spatial Planning, Construction and initiated upon the extraordinary legal remedy i.e. Request for the Examination of Court Decision. This case represents precedent when it comes to the consideration of the cases related to the environment, because in this case the court engaged in reading and analysis of studies of environmental impact, giving primacy to the merits, not only procedural errors in the course of the proceedings that are possibly made.





## 2. The former Yugoslav Republic of Macedonia

Prepared by Mr. Bojan Bogeovski, national expert, email: bojanbogeovski@yahoo.com

### I. General information

Please provide any update to analytical studies<sup>2</sup> and complete missing information concerning your respective country, with respect to:

#### 1. Legislation relating to the environment.

The core of the environmental legislation in the Country is composed of the Constitution that enshrines the right to a healthy environment,<sup>3</sup> the Aarhus Convention (ratified by the Assembly on July 01, 1999) and the Law on Environment (Sept. 2005, entered into force). In addition, the standard sectoral laws and by-laws as well as provisions related to the environmental protection incorporated in the legislation concerning urban planning, transport, agriculture, energy and other areas that have impact on the environment are part of the national environmental legislation and mainly harmonized with the EU acquis. The Criminal Code includes various environmental crimes; and also the Law on Obligations and the right to claim damages, in certain cases may be used for protection of pollution or other environmentally harmful activities.

Since the last analysis (2014) (see footnotes to studies below), there are no significant amendments in the core of the environmental legislation, including amendments related to the horizontal legislation (including EIA, SEA, IPPC procedures) and the Aarhus rights. However, having in mind the administrative nature of most of the procedures related to the environment, it is important to note that during July 2015 new Law on General Administrative Procedure (Official Gazette n. 124/2015) was adopted. According to the legal experts on administrative law, the Act is a step forward in right direction and the Act has widened the level of citizens' protection.<sup>4</sup>

#### 2. General principles of public administration

The Law on General Administrative Procedure regulates the operation of the public administration/authorities<sup>5</sup> when deciding on administrative matters. According to art. 2 of the Law, its provisions shall apply to all administrative activities of the public administration. Other laws may regulate certain activities differently than the Law on General Administrative Procedure, but only insofar "if it is not contrary to the basic principles and purpose of this Law and [the Lex Specialis] does not reduce the level of protection of rights and legal interests of the parties guaranteed by this Law" (art.2, par.2)

Chapter II of the Law on General Administrative Procedure stipulates the basic principles of public administration, such as:

- principle of lawfulness,

<sup>2</sup> Available from [http://www.unece.org/env/pp/tfaj/analytical\\_studies.html](http://www.unece.org/env/pp/tfaj/analytical_studies.html) (under headings EECCA and SEE).

<sup>3</sup> See art. 8, p. 1, a. 10, art. 43, art. 55, art.56 and Amendment XVII of the [Constitution of the former Yugoslav Republic of Macedonia](#) (Official Gazette n. 52/1991). Having in mind the special protection of the environment uphold in the Constitution, and especially the public participation Amendment (XVII) that particularly mentions the environmental issues, all suggesting broad and collective interest in healthy environment, it is clear that in order these rights to be effective wide scope of legal standing is required.

<sup>4</sup> For more see the comparative study "[Legal Remedies in Administrative Proceedings in Western Balkans](#)", by the Institute of Public Administration from Zagreb, Croatia and the Regional School of Public Administration from Danilovgrad, Montenegro, 2016, pp. 86 - 89 (the chapter for the former Yugoslav Republic of Macedonia).

<sup>5</sup> Besides the state and local administration bodies, the legal and other entities (i.e. private companies) entrusted by law to perform public authorizations are covered under article 1 of the Law on General Administrative Procedure. This is in the same direction as the spirit of art. 2, p. 2 of the Aarhus Convention, i.e. covering any public administrative function performed regardless if performed by state or private entity.





- principle of proportionality,
- principle of efficiency in the proceedings,
- principle of equality, impartiality and objectivity,
- principle of material truth,
- principle of hearing the parties,
- principle of autonomous evaluation of evidence,
- principle of delegation of authorities, and
- principle of legal protection (remedy).

For our analysis, it is important to explain further the Principle of legal remedy. Namely, according to this Principle the parties have a right to challenge any administrative activity (or omissions) or administrative act.<sup>6</sup> The appeal need to be filled to the first instance body (that passed the challenged act) within a general deadline of 15 days of the day of publishing the administrative act. The first instance body (i.e. separate organizational unit of the public body/authority) can dismiss the appeal if it is inadmissible, filed too late or filled by an unauthorized person. If the first instance body considers the appeal to be fully justified, it can replace the challenged administrative act with a new one. If the party is not satisfied with the decision by the first instance body or it does not receive a reply within the legally prescribed deadline of 7 days, it may file a complaint in front of the [State Commission for Decision-Making in Administrative Procedure and Labour Relations Procedure in Second Instance](#) (hereinafter: State Commission).<sup>7</sup> The State Commission is formally independent and impartial body specifically established with responsibility to review complaints against administrative acts adopted in an administrative procedures in first instance by the public authorities<sup>8</sup>. In addition, when the complaint against first instance administrative acts is not prescribed in the laws, or the party is not satisfied by the second instance administrative decision by the State Commission, an administrative dispute (lawsuit) may be initiated before the [Administrative Court](#).<sup>9</sup>

<sup>6</sup> In accordance with art. 4, para. 1, line 6 and 7 (Definitions) of the Law on General Administrative Procedure, "**administrative activity**" includes "the process of adoption of administrative acts, concluding of administrative agreements, protection of the users of public services, as well as undertaking of other administrative actions in the administrative matters in accordance with the law"; while "**administrative act**" is "individual legal act of public body with which it is decided upon the rights, responsibilities and the legal interests of the parties. The administrative acts may be termed as decision, decree, order, license, permit, ban, consent or other term". The Law is in line with the Aarhus requirements in sense of that it grants legal protection in any administrative matter. This is confirmed in art. 104, para. of this Law that states clearly that "the party have a right to legal remedy against any administrative activity [administrative acts included] or omission, if he/she claims that with it her rights or legal interests are violated". Para. 4 of the same article confirms that "when the complaint/appeal is not prescribed in the law, the party have a right to initiate an administrative dispute/lawsuit".

<sup>7</sup>The *State Commission*, as independent state body with capacity of legal entity and its own expert service on disposal, is established by separate law. The *State Commission* is composed of president and six members who shall carry out their office professionally, appointed through an open bid by the Assembly of the FYROM for a time period of five years with right to be re-appointed. The Commission's manner of operations is determined with separate Rules of Procedure and the Law on General Administrative Procedure as *Lex Generalis* that the Commission shall follow. There is possibility for third party intervention into administrative procedures, in situations where organizations (NGOs', workers' unions, etc.) may become involved in already initiated procedure against its members, in order to defend them or if the "third person would be directly harmed by an annulment of the disputed administrative act. However, the general effectiveness of the State Commission is very low. In the previous study, we concluded the following: "in many cases, the Commission is silent on the matter, but still is absorbing 60 days at least. Thus, the complainant's only choice after the "O-decision" of the Commission is to challenge the decision before the Administrative Court. However, the Court is overloaded with cases and it may take more than a year to adopt a decision, enough time for the decision even if it is favourable for the complainant to be not effective in practice, i.e. not to succeed in prevention of the environmental harm. The extremely low use of alternative mechanisms for dispute resolutions is not easing the issue with the court congestion." The situation today is not much improved.

<sup>8</sup>Law on the Establishment of the State Commission for Decision-Making in Administrative Procedure and Labour Relations Procedure in Second Instance (Official Gazette n. 51/2011...53/2016).

<sup>9</sup> See art. 14 of the Law on General Administrative Procedure that stipulates:

"(1) The party have a right to legal remedy against any administrative activity or act according to the law.

(2) The party have a right to appeal against first instance administrative acts in cases regulated by law.

(3) In cases from paragraph (2) of this article the party have a right to appeal and if the public authority did not act in the determined deadline upon request of the party.

(4) Against second instance administrative acts, as well as against first instance administrative acts against which an appeal is not allowed, the party may initiate administrative dispute." These are sectoral laws or concrete procedures that does not





The art. 2 of the Law on General Administrative Procedure combined with the principle of legal remedy (should) represent strong basis for the right to access to justice in *all* administrative procedures.

**3. Decision-making procedure relating to the environment in the following areas (please indicate the type of decision, whether the public should be informed about the procedure and its documentation, has a right to participate, there is a time limit for comments to be submitted). Please elaborate your answer in light of article 6, paragraphs 1 (a) and (b), paragraphs 10 and 11, article 7 and Annex I, paragraph 22, of the Aarhus Convention.**

As said, there are no significant amendments in the core environmental legislation. The individuals and environmental NGOs are mainly focused on EIA, SEA or IPPC procedure for the activities that may have environmental impact, whereas the right to public participation may be utilized at most. However, one general problem is that it seems like the authorities are making distinction between these procedures and the main process for adopting a decision that is based on other sectoral laws. Many of the sectoral laws do not even contain provisions on public participation. In addition to the licensing processes explained below (concerning hunting, registration of pesticides and waste import/export) additional important example are the projects for which no EIA is needed, but an elaborate for environmental impact. These projects are determined in separate by-laws and depending of the projects, the elaborates are approved by the [Ministry of Environment and Physical Planning](#) (hereinafter: MoE or Ministry of Environment) or the local authorities.<sup>10</sup> And although these activities are considered with smaller potential environmental impact, these are not negligible (ex: construction of hotels, auto-camps, public garages, smaller hydro projects (2 to 10mw), storages for metal waste including old cars, and many similar projects). In all these procedures, there seems to be right to challenge the approval of the elaborate project by the public,<sup>11</sup> however without public participation and transparent process, the right to access to justice is clearly limited. In the consultation process with the active environmental NGOs, one such case that was pointed out were the elaborates for the 80 small hydro power plants that are planned to be installed that was not available for the public. The same problem is with the "smaller industrial polluters" that are covered with the IPPC, i.e. under so-called B environmental permit (around 240 facilities).<sup>12</sup> The processes are not fully transparent and the public does not get access to adequate, timely information. One problem here is that in these procedures there is tendency only the applicant and the authority to be regarded as "parties". There is no case-law to test the court's opinion on these (open) issues. The right to public participation is seriously limited while in practise (confirmed in the consultation with several NGOs and several journalist's reports) definitely is a problem. It is not just the noted procedures but it seems that most of the environmental procedures that are not covered with EIA, SEA and IPPC have very limited possibilities for effective public participation and access to justice.

---

prescribe a right to file a complaint but the party still have a right to initiate a dispute/lawsuit in front of the Administrative Court.

<sup>10</sup>"Decree for the activities and projects for which it is obligatory to be conducted an elaborate for environmental impact and are approved by the Ministry of Environment" (Official Gazette n. 80/2009); and "Decree for the activities and projects for which it is obligatory to be conducted an elaborate for environmental impact and are approved by the Major of the municipalities" (Official Gazette n. 80/2009). Other relevant by-law that regulates this procedure is "Rulebook for the form and content of the elaborate for environmental impact, the process of its approval and the manner of keeping the Register of approved elaborates" (Official Gazette n. 50/2009) but there are no provisions related to the public participation in any of these acts.

<sup>11</sup>Art. 24, para. 10 of the Law on Environment ("*The decision [for approval of the elaborate] may be challenged by the legal entities and individuals by filling a complaint in front of the State Commission in period of 15 days after receiving the decision*"). However, the wording in this provision ("*after receiving the decision*" instead of "*after publishing the decision*" which is used for example in EIA procedure whereas it is clearly stipulated that the public may challenge the decision) may indicate that the intention of the lawmaker is to recognize the right to challenge the decision only for the investors.

<sup>12</sup>Please see the excellent journalist's research on the same topic: "[Chaotic implementation of the legislation related to the B-integrated environmental permits](#)", 27 December, 2016. Since November 2013 until April 2014 around 150 B-environmental permits were issued without any public participation and in non-transparent procedures according to the environmental activists interviewed in the story. Without adequate and timely information, the access to justice rights are limited as well.





Before proceeding with explanation of particular situations below, I would like to add that all activities determined in Annex I of the Aarhus Convention<sup>13</sup> should pass through EIA (or IPPC) procedure. Only in special cases,<sup>14</sup> and upon proposal of the Ministry of Environment, it may be decided, fully or partially, the environmental impact of the project not to be assessed. In this case as well there is a space (albeit limited) for public participation.<sup>15</sup> In addition, in any case where a project is assessed that will not have an impact over the environment, the concerned public (including here the environmental NGOs) have a right to challenge the decision in front of the State Commission.<sup>16</sup>

Moreover, as explained below, the public participation rules apply whenever the authorities will reconsider or update any of the permits related to the activities of Annex I of the Aarhus Convention. Although, in all cases when there are amendments in the project that fall under the EIA rules, the authorities are assessing whether the changes may have significant environmental impact regardless if for the main project the EIA was obligatory. If the change in the project is assessed as without significant environmental impact, for which the Ministry of Environment have certain discretion, the public is left only with a right to challenge this decision (there is no space for comments or any other participatory right).

#### (a) Construction requiring Environmental Impact Assessment

The construction projects are regulated under the Law on Construction (Official Gazette n. 130/2009...132/2016). In accordance with this Law, the investor [private or public entity that acquires the right to construct the project] may commence with construction only after obtaining construction approval (with 3 years validity, with possibility for prolongation; in period of 10 years the construction must be built). Depending if the project is first or second category according to the categorization in the Law, i.e. projects "significant for the Republic" or projects of "local significance", the construction approval is issued by the Ministry of Transport and Communication or the concerned municipality (there are projects that fall under authority of other bodies if they are built in Industrial development zones or if the project is construction of large sports stadiums).<sup>17</sup>

What is important is that for construction projects the investor must file a basic project that shall also contain an environmental impact assessment (EIA) study approved by the Ministry of Environment, if the project falls under Annex I of the Aarhus Convention.<sup>18</sup> The construction permit may not be issued without the "green light" by the MoE. The MoE is responsible for conducting the EIA procedure that includes right to public participation when all options are open.<sup>19</sup>

---

<sup>13</sup> The Ordinance for determining the projects and criteria upon which the need for conducting environmental impact assessment procedure is determined (Official Gazette no. 74/2005; 109/2009 and 164/2012) and the Ordinance for determining the activities of the installations for which needs to be issued an integrated environmental permit ... (Official Gazette no. 89/2005), transposes Annex I of the Aarhus Convention into the national legislation.

<sup>14</sup> Following the art. 6, p. 1 (c) of the Aarhus Convention, the art. 78, p.1 of the Law on Environment envisages the following cases where EIA shall not be carry out: 1) war or emergency situation, 2) for the needs of the defence of the Country if it is assessed that the EIA procedure may have negative effects on the defence, and 3) if there is a need for urgent prevention of events that could have not been predicted and are likely to have a serious impact on health, security or property of people, or on environment.

<sup>15</sup> See art. 78, p. 5 of the Law on Environment. In these cases, the Government (Ministry of Defence) is obliged to publish the decision not to carry out EIA in one daily newspaper and on its website and to give the public 15 days to comment. Afterwards, the Ministry of Defence collects the comments of the public and together with its own reply submits the materials to the Ministry of Environment. The Ministry of Environment decides whether the project will be approved.

<sup>16</sup> Art 81, p.6 of the Law on Environment

<sup>17</sup> The investor prior must obtain other related licenses/permissions, depending on what type of project is planned to be constructed (ex: if the project concerns protected cultural heritage, a conservatory approval issued by the Directorate for Cultural Heritage Protection is obligatory).

<sup>18</sup> See art. 47, p. 4 of the Law on Construction: "*The basic project shall contain EIA study of the project ... if the regulations in the field of the environment anticipate the preparation of a study for such type of a construction*". Concerning the "Ordinance for determining the projects and criteria upon which the need for conducting EIA procedure is determined" the construction projects are generally determined projects for which the need of EIA is decided on case-by-case basis.

<sup>19</sup> Art. 91 of the Law on Environment:

"(1) *The body of the state administration responsible for the affairs of the environment shall provide for a public hearing at least 5 working days before the expiry of the term referred to in Article 86, paragraph (5) of this Law regarding the study on*





The public have a right to file comments in period of 30 (calendar) days after publishing the EIA study<sup>20</sup> and on the public hearing that is obligatory to be organized during the procedure. The procedure ends with the Decision by the Ministry whether to grant consent or to reject the application for the project.<sup>21</sup>

If there is a change in the basic project after passing all the approvals, the MoE is assessing whether the change may have significant environmental impact. Depending on the assessment, the public may participate in the process if it is deemed as significant change.

#### **(b) Permit(s) allowing releases into the environment**

The control of the releases into the environment is mainly done through the IPPC procedure and the main envisaged regulatory tool - integrated environmental permits (A: environmental permits for larger facilities; B: environmental permits for smaller types).<sup>22</sup>

The IPPC procedure is initiated by the operator (company) with submitting application/request for integrated environmental permit to the MoE (or the local authorities, if the installation is potential smaller polluter that is regulated with B environmental permit). In period of 7 days of receiving the complete application, the MoE is obliged to publish the application in at least 1 national newspaper and on its webpage, and to make accessible all the information related to the application needed for the public to form its position and opinion. The concerned municipality is obliged in period of 30 days from the day that they received the application from MoE to submit its opinion; in addition, the Mayor of the concerned municipality have a right to organize a public hearing in this phase (although this is not obligatory, this right is used in practice by the Mayors). The public have a right to submit its comments in period of 14 days from publishing the request/application by the MoE and they have a right to request the investor to organize a public hearing as well. In the explanation attached to the integrated environmental permit the Ministry of Environment is obliged to explain which of the public comments are taken into consideration and which are rejected.

In addition, the environmental permit may be amended ex officio or at a request of the operator. In both cases, it is clearly stipulated that the same provisions as for issuing new permit apply, including the procedure for public participation.<sup>23</sup>

However, in practise, many problems related to the public participation are identified in the IPPC procedures. Two examples: 1) the way of informing the public - in daily newspaper and on MoE' website - without identifying

---

*the project environmental impact assessment and ensure availability of information needed to the public for participation in the public hearing in accordance with Article 90 of this Law, as well as inform citizens' associations established for the purpose of environment protection and improvement in the area in which the project would be implemented.*

*(2) The body of the state administration responsible for the affairs of the environment may postpone the public hearing if the Investor, the persons who prepared the study on the project environmental impact assessment do not participate therein, and shall in such case set a new term which will be at least five days after the day on which the public hearing was discontinued.*

*(3) The body of the state administration responsible for the affairs of the environment shall keep minutes from the public hearing in which it shall list the participants as well as the conclusions, and stenographic notes and video or audio records of the hearing shall be attached to the minutes.*

*(4) The body of the state administration responsible for the affairs of the environment shall submit a copy of the minutes along with the attachments to the Investor, the bodies of the public administration responsible for the activities to which the project relates and to the bodies of the municipality or of the City of Skopje and of the municipalities of the City of Skopje where the project would be implemented, and shall publish the minutes on its web site.*

*(5) Information protected under special regulations shall not be discussed at the public hearing."*

<sup>20</sup>Art. 83, p. 5 of the Law on Environment:

*"(5) Any person, state administration body, the Mayor of the Municipality, of the City of Skopje and of the municipalities of the City of Skopje may submit their opinion in written form to the body of the state administration responsible for the affairs of the environment within 30 days from the date of publication of the study on the project environmental impact assessment."*

<sup>21</sup> See art. 87, p.1 of the Law on Environment that stipulates that the Ministry shall "on the basis of the study on the project environmental impact assessment, the report on the adequacy of the study of the project environmental impact assessment, the public debate ... issue a decision on whether to grant consent...".

<sup>22</sup> Chapter XII of the Law on Environment.

<sup>23</sup> For example, see art. 115, p. 5 of the Law on Environment that stipulates the following: "the amendment of the A integrated environmental permit ... shall be carried out in accordance with the procedure for issuance of a new A integrated environmental permit." Also, see art. 117 of the same Law.





and having more targeted approach for the public concerned, does not guarantee at all that the public is adequately informed; 2) in addition, the deadline for submitting comments by the public (14 days) is too brief for the public to prepare itself for effective participation.

### (c) (City) Planning procedures

The city planning procedures are regulated with the Law on Spatial and Urban Planning (Official Gazette no. 199/2014...163/2016). The Law (art. 7) determines two main types of plans depending of the space that is arranged: a) Spatial Plan of the Country that is adopted by the Assembly and is main strategic document for spatial planning; and b) urban plans that includes general urban plan, detailed urban plan, urban plan for villages and urban plan for non-populated area. They are all hierarchically interrelated, meaning that the general urban plan is prepared based on the data and arrangements from the Spatial Plan - the detailed urban plan is prepared for area which is included in general urban plan; etc.

In accordance with the relevant Ordinance<sup>24</sup>, the urban planning documents (and their changes) must be assessed whether should pass strategic environmental assessment. In addition, the Law on Spatial and Urban Planning (art.28) relates to the Law on Environment, i.e. stipulates that the relevant municipality is obliged to pass a decision with explanatory note whether SEA should be conducted for the particular urban plan and submits it to the Ministry of Environment. The Explanatory note should contain the rationale behind the decision in relation to the criteria determined in the "Ordinance for the criteria upon which the decision should be adopted whether particular planning documents could have significant environmental and health impact" (Official Gazette n. 144/2007). The Ministry of Environment in period of 8 days of receiving the decision has a right to overturn the decision and to oblige the relevant municipality to perform SEA if it assess that the plan may have significant environmental or health impact. The public as well have a right to challenge the decision in period of 15 days of the day of publishing the decision on the website of the particular municipality.<sup>25</sup> The Ministry of Environment with its decision also determines the scope of the SEA and publishes on its website - the concerned public have a right to challenge this decision in front of the relevant second instance State Commission.<sup>26</sup>The SEA procedure envisages at least 1 public hearing and publishing of the draft document for a period of at least 30 days when the public have a right to submit its comments and suggestions. After this step, the responsible municipality prepares SEA Report that includes the public comments and submits to the Ministry of Environment for approval. The Ministry may engage external experts to review the SEA Report and should assess its quality - the assessment is published on its website in period of 5 days of adopting the decision. The responsible body for adoption of the plan is obliged to take into consideration the SEA Report and the MoE assessment, after which it adopts the plan and publishes on its website together with Statement that summarizes how the environmental impacts are integrated in the plan, how the public comments are taken into consideration and why the chosen alternative was selected and the measures for following the environmental impacts of realization of the plan.

For the SEA procedures, it can be said that the right to public participation is strongly guaranteed because there is also separate by-law that regulates in details the public participation in these processes.<sup>27</sup>

---

<sup>24</sup> Art. 3, i. 13 of the Ordinance on strategies, plans and programmes, including changes of those strategies, plans and programmes, for which the procedure for assessment of their environmental and health impact is mandatory (Official Gazette n. 153/2007 and 45/2011).

<sup>25</sup>Art. 65, p. 11 of the Law on Environment:

*"Against the decision [whether SEA will be conducted], the public have a right to lodge a complaint in front of the State Commission within 15 days of the day of its publishing on the website of the body that is preparing the document."*

<sup>26</sup>Art. 65, p. 17 of the Law on Environment:

*"Against the decision [that determines the scope of the SEA study], the public concerned... have a right to lodge a complaint in front of the State Commission."*

<sup>27</sup> Decree on public participation in the process of preparation regulations and other acts, as well as plans and programmes from the environmental area (Official Gazette n. 147/2008 and 45/2011). In article 1 of this Decree it is clearly stipulated that the public should have a right to participation early in the process when all options are open and that this Decree applies also when there is a change in the relevant document.





According to this Decree, it is clear that the public should have a right to "*effectively participate in the process of preparation of legal acts and adoption, amendment and revision of plan documents in its earliest phase*" (art. 2) which means when the responsible authority decides to start preparing some document it should adopt and publish a decision for preparation of the document (art.4). In parallel, the following information should be published: the place, time and period when a public insight may be performed of the plan; the place and time when the public hearing will be held; and similar information for the public.

Actually, the right to public participation is given in the SEA procedure but also in the process of adoption of the urban plan in accordance with the Law on Spatial and Urban Planning. Namely, the urban plans are prepared in 2 phases: draft plan and proposal plan. The draft of the main Spatial Plan is determined by the Assembly after prior expert hearing with the relevant institutions, experts and NGOs (art. 22). The comments from this expert hearing are included in a report that is part of the proposal plan. Concerning the general urban plans, the concerned municipality is obliged to organize expert hearing upon the draft plan. The time and place of the hearing is published in at least two national newspapers 2 days prior to the hearing. 10 days after the expert hearing the concerned public may submit its comments (art. 23). After the expert hearing, a special Committee should prepare a Report that contains the public comments and the reply of the public authority, which is part of the proposal plan.

Upon the draft of the detailed urban plans, the urban plan for villages and the urban plans for non-populated areas, the concerned municipality should organize public presentation and public poll (art. 24). These are organized by the Major of the concerned municipality after the draft plan is determined by the Council of the municipality and prior approved by the inner expert Committee (only 1 of the members is not employed in the municipality). Also, the responsible municipality should request an opinion from all the relevant public authorities - in cases when the same process of public participation and deadlines is envisaged here as well. If the public submits many proposals that are accepted and due to this the plan should be significantly changed in many parameters than another public poll should be organized. Before adoption of the plan, the Ministry of Transport should issue its consent that confirms that the procedure for adoption of the plan was in accordance with the Law on Spatial and Urban Planning (art.25). 15 days after receiving the consent, the plan is submitted for adoption by the Council of the municipality.

#### **(d) Licensing /permitting procedures for mining**

The mining activities are regulated with the Law on Mining (Official Gazette n. 136/2012...189/2016).<sup>28</sup> The permitting procedure begins with the prospecting of geological explorations (regulated in art.7-a). Namely, the right to conduct prospecting geological explorations may be gained by any legal entity by acquiring concession by the Government (concession grantor) based on a public call by an electronic auction. The concession is granted for a 2-year period without possibility for extension. Also, the interested legal entities have a right to submit an initiative for conducting prospecting geological exploration with submitting a request containing the basic data of the company, a period for which the concession is requested and an area where the prospecting explorations would be conducted. The best bidder on the public call is rewarded with the concession by a decision by the Government that is published in the Official Gazette, and within 15 days of publishing this decision an agreement on concession between the Government and the concessionaire should be signed.

If the geological exploration indicates presence of minerals, a phase for detailed geological explorations should be initiated (regulated in Chapter II of the Law on Mining). It is important to note that detailed geological

---

<sup>28</sup> More precisely, art. 1 of the Law on Minerals stipulates that the Law shall regulate: "*the conditions and the manner of conducting geological explorations, the promotion and development of geological explorations with the aim of providing their optimal utilization in accordance with the principles of sustainable development and environmental protection; the promotion and the development of exploitation of mineral resources and mineral processing as well as strengthening the measures for safety, environmental protection and human health ... the measures and the manner in which the harmful effects on the environment and human health caused by the management of waste that is created or is already created from the explorations, mineral exploitations and processing is prevented or reduced to the lowest possible extent*".







explorations cannot be conducted in areas located in inhabited places, water resource management facilities, watercourses, lakes, cultural monument, protected areas of nature and other areas where facilities of public interest are located, but only in exceptional cases upon prior consent of the Ministry of Economy. Before approving the concession, the Ministry of Economy should request an opinion from the state administrative bodies responsible for the activities in the field of environment and spatial planning, protection of cultural heritage, transport and communications, forestry and water resources management, agriculture as well as the concerned municipality, which have 15 days to reply. Upon receipt of the opinions, the Ministry of Economy submits an elaborated proposal and decision to start a procedure for awarding concession for detailed geological explorations to the Government. Afterwards it is the same procedure as for prospecting of geological explorations, only in this case the period of concession is 6 years for energy or metallic minerals.

The last licensing/permitting phase is the concession and issuing of permit for exploration of minerals (Part III of the Law), which is conceptually the same like the previous phases. The interested company must obtain a Permit for exploration of minerals by the Ministry of Economy with validity period that cannot be longer than the validity period of the concession (max. 60 years, i.e. 30 years with possibility for extension for another 30 years). The procedure is initiated by the concessioner with a request filled to the Ministry of Economy. The request includes among other things the approval of the EIA study by the MoE, thus as in the other cases the public participation is envisaged in the EIA process with the same rights and limitations as explained previously.<sup>29</sup>The draft permit for exploitation of minerals is also published on the site of the Ministry of Economy and the concerned public may submit its comments in period of 15 days.

**(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes).**

(i) The breeding, protection and hunting of animals/game is regulated in the Law on Hunting (Official Gazette n. 26/2009 ... 193/2015). The hunting grounds are determined by the Government in accordance with the Spatial Plan of the country (art. 28) and given for management to legal entities that perform activities of public interest in the area of forestry, hunting and environmental protection or public bodies that manage the national parks. The game/animals in the hunting grounds are given on concessions to legal entities, mainly hunting organizations which are responsible to issue permits for hunting to interested persons. The concept of concessions awarding is the same as explained in the previous question for the mining. There is no public participation envisaged in these procedures.

(ii) There have been no changes in the Law on GMO since the last analysis. In brief, although public participation is envisaged in the decision-making process related to deliberate releases of GMOs, only the applicant/investor has a right to file a lawsuit against the Decision of the MoE on rejection of the notification for deliberate release of GMO, i.e. the public does not have a right to challenge an approved License for deliberate release of GMOs. No provisions that regulates the process if there is update or change in the License. Important note: with amendments in the Law on Food Safety (art. 55) the production, releasing or importing of GM food in Macedonia is forbidden until accession in EU.

(iii) The registration of pesticides is regulated under the Law on products for protection of plants (Official Gazette n. 110/2007...39/2016) and the Law for food safety (Official Gazette no. 157/2010...39/2016). The main preventive idea of the Laws is that no product will be placed on the market and used if it is not prior registered in the register of the Fit-sanitary Directorate within the Ministry of Agriculture, Forestry and Water Management based on a request of the legal entity that is owner of the product, i.e. in the registry for objects of food operators. There is no public participation envisaged in these procedures.

(iv) The issue of import/export of chemicals, including the export/import of certain dangerous chemicals, is regulated in the Law on Chemicals (Official Gazette no. 145/2010...37/2016). The import/export of chemicals may be done by legal entity only upon permit for export/import issued by the Ministry for Health (art. 69). Concerning the export/import of certain dangerous chemicals (industrial chemicals and pesticides) the

---

<sup>29</sup> Art 55, p. 2, i. 4 of the Law on Mining.





Rotterdam Convention's concept of prior informed consent (PIC) applies. There is no public participation envisaged in these procedures.

Concerning the import/export of hazardous waste, the process is regulated based on the Basel Convention on the control of transboundary movements of hazardous waste and their disposal. Namely, import of waste may be approved only on legal entity that imports the waste for treatment and have an adequate permit or have integrated environmental permit according to the IPPC procedure to use the waste for its own purposes. The permit is issued by the Ministry of Environment upon prior request by the legal entity and submitted elaborate for environmental impact (in case if it is not regulated under the IPPC provisions).<sup>30</sup> There is no public participation envisaged in these procedures.

**4. The structure of the judiciary in your country (types of judicial bodies, jurisdiction in judicial review of authorities' decisions, acts or omissions in environmental matter). Are there judges specializing in environmental cases? Do the courts have technicians of their own? Do judges have education and training in environmental law and the Aarhus Convention? Please indicate if you know what training methodologies and tools are used?**

The judicial system is structured and regulated in accordance with the Constitution of FYROM and the Law on Courts.<sup>31</sup> Thus, the judicial power is exercised on "three-level" structure<sup>32</sup>:

- **Basic courts**, established as courts with basic and expanded competences. Basic courts have competencies to decide in first instance upon crimes and misdemeanours, as well as in civil disputes, as stipulated in art. 30 and 31 of the Law on Courts. Therefore, the Basic courts have jurisdiction to decide upon environmental misdemeanours and the prosecution of environmental crimes and in civil claims of the individuals and NGOs against other private parties or public authorities (ex. property and other civil disputes, compensation for damages, etc.);<sup>33</sup>
- **Appellate courts**, established to decide upon appeals against the decisions of the basic courts. Namely, the Law on Civil Procedure and Criminal Procedure Code confirms the constitutional right to an appeal of the first instance decision, due to violation of the litigation procedure, wrong or incomplete determination of the factual condition or misapplication of the material right; and
- **Supreme Court** of FYROM, established to decide in third and last instance upon appeals against the decisions of the appellate courts, to decide upon extraordinary legal remedies against the legally valid decisions of the courts (ex. revision of the second instance decision) and to decide upon a request of the parties in procedures for violation of the right to trial within a reasonable period.<sup>34</sup>

Furthermore, the judicial power is vested also in the Administrative Court, as competent to decide, *inter alia*, upon a dispute resulting from implementation and enforcement of concession agreements or contracts for public procurements which are of public interest, as well as against individual acts of the public authorities.

The Higher Administrative Court is established by law to decide upon appeals against the decisions of the Administrative Court.

---

<sup>30</sup> Rulebook for the form and content of the elaborate for environmental protection, the proceeding for its approval, as well as the register for approved elaborates (Official Gazette n. 50/15.04.2009).

<sup>31</sup> See art. 98 – 105 and Amendment XV, XXV, XXVI, XXVII, XXVIII and XXIX of the Constitution and the Law on Courts.

<sup>32</sup> See art. 22 of the Law on Courts.

<sup>33</sup> The Law on Courts envisages a formation of specialized court department (as part of Basic Court Skopje I) that will be competent for trying in organized crime and corruption. If environmental crimes are committed by "a structured group of three or more persons that exists for a certain period of time and acts for purpose of committing one or several crimes for which an imprisonment sentence of minimum four years is anticipated by law, with intend to obtain directly or indirectly financial or other benefits", they shall be tried in front of this Department.

<sup>34</sup>In accordance with art. 36 of the Law on Courts, the party that considers that the competent court has violated its right to trial within a reasonable time, have right to submit a *request for protection of the right to trial within a reasonable time* in front of the Supreme Court. The Supreme Court acts upon the request within a period of six months of its submission and if the Court establishes violation of the right to a trial within a reasonable time it shall define deadline for the relevant court in which the procedure is underway and a fair compensation for the party.





Besides the above, the Constitution of FYROM establishes [Constitutional Court](#) as a judicial body protecting the constitutionality and legality.<sup>35</sup> Thus, in accordance with the Rules of Procedure of the Constitutional Court<sup>36</sup>, anyone (including NGOs) may submit an initiative for assessment of the constitutionality of a law and/or assessment of the constitutionality or legality of an (environmental) regulation or other common act (administrative act that affects more individuals and/or legal entities). The Constitutional Court may repeal or invalidate a law (or specific legal provision) and other regulation or enactments, if it deems as in non-compliance with the Constitution or the law.

Moreover, the Constitutional Court protects the freedoms and rights of individuals relating to freedom of expression (conviction, conscience, thought ...), political association and activity, as well as right to non-discrimination on any basis. Any *citizen* may request protection by the Constitutional Court if it deems that an individual act or action (by the private or public entity) has infringed his above noted freedoms (ex. this may be used as protection against SLAPP claims against environmental activists that publicly protest against environmentally harmful corporate activities).

Most of the judges are familiar with the environmental law, however, it could not be said that there are specialized judges in this area. Reviewing the programmes for continuous training of the judges and public prosecutors for the period 2013-2016, it is noticeable that the judges have every year trainings on the Law on Environment, and they are paying special attention to environmental crimes. The Academy for Judges and Public Prosecutors is open for cooperation with external experts and NGOs, thus there is space for more focused and specialized trainings on the Aarhus Convention and environmental law, or studying the case law of the Aarhus Convention Compliance Committee.

The courts have technical / paralegal assistants but not specialized technicians that may provide expert opinions and help on complex cases. In complex cases, the courts may engage experts to provide expert opinion that will be evaluated together with the other evidences provided in the proceeding.

**5. Does the public (individuals and eNGOs) have a right to challenge in court the decisions on specific activities relating to the environment, in relation to article 6, paragraphs 1 (a) and (b), paragraphs 10, 11 and Annex I, paragraph 22, of the Aarhus Convention?**

With exception of special cases of national emergencies, the public concerned<sup>37</sup> have a right to challenge the substantive and procedural legality of the decisions on specific EIA activities related to the environment, including the right to challenge a decision of the MOEPP not to conduct EIA procedure for particular project.

Having in mind the legal hierarchy, in these cases the public concerned must first file a complaint against the decision in front of the relevant second instance State Commission. In the next instance, if the complaint is unsuccessful before the State Commission, the public concerned have a right to challenge the decision in front of the Administrative Court. The public concerned have a right to initiate directly an administrative dispute if complaint is not envisaged in first instance.

**6. Does the public (individuals and eNGOs) have a right to challenge in court acts/omissions by public authorities “which contravene provisions of its national law relating to the environment” (article 9, paragraph 3, of the Aarhus Convention)?**

---

<sup>35</sup> See art. 108 – 113 of the Constitution of FYROM.

<sup>36</sup> See art. 11 and 12 of the Rules [of Procedure of the Constitutional Court](#).

<sup>37</sup> Art. 5, para.1, item 26 of the Law on Environment defines "the public concerned" as follows: "[the public concerned] shall mean the public concerned by or having an interest in - at present or in future, the making of decisions concerning the environment, with which it has specific relation through particular procedure. The public concerned shall include the citizens' associations established for the purpose of environment protection and improvement, as well as individual with regard to whom there is a high probability to experience the effects of decision making."





The concerned individuals / environmental NGOs may challenge an act or omission by the public authority which contravene environmental laws and may request damages and/or request injunction relief.<sup>38</sup> Civil remedies are also available to owners of neighbouring lands that suffer damages to their property or person due to harmful emissions (if the damages are above the limits prescribed in the permits of the polluter). In addition, the Law on Obligations establishes a right for any member of the public to may take an action in court against the operator that is owner of a “potential source of danger” that threatens to cause significant damage to indefinite number of person (i.e. the potential harm that threatens the public interest).

Anyone may report breach of environmental laws by private persons or public authorities to the supervisory authorities, i.e. the State Environmental Inspectorate which is obliged to act upon the report. If the Inspectorate establishes that there is an infringement of the environmental laws, it may issue an order or prohibition of the activity or *initiate* a misdemeanour procedure. Moreover, *anyone* may file an indictment to the public prosecutor for the (potential) crimes against the environment by the public authorities or private persons. Anyone may also file a complaint to the Ombudsman if believes that his/hers environmental rights have been infringed by the public authorities. Moreover, art. 12 of the *Rules of Procedure of the Constitutional Court of RM* envisages that *anyone* can submit an initiative for assessment of the constitutionality of law or assessment of the constitutionality and legality of a regulation or other common act to the Constitutional Court.

Finally, the Law on acting upon complaints and proposals<sup>39</sup> prescribes a general right for the citizens to file free-of-charge complaints for the purpose of protecting their personal rights and interests, but also protecting the public interest as well. The public authorities are obliged to provide an answer regarding the “*legal grounds and the results of the actions taken*” within a period of 15 days/30 days for more complex issues. Moreover, if it is established that there is a violation of the public interest, the public authority is obliged to send a request to the competent body to take over the necessary measures to eliminate the violation and the caused damage. However, is this possibility for “indirect citizen’s enforcement” of the environmental law, i.e. if it may be used to protect the environment as “public good” is questionable and a future test for the public authorities and the judiciary itself.

The legal standing is dependent on the type of proceeding in question, but in general is based on the “*impairment of rights doctrine*”. Namely, **in the civil proceedings**, “*any natural or legal entity can be a party in the procedure*” and the court may “*recognize the capacity of the party and of those forms of joining that lack the capacity of a party ... should it be confirmed that, in regard to the subject of the dispute, they actually meet the conditions for acquiring the capacity of a party and should they have at their disposal property whereof enforcement can be conducted*”.<sup>40</sup> On the other hand, **in the administrative procedures**, “*a party ... is a person who request a procedure to be initiated ... or who has the right to participate in procedure in order to protect his/her rights or legal interest*”.<sup>41</sup> Moreover, art. 47, p. 2 of the Law on General Administrative Procedure clearly states that NGOs and group of people may be party “*if they can be considered as holders of rights and responsibilities subject to administrative procedure*”.

The issue of legal standing commonly is left for the courts to decide. However, there is no significant case-law in environmental matters, so our exact expectations of the court stance are quite limited. Regardless, reasonable observations and interpretations of the above provisions indicated that it may be expected potential litigants who live in some reasonable vicinity of the polluter and are in a risk to be affected by their operations to be granted a right to challenge the permit/the activity of the operator, including the inactivity of the public

---

<sup>38</sup> For example, art. 143 of the Law on Obligations stipulates that everyone may request from other person to remove the source of danger that threatens significant damage to him or indefinite number of persons. Also, the court, at the request of the person concerned shall order appropriate measures to be taken in order to prevent the occurrence of the damage or disturbance, or to remove the source of danger.

<sup>39</sup> Law on acting upon complaints and proposals (Official Gazette n. 82/2008 ...193/2015) regulates the actions taken upon complaints and proposals submitted to the public authorities by the citizens.

<sup>40</sup>Art. 70 of the Law on Civil Procedure.

<sup>41</sup>Art. 4, item 8 of the Law on General Administrative Procedure.





institutions to prevent the pollution. The individuals may "open the gate for access to justice" also with participation in the administrative proceeding (ex. when issuing the disputable permit). Concerning the NGOs,

their right to standing seems to be wide, and not constrained with additional requirements and criteria. Namely, the Law on Environment defines the environmental NGOs and the individuals whom there is high probability to experience the effects of particular decision, as public concerned, i.e. public that have an interest in the making of decisions concerning the environment. Thus, it is highly probable that the civil and administrative courts will deem the environmental NGOs and the affected individuals as parties in these procedures.

This interpretation of the laws is confirmed in the court case related to the Veles Smelter whereas the Court took a clear position that the environmental NGOs have a right to challenge act/omissions which contravene environmental law in front of the courts "*because the same are legal entities who are working on issues related to the protection of the environment*".

## II. Who can be reviewed

### **7. Decisions of which public authority under article 9, par. 2 and 3, of the Convention are subject to judicial and administrative review? Are all decisions of these authorities subject to judicial review? If not, which decisions or public authorities are not subject to such checks and on what grounds?**

As explained under question 1.2, formally the Law on General Administrative Procedure recognizes the principle of legal remedy, i.e. the parties concerned may challenge any administrative activity (or omissions) or administrative act (I instance - before the same body that passed the act; II instance - before the independent State Commission; III instance - Administrative Court). This is confirmed in article 104 of the same Law, whereas it is clearly stipulated that "*the party have a right to legal remedy against any administrative activity or inactivity, if it claims that it infringes its rights or legal interest*" (the environmental NGOs are considered parties with legal interest in environmental disputes).

However, as noted above, the major issue is that there is low transparency and thus limited public participation in many procedures that are regulated under the sectoral laws (and especially if not passing through EIA, SEA or IPPC procedure). This is one of the reasons why very rarely the environmental NGOs and the concerned public do not challenge many of the decisions and permits with environmental impact although there is strong public disapproval and revolt at the same time. Especially the public participation is limited when there is a decision-making process on highest governmental level. The environmental activists have noted the latest case of the National Park Galichica and the governmental request for changes in the Plan for management of the NP Galichica in order to envisage a touristic development zone that includes ski-centre, express road and other services within the Park. Although the process is still pending and there was public participation in the SEA procedure, all options are clearly not opened, i.e. the SEA is prepared only to minimize the negative environmental effects and the public cannot influence the project.

Also, in the special national emergency cases where the Government, upon proposal by the MoE, decides not to conduct EIA, the Law on Environment does not envisage a possibility to complaint nor a right to challenge it in front of the court and it is questionable whether the public concerned may use here the general principle of the Law on General Administrative Procedure to challenge this type of decisions.

## III. What decisions, acts or omissions can be reviewed

### **8. What public authorities' decisions/acts/omissions are subject to judicial and administrative review in the areas of decision-making as indicated below that can be initiated by the members of the public meeting the criteria laid down in the national law? Are there differences of criteria for eNGOs and individuals? Is there time-limit for decisions/acts/omissions to be reviewed? Please elaborate in light of article 9, paras. 2 and 3, of the Aarhus Convention.**

#### **(a) Construction requiring Environmental Impact Assessment**





As explained above, the construction projects that require EIA end with the Decision by the Ministry of Environment whether to approve or reject the project based on the environmental assessment. The public concerned have a right to challenge both the substantive and the procedural legality of the decision within

15 days as of the day of publishing the decision before the second instance State Committee.<sup>42</sup> If the decision was not published as prescribed by the Law on Environment (at least in 1 national newspaper and on the website of the Ministry of Environment), the public concerned may challenge the decision in period of 15 days when it learnt about it. If not satisfied by the decision of the State Committee (or the Committee does not decide within the legally prescribed period), the complainant may initiate an administrative dispute as well.

In addition, it is interesting to note that at the end of this procedure the Law on Construction (art.62-a) envisages "*an obligation to inform your neighbours*". More precisely, the competent body that has adopted the construction approval is obliged "*within a period of 3 days as of the adoption of the construction approval, to inform the immediate neighbours of the construction parcel, subject of approval, that the construction approval has been issued and that they have right to inspect the documentation within a period of 15 days as of the issuance of the construction approval*". In the same period, a right to one final (first instance) appeal is envisaged. The construction approval is legally valid actually only after passing this period. Unfortunately, this rule does not apply to construction approvals in the technological industrial development zones established by the Government.

#### **(b) Permit(s) allowing releases into the environment**

According to art. 108, the Ministry of Environment adopts Decision with which an A-integrated environmental permit is issued. Against this decision the public concerned and the environmental NGOs may file a complaint in period of 15 days of publishing the decision. If not satisfied by the decision of the State Commission (or the Commission does not decide within the legally prescribed period), the complainant may initiate an administrative dispute as well (in period of 30 days of the day when the challenged act is adopted).

#### **(c) (City) Planning procedures**

An *actio popularis* is available for challenging the substantive and procedural legality of the urban plans (considered as "common acts") in front of the Constitutional Court.<sup>43</sup> More important, there is valuable case law that the Constitutional Court was reviewing challenged urban plans from the aspect of "transparency and public participation" perspective.<sup>44</sup>

For example, in one case where the Court was reviewing the constitutionality and the legality of the detailed urban plan for industrial zone in the municipality of Kichevo, it took the following opinion: "*...from the available evidence, the Court assess that it could not be confirmed how the public was informed for the public poll upon the Draft detailed urban plan in accordance with article 18 of the Law [on Spatial and Urban Planning] ... thus, the legality of this part of the procedure may be questioned. Although from the Report for the public poll ...it is obvious that there was a comment filled by a citizen ... but still the question stays whether and how the citizens were informed for the organizing of the public poll for the draft plan.*" In addition, the Court is indicating that the public concerned should be identified and invited in these proceedings: "*the expert consultation upon the Draft-*

---

<sup>42</sup>Art 89 of the Law on Environment. If the decision is not published in accordance with the legal requirements, the public concerned may file a complaint within 15 days of the day on which they have learnt of the decision.

<sup>43</sup>Art. 12 of the [Rules of Procedure of the Constitutional Court of FYROM](#): "*Anyone can submit an initiative for initiating constitutionality of law and constitutionality and legality of a regulation or other common act assessment procedure*".

<sup>44</sup>According to art. 80 of the Rules of Procedure of the Constitutional Court of FYROM the execution of individual acts passed on the basis of an urban plan which is revoked by Constitutional Court decision "*cannot be allowed, nor implemented, and if the execution is being started, it will be cancelled*".





plan was conducted ... on this consultation the company "Zemjodelski Kombinat" who is initiator of this initiative [before the Constitutional Court] was not invited".<sup>45</sup> Or, in another case when the Court was deciding on the legality and constitutionality of detailed urban plan for area in the municipality of Kichevo and revoke the decision for adoption of this urban plan, it clearly stipulated that not taking into account the comments by the public, especially if the comments were assessed as appropriate

but still not included in the final plan without any explanation, is *substantial* breach of the legally prescribed procedure for adoption of detailed urban plans.

**(d) Licensing /permitting procedures for mining**

Having in mind that the public concerned have a right to participate in the process of permitting, it may directly initiate an administrative dispute / lawsuit against the permit for mining (because the Law on Mining does not envisage a right to appeal in second instance). Namely, in accordance with the art. 8, para. 2 of the Law on Administrative Disputes (Official Gazette no. 62/2006 and 150/2010), "*administrative dispute may as well be initiated against an administrative act of first instance, when legal remedy is not anticipated in an administrative procedure of second instance*".

Besides, the EIA study is obligatory for the requestor for mining, thus the public concerned have a possibility to challenge the decision for approving the EIA study as well, in accordance with the Law on Environment.

**(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes)**

There is no public participation envisaged in these procedures nor direct legal basis to challenge the decisions by the members of the public. In the decision-making procedure related to releases of GMOs, the Law on GMOs envisages only a right to initiate an administrative dispute against the decisions of the Ministry of Environment only for the requestor of approval for releasing of GMO.<sup>46</sup>

**(f) Other decisions/act/omissions not covered by above in light of article 9, para. 3, of the Aarhus Convention.**

According to the Law on Administrative Disputes an administrative dispute cannot be initiated against legal acts for which the judicial protection is secured out of the administrative dispute and for matters that the Assembly or the President decides directly based upon their authority derived by the Constitution, but these types of decisions are not relevant for our analysis.

\*In the end, there are no differences of criteria for NGOs or individuals concerning the *locus standi*.

**9. Is an administrative appeal required for the decisions/acts/omissions indicated in question 8 prior to judicial review? What is the relationship between administrative appeal and judicial review?**

---

<sup>45</sup>Decision by the Constitutional Court, C. no. 58/2011-0-0 / 09.11.2011. Similar case-law where the Constitutional Court revoked the plans: [Decision C. no. 108/2007-0-0 / 16.01.2008](#) (public participation provisions not followed); [Decision C. no. 63/2010-0-1 / 26.01.2011](#), [Decision C. no. 201/1994-0-0 / 13.09.1995](#) (no reply on the comments of the public); [Decision C. no. 164/1995-0-0 / 22.11.1995](#) (change of the urban plan without following the same procedure for public participation); [Decision C. no. 24/2006-0-1 / 21.06.2006](#) (not requested consent by the public authority for protection of natural rarities); [Decision C. no. 67/2014-0-1 / 04.02.2015](#) (public authority under the alleged "correction of technical error" made amendments of the urban plan without following the whole legally prescribed procedure); [Decision C. no. 199/2003-0-0 / 15.09.2004](#) (the draft plan was presented with one parameters - in the proposal plan others were given which were not proposed by the public); [Decision C. no. 182/2011-01 / 08.02.2012](#) (another public poll was not organized although the draft plan was drastically changed due to public comments and proposals);

<sup>46</sup>For example, art. 46, para. 6 of the Law on GMOs stipulates that "*The notifier shall have the right to file a lawsuit for initiating an administrative dispute with the competent court against the conditions stated in the license for placing GMO products on the market and against the decision itself.*"





The principle of "legal hierarchy" applies here. This is clear also from reading art. 26, para. 1, i. 4 of the Law on Administrative Disputes that stipulates that the Administrative Court shall dismiss the complaint if it finds that, *inter alia*, "an appeal could have been lodged against the challenged administrative act but no such appeal has been filed".<sup>47</sup> However, as explained above, there are cases where the administrative appeal is not envisaged in the *Lex Specialis* (ex. decisions under question 8 (e)). In these cases, the public concerned may initiate an administrative dispute / lawsuit against the challenged administrative act or activity.<sup>48</sup>

When envisaged, the procedure upon administrative appeal should be finalized as soon as possible but not later than 60 days. If the State Commission does not reply to the appeal within this deadline, the party may initiate an administrative dispute. The Administrative Court shall decide upon the dispute based on the facts established in the administrative procedure (I instance), or based on facts established by the courts itself. The lawfulness of the challenged administrative act shall be investigated by the Court within the limits of the request in the lawsuit, although it is not bound to the reasons of the lawsuit.

**10. Which system of jurisdiction is competent to verify these decisions/acts/omissions indicated in question 8? Please indicate if different for individuals or NGOs.**

The administrative courts (Administrative Court, Higher Administrative Court), except in cases of damages (civil court). No differences for individuals or NGOs.

**11. Which kind of legal recourse is open against these decisions indicated in question 8? What are the relevant legal proceedings in this matter?**

After exhausting the right to complaint in front of second instance State Commission the public concerned may initiate an administrative dispute. The Administrative Court decides upon the legality of the challenged act (procedural and substantive) and for the administrative matter itself (art. 30 of the Law on Administrative Disputes). Against the judgment by the Administrative Court (due to substantial violations of the procedural provisions, wrongly or not fully determined factual situation or wrong appliance of the relevant law) the party may file a complaint before the Higher Administrative Court in period of 15 days of the day of receiving the judgment.

**IV. The grounds for review and its intensity**

**12. Which control does the judge exercise on public authorities' decisions that are being challenged? Does the judge monitor substantive and procedural legality (e.g. the formal requirements of law, legal proceedings and/or reasons for these decisions)?**

In the administrative matters, the courts review both procedural and substantial legality of the challenged act. More precisely, the courts review whether: a) the act is adopted by the responsible public authority; b) the relevant legislation was properly applied; c) the factual situation was fully and appropriately determined before adoption of the challenged act; and d) the procedure was followed for adoption of the challenged act.<sup>49</sup>

---

<sup>47</sup> Confirmed in many case laws. For example, in the case n. 232 (31.03.2016) before the Higher Administrative Court: "... the Administrative Court adequately applied the provision of article 26, p. 1, i. 4 of the Law on Administrative Disputes and adopted legal decision and adequately assessed that the complaint should be dismissed due to the fact that the complainant were obliged first to file a complaint against the first instance decision, and then to initiate administrative dispute before the Administrative Court."

<sup>48</sup> However, as explained above, here the problem is that in many of these instances there is lower standard of transparency (in comparison with the EIA, SEA, IPPC and the similar environmental procedures) and limited space for public participation that in the end is reflected in limited access to justice as well.

<sup>49</sup> Art. 10 of the Law on Administrative Disputes.







In addition, the courts are deciding for the legality of the administrative act but also for the administrative matter itself.<sup>50</sup>

If the court accepts the lawsuit and its merits it will annul the examined administrative act and, if the factual situation is clearly determined, will decide the administrative matter itself. In cases when, *inter alia*, the relevant law was wrongly applied, the court annulled the administrative act but the responsible public body did not act in accordance with the instructions and opinion of the court's judgment, or if the public authority adopts new administrative act that is against the reasoning of the court, the court will adopt decision that in fully replaces the administrative act. In these cases, the court informs the relevant inspectorate and the inspectorate is obliged to suspend the official person that did not respect the court's decision and to initiate a proceeding against him.<sup>51</sup>

The lawsuit does not suspend the enforcement of the challenged administrative act, except if injunctive relief is requested and approved.<sup>52</sup>

**13. What is the basic philosophy of the courts' control of administrative decisions? Do the courts rely in the evidence that is produced by the other parties to the proceedings, or do they have a responsibility of their own to investigate the case in line with the so called inquisitorial principle?**

The basic philosophy of the courts' control of administrative decisions is grounded on the inquisitorial principle, although in practice the foremost focus of the courts is on the procedural legality of the contested act. This is the largest opportunity for the public to challenge the administrative acts. According to the Law on Administrative Disputes (art. 36), as a rule, the Administrative Court decides based on the facts that are determined in the administrative procedure or based on the facts that the court will determine. The Administrative Court actually will review the facts that are determined in the administrative procedure, i.e. whether the factual situation is fully determined, whether from the determined facts wrong factual conclusions were drawn, whether the procedural requirements were followed. If it is obvious that the factual situation was not fully determined or that the returning of the case back to first instance will cause irrevocable damage to the complainant (or if once the Court returned back the case to first instance but the relevant authority did not follow the court's instructions), the Court is obliged to determine the factual situation himself on a hearing where the parties are invited as well, and pass a final judgment. The legality of the contested act the Court is assessing within the framework required by the complainant.

**14. For which kind of public authorities' decisions does the judge have limited control (e.g. only towards facts, procedural rules, errors in the applied laws or irrelevant matters taken into considerations, other)? In contrast, for which kind of public authorities' decisions does s/he exercise thorough control?**

For environmental issues, there are no limitations to the judge's control of the public authorities' decision. The Law on Administrative Disputes recognizes that the administrative disputes could not be launched against acts for which there is court protection outside of the administrative disputes (ex. decision from the labour relations area for which there is a right to remedy in the civil court) and for decisions that are adopted directly by the Assembly or the President based on the constitutionally determined authorities.

---

<sup>50</sup>Art. 30, p. 2 of the Law on Administrative Disputes.

<sup>51</sup>Art. 40 of the Law on Administrative Disputes.

<sup>52</sup> However, the criteria upon the injunctive relief is granted are vague and left to the discretion of the court. Also, there is the issue that the court will not grant the relief in most of the environmental cases due to different reasons (non-understanding of the issue, pressure not to stop important investment project, overall economic condition, etc.). In addition, there is a possibility for the complainant to be sued for damages that were caused by the injunctive relief, making its use financially risky or to be asked for the plaintiff to provide financial guarantee before-hand that in complex cases against big polluters may be in prohibitively expensive" to be borne, especially by NGOs.





**15. While exercising judge's power of judicial review how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?**

It is known that the courts use academics for theoretical knowledge, but most often they engage independent experts to clarify the circumstances of the case. His/her opinion is not binding, but the courts are relying on it as on the final opinion, having in mind that both parties may offer its own different arguments and opinions. In addition, the courts have paralegals who are assisting the judges in utilizing relevant case-law and other supporting activities.

**16. Do the courts have different approaches on e-NGOs' lawsuits and lawsuits of individuals?**

Although the case-law on the *locus standi* question is poor, it seems that the courts do not have different approach towards NGOs in comparison with individuals. In the famous case (explained in the previous analysis) of the citizens of Veles and NGOs vs. Veles Smelter the court took a clear position that the environmental NGOs have a right to challenge act/omissions which contravene environmental law in front of the courts "*because the same are legal entities who are working on issues related to the protection of the environment*".

In addition, formally, the legislation does not make difference and recognizes the NGOs as potential parties in the lawsuits.

**V. What are the outcomes of judicial review**

**17. Do the courts have only cassation or also reformatory rights in cases under article 9 of the Convention? (Generally speaking, what is the outcome of a successful challenge of an administrative decision?)**

As explained mostly in q. 12 and 13, the courts have cassation but also reformatory rights. The administrative courts may rule on legality as well as on the procedural aspect of the administrative decision. Generally speaking, outcome of a successful challenge of an administrative decision would be fully determined factual situation, rightly applied law and passed final decision that the first instance administration will implement in 30 days.

**18. What are the limits of discretion by public authorities after the court decision?**

As a rule, the national legislation is clear that "*the legally valid court decision shall have undisputed legal effect*" and that "*the court decision may only be amended or abolished by a competent court in a procedure prescribed by law*".<sup>53</sup> Moreover, "*the court decisions have greater force with regard to the decision of any other body*", as well as "*everyone is obliged to obey the legally valid and enforceable court decision*".<sup>54</sup> Whenever the courts annul an act in an administrative dispute, the public authority that adopted the decision in the first instance is obliged to reinstate the situation as prior to the adoption of the annulled act.<sup>55</sup> Thus, the responsible public authority is obliged to adopt a new act if it is necessary instead of the annulled administrative decision or to adopt an act for enforcement of the court's decision within 30 days at latest.

However, if the public authority does not act within the deadline, the procedure for enforcement may be prolonged and this is something that is occurring in practice. In these cases, the party must file a special request to the responsible public authority to act upon the court's decision in period of 7 days. If this also is not successful, the party must go back and lodge another complaint to the administrative court. In this instance, the court is authorized to bring a decision "*which in every aspect substitutes the act of the competent body*" and shall notify the State Administrative Inspectorate. The responsible authority is obliged to enforce the court decision as is ordered with no postponement or may be criminally charged for obstructing the justice.

---

<sup>53</sup> See art. 13 of the Law on Courts.

<sup>54</sup> Ibid, p. 4 and 5.

<sup>55</sup> See art. 52 of the Law on Administrative Disputes.





## VI. Case-law

19. Please, if possible, briefly describe relevant case-law.

### **Administrative Court's Decision n. 369/2013 in the case Front 21/42 (environmental NGO) vs. State Commission for Decision-Making in Administrative Procedure and Labour Relations Procedure in Second Instance, related to the case hydropower plant "[Boshkov Most](#)"**

In September 2010, ELEM (JSC Macedonian Power plants) submitted Notification for intention to implement the project HPP Boshkov Most to the MoE. The Ministry of Environment passed a decision in April, 2011 that obliges the investor to prepare an EIA study for the project and determined the scope of the study. After conducting the EIA study, during September 2011, the study was presented on three public hearings, after which MoE adopted the Report for appropriateness of the EIA study that includes various measures and recommendations for mitigating the environmental impact. On 09.10.2012 MoE passed a decision for approval of the project.

The environmental NGOs (lead by Front 21/42) appealed the MoE's approval of the EIA study in front of the "State Commission for Decision-Making in Administrative Procedure and Labour Relations Procedure in Second Instance", challenging the content and quality of the EIA study on several bases, as well as claiming that the right to public participation was not fully respected. The complaint was rejected in May 2013 as not grounded and MoE' decision was confirmed.

The environmental NGO Front 21/42 initiated a lawsuit against the decision of the State Commission. After noting the relevant articles of the Law on Environment related to the EIA procedure and especially the access to information, public participation and access to justice provisions, the Administrative Court accepted the lawsuit and decided in favour of the NGOs. According to the Court's explanation the second instance State Commission did not explained the reasons for rejecting the appeal, especially why it considered that the MoE' decision to approve the EIA study was in accordance with the Law on Environment and the relevant by-laws having in mind that the public concerned contested exactly the completeness of the study. With this stance the Court clearly confirms that the second instance State Committee has obligation to examine the merits of the appeal substantially (not just procedural-wise). Moreover, the Court stated that due to the fact that the State Commission did not submit the requested documents that are needed for the Court to examine the case, there are no evidence that the decision of the MoE have taken into consideration the public consultation process and the comments of the NGOs and experts. Due to all of this, the Court annulled the decision by the State Commission and returned the case with obligation for the State Commission to follow the reasoning of the Court.

In June 2015, the MoE prolonged the EIA permit for HPP Boshkov Most without any public consultation process under explanation that there are no substantial changes that will affect the environment. Front 21/42 is challenging this decision as well. There is no decision of the State Commission yet but no other legal actions are undertaken (i.e. administrative lawsuit because the State Commission is not replying within the 60 days period).





### 3. Montenegro

Prepared by Mrs. Maja Kostić-Mandić, national expert, email: [majak@t-com.me](mailto:majak@t-com.me)

#### I. General information<sup>56</sup>

##### 1. Overview of the legislation relating to the environment.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) was ratified by the Parliament of Montenegro in July 2009 and entered into force on 2 February 2010. As other ratified international conventions, the Aarhus Convention is a part of internal legal system of Montenegro. In terms of the hierarchy of the sources in law, the Constitution of Montenegro of 2007 prescribes that the ratified and promulgated international conventions shall have the supremacy over the national legislation, and shall be directly applicable when they regulate the relations differently from the internal legislation. However, in Montenegro, public authorities and courts do not apply the Aarhus Convention directly and they are more likely to apply the relevant provisions of domestic legislation (Law on Environment, Law on Free Access to Information, Law on EIA, Law on SEA and many other statutes containing provisions guaranteeing implementation of the rights provided by the Aarhus Convention).

The 2007 Constitution of Montenegro addresses environmental issues in its several provisions, building on Montenegrin legal tradition in this field. The Constitution of Montenegro defines the state as an “ecological one”, treating the right to a healthy environment as a human right. There are explicit provisions of the Constitution dealing with access to information, public participation and access to justice in environmental matters.

The Parliament of Montenegro has adopted a new Law on Environment (“Official Gazette of Montenegro”, No. 052/16 of 09/08/2016). The Law governs the principles of environmental protection and sustainable development, environmental protection instruments and measures, as well as other issues of relevance for the environment. To the existing principles of environmental protection: the principle of access to information and public participation, a new principle is added: the principle of protection of right to healthy environment and access to justice. It stipulates that a citizen or a group of citizens, their associations, professional and other organisations, have a possibility to influence a decision-making in environmental matters, as well as a possibility of access to justice of the competent authorities and before the court. Within the new Chapter of the Law which is related to the access to information, public participation in decision-making and access to justice, a special article (Article 72) provides that in a decision-making procedure related to environmental matters, the interested public shall have the right to initiate a procedure of decision review before a competent authority, or before the court in accordance with the law. Interested public has the right to file an appeal against the decision of the authority competent for the environmental protection, i.e. the right to sue before a competent court in accordance with special regulations.

Along with the Law on environment, as the umbrella law in this field, environmental protection and sustainable development are regulated by special laws regulating certain segment of the environment and these are: 1) environmental impact assessment of plans, programmes and projects; 2) liability for damage in the environment; 3) integrated pollution prevention and control; 4) nature protection; 5) protection of air, water, sea, soil, forests and geological resources; 6) chemicals; 7) waste management; 8) protection from the negative impact of climate change; 9) ionizing and non-ionizing radiation; 10) protection from noise.

Environmental rights are also protected by the implementation of other laws.

Administrative procedure is regulated by the new Law on administrative procedure (LAP, “Official Gazette of Montenegro”, no. 56/2014. Provisions of the law regulating general administrative procedure are accordingly applied to the environmental laws in terms of those issues which are not particularly regulated by these laws.

---

<sup>56</sup> See also other analytical studies Available from [http://www.unece.org/env/pp/tfaj/analytical\\_studies.html](http://www.unece.org/env/pp/tfaj/analytical_studies.html) (under headings SEE)





The Law on administrative procedure will be applied as of 1 July 2017. Article 119 of the LAP prescribes that party (each individual or organisation whose right has been violated by a decision adopted by the first instance authority) may file an appeal to the second instance authority. The appeal is a regular remedy that initiates a second instance administrative procedure as a control procedure of the work of first instance authority. Without an appeal there is no control of this type, because the second instance procedure may not be initiated or conducted *ex officio*. This is the law regulating general administrative procedure and if all issues are not regulated by special environmental regulations, in a decision-making procedure provisions of this law are applied accordingly.

Law on administrative dispute ("Official Gazette of the Republic of Montenegro", no. 60/03, "Official Gazette of Montenegro", no. 73/10, 32/11) provides that each individual or organisation may file a case to the Administrative court of Montenegro against an administrative or other act adopted at the second instance, the decision of which he/she is not satisfied with (Article 7 and Article 15). Administrative court decides by judgement on subject matter by: dismissing the appeal as unfounded and uphold a second instance decision or upholding the appeal and revoke a second instance decision.

Article 76 of the Civil Code Procedure ("Official Gazette of the Republic of Montenegro", no. 22/04, 28/05, 76/06, "Official Gazette of Montenegro", no. 73/10, 47/15, 48/15)) stipulates that a party in the proceeding may be any natural or legal person. Special regulations provide for who, beside natural and legal persons, may be a party in the proceeding. It must be noted that a group of citizens which has no legal entity may be placed in unequal position in relation to other parties in the proceeding, but the courts do not interpret this provision in its literal meaning, so that there are no major problems in the practice.

Protection of environmental rights is also exercised in a criminal procedure which is regulated by Criminal Code Procedure. The basic right and duty of the public prosecutor is to institute the criminal procedure *ex officio* against criminal offenders, with the regard to the criminal offences for which *ex officio* prosecution is provided. An injured party as a prosecutor has the right to assume, i.e. to continue the criminal prosecution within 30 days from the day of receipt of the notice from the public prosecutor stating that there are no grounds for instituting criminal prosecution for the criminal offence for which *ex officio* prosecution is provided.

Amendments to the Criminal Code ("Official Gazette of the Republic of Montenegro", no. 70/03, 13/04, 47/06, "Official Gazette of Montenegro", no. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15) from 2013 expanded the number of criminal offences against environment, and some of them have been formulated differently. Chapter XXV prescribes that criminal offences against environment (Articles 303 until 326) are as follows: environmental pollution, environmental pollution by waste, depletion of the ozone layer, failure to undertake environmental protection measures, illegal construction, start-up and operation of facilities and installations which pollute environment, damage of facilities and devices for environmental protection, environmental damage, abuse of genetically modified organisms, destruction of plants, killing and torture of animals and destruction of their habitats, destruction and damage of a protected area, stealing protected natural resource, carrying in and carrying out of a protected natural resource and specially protected plants and animals and trade of therein, carrying in and carrying out of hazardous substances, illegal treatment of hazardous substances, illegal construction of nuclear power plants, non-compliance with the order for environmental protection measures, violation of the right to free access to information on the state of environment, transmission of infectious diseases in plants and animals, negligent provision of veterinary services, illegal practice of veterinary, production of hazardous agents for animal care, pollution of food and water for animal feeding and watering, deforestation, forest theft, illegal hunting, illegal fishing. The most common criminal offences in Montenegro are forest theft and illegal hunting. It should be noted that there is a change in court practice in terms of ruling with regard to the previous period, when criminal offenders were mainly sentenced with parole. Thus, for the above-mentioned criminal offences, sentence of imprisonment and fine sentence are more often imposed.

Those crimes are prosecuted *ex officio* by the competent prosecutor and one of the institutions which in the course of its work files criminal charges is Administration for inspection affairs – the Sector for environmental inspection. In practice, there are examples that while reviewing criminal charges, prosecutors find that





there are no essential elements of the criminal offence and therefore file a request for initiation of misdemeanour proceeding. In misdemeanour proceedings, fine sentences are imposed as the most lenient form of violation of positive regulations, so that this kind of sanctions has low impact on legal persons for not committing such acts again.

Civil legal protection related to the environment is exercised in civil proceedings, in accordance with the provisions of the Civil Code Procedure. In the context of the fact that in the process of deciding on rights and legal interests of natural and legal persons is a special issue of setting compensation for endangering the rights in the field of environmental protection, Article 186 of the Criminal Code Procedure ("Official Gazette of Montenegro", no. 57/09, 49/10, 47/14, 02/15, 35/15, 58/15)) stipulates that a civil procedure shall be initiated by a plaintiff, so that any individual or organization may submit a claim for compensation of damages sustained by the threat of his rights in the field of environment, as well as the claim with a view to prevent occurrence of damage in the environment, to which effect he/she may require from the court to determine temporary security measures during the dispute on the claim. In accordance with the Law on property and legal relations, one of the means of protection of the owner of a property from various hazardous impacts (emission), which can significantly jeopardize the use of the property, is *actio negatoria* claim for cessation of harassment, or removal of the resulting interference. Owners of the real-estate exposed to excessive emissions are entitled to claim the removal of causes of such emissions from the owners of the real-estate where such emissions come from and to claim compensation of damage inflicted by such emissions, as well as to claim that he/she deter himself/herself from activities and to remove causes originating from his real-estate until all measures for disabling those emissions are undertaken.

## **2. General principles of public administration**

The administrative procedure is regulated by the Law on administrative procedure (LAP). State authorities and local self-government authorities shall proceed in compliance with the provisions of this Law, directly applying the legal regulations, when deciding in administrative matters on rights, obligations or legal interests of a natural person, legal person or other party, as well as when they perform other affairs determined by this Law. The new Law on administrative procedure will be applied as of 1 July 2017.

The main general principles of administrative procedure are: legality and protection of reasonable expectations of the parties, proportionality, protection of citizen's rights, active assistance to the party, efficiency and procedure economy, truth (all decisive facts should be established accurately and wholly in the procedure), hearing the party, assessment of evidence, independence in deciding, right of a party to participate in the procedure, right of a party and other participants to examine files and to be informed, the use of language.

Law on administrative procedure stipulates that a party, as well as the person who was not given an opportunity to participate at the first instance procedure, has the right to lodge an appeal against decision adopted in the first instance procedure, if such decision is related to his/her rights and legal interests (interested person). A decision may be challenged by an appeal due to: the violation of the rules of the proceeding, incomplete and incorrectly determined factual situation and due to wrongful implementation of substantive law. If the second instance authority does not dismiss the appeal, it takes the subject for consideration and may dismiss the appeal, revoke a decision in whole or partially, or alter it. Decision upon appeal is a final act in administrative procedure and administrative dispute may be initiated against such decision.

Administrative court of Montenegro is competent to decide in administrative procedure (on lawfulness of administrative acts, as well as on lawfulness of other individual acts when it is stipulated by law, as well as on extraordinary legal remedies against final orders in misdemeanour procedure).

Supreme court as the highest instance court in Montenegro decides on extraordinary legal remedies against decisions of the courts in Montenegro (except for the retrial of the procedure in which the court that issued a decision in the first instance shall decide). Constitutional court of Montenegro allows the possibility of lodging a constitutional appeal due to the violation of human rights and freedoms after all other efficient legal remedies have been exhausted.





In Montenegro, there is no specific law on access to environmental information. Access to environmental information is provided in accordance with the Law on Environment and the Law on free access to information. The new Law on environment introduces a novelty regarding the previous law, and it relates to the incorporation of provisions on ensuring access to environmental information. Access to environmental information is ensured based on a request submitted to the state authorities, administration body and local government authority, which does not contain reasons for requesting information. Due time for deciding on the request is within 15 days from the day of the submission of the request in accordance with the law regulating free access to information. Deadline may be extended for eight days, if the requested access relates to extremely extensive and complex environmental information. Appeal may be filed to the Agency for the protection of personal data and the free access to information against a decision rejecting the request for access to environmental information.

**3. Decision-making procedure relating to the environment in the following areas (please indicate the type of decision, whether the public should be informed about the procedure and its documentation, has a right to participate, there is a time limit for comments to be submitted). Please elaborate your answer in light of article 6, paragraphs 1 (a) and (b), paragraphs 10 and 11, article 7 and Annex I, paragraph 22, of the Aarhus Convention.**

**(a) Construction requiring Environmental Impact Assessment**

Law on Spatial Development and Construction of structures ("Official Gazette of Montenegro", no. 51/08, 40/10, 34/11, 40/11, 47/11, 35/13, 39/13, 33/14) provides that every person shall have the right, in accordance with law, to be informed on affairs pertaining to spatial development and construction of structures, to propose initiatives, give opinions or otherwise participate in affairs related to spatial development and construction of structures. The Government or local self-government executive authority shall place draft planning document for public hearing. Public hearing shall be announced in one daily printed media outlet being distributed on the territory of Montenegro, on the website of the Responsible party for preparatory tasks and shall last from 15 to 30 days from the day of publication. Responsible party for preparatory tasks shall compile a report on public hearing and submit them to the drafter who will embed remarks and suggestions in the planning document in an appropriate manner. Report on strategic environmental impact assessment shall be placed for public hearing along with the placement of the planning document for public hearing. A repeated public hearing may be carried out, if upon conducted public hearing the planning document defers significantly from the original draft planning document. Responsible party for preparatory tasks shall determine the degree of differences. Repeated public hearing shall be carried out in respect of the entire planning document or its part, provided that its duration shall be 15 days from the day of publication. Responsible party for preparatory tasks shall enable examination of the report on public hearing, which is being published on the website, to all interested parties. Responsible party for preparatory tasks shall submit to the Government or to the local self-government executive authority proposal of the planning document with the report on public hearing. Local self-government executive authority shall submit the proposal of the local planning document after its adoption to the Ministry for assent. The proposal for the local planning document and the assent, or the act on necessary modifications shall be published on the website of the Ministry, within seven days after the date of delivery, or after the date of giving assent.

**(b) Permit(s) allowing releases into the environment**

Law on Environment prescribes that state authorities, administration bodies and local government authorities competent for environmental protection affairs are obliged to timely inform the public on environmental decision-making procedures relating to: 1) strategic environmental assessment of plans and programmes; 2) environmental impact assessment; 3) permitting procedure for integrated pollution prevention and control through approval of operation of new, or existing facilities; 4) strategies, plans, programmes and other documents relating to environmental protection; 5) other environmental issues in accordance with special regulations (Article 72). Law on integrated pollution prevention and control ("Official Gazette of the Republic of Montenegro", no. 80/05, "Official Gazette of Montenegro", no. 54/09, 40/11, 42/15) prescribes that a competent authority informs interested authorities and organisations and public on the receipt of a request, within five days from the day of the receipt of proper request for issuing permit, or additional data, documents and information.





***(c) (City) Planning procedures***

The Law on Local Self-Government ("Official Gazette of the Republic of Montenegro", no. 42/03, 28/04, 75/05, 13/06, ("Official Gazette of Montenegro", "Official Gazette of Montenegro", no. 88/09, 03/10, 73/10, 38/12, 10/14, 57/14, 03/16) stipulates that the authority of the units of local self-government and public services are obliged to inform the public about performance of duties within their scope of work and report their work to

public through the mass media, and in any other appropriate way. Every person has the right to file a citizen appeal or submit a petition to the authorities of local self-government units, as well as to request from the authority information about their scope of work. Procedure of filing of appeal and authority's deciding upon the citizen appeal and petition are regulated in more detail in the statute of the Municipality. The authorities to whom requests have been submitted are obliged to issue a decision, or provide notification within 30 days from the day of receipt of the request. Forms of direct participation of citizens in expression of views and decision-making are: citizens' initiative, citizens' assembly, referendum (in districts and municipalities) and other forms of expression of views and decision-making defined by the Statute. Citizens through citizens' initiatives propose adoption of acts or change of hereto which regulate a particular issue within the competence of unites of local self-government.

***Licensing /permitting procedures for mining***

License which is issued in respect of performing commercial exploitation and geological exploration of mineral resources by the Ministry of economy in the form of a decision is final and an administrative dispute may be initiated against it. Article 53 of the Law on mining stipulates that the works on the exploitation of mineral resources and the construction of mining facilities can be carried out only based on approved mining projects, after obtaining the approval for exploitation. Along with the request for authorization to perform works for the main and supplementary mining project, among others, the state authority competent for the environmental protection shall submit an approval of the Environmental Impact Assessment Study or a decision that it is not necessary to carry out an impact assessment to be issued in accordance with a special regulation.

Article 20 of the Law on environmental impact assessment ("Official Gazette of the Republic of Montenegro", no. 80/05, "Official Gazette of Montenegro", no. 40/10, 73/10, 40/11, 27/13) prescribes that within five days from the receipt of the application for approval for the Study, the competent authority shall inform authorities, organisations and the public concerned about the manner, time and venue for public viewing, submission of opinions and remarks, as well as the time and venue for holding the public hearing on the Study. The public hearing may not be held sooner than 10 days from the day when the authorities, organisations and the public concerned were informed. The public hearing shall be organised and chaired by the competent authority. Within two days from the date of establishing Environmental Impact Assessment Commission, the competent authority shall submit the study to the Environmental Impact Assessment Commission while the report with the review of the remarks and opinions obtained during the public viewing and the public hearing shall be submitted within three days from the day of held public hearing. The Environmental Impact Assessment Commission shall submit the report concerning the Study evaluation to the competent authority not later than within 25 days from the date of receipt of documentation. The competent authority shall decide on granting the approval or rejecting the application for approval of the Study based on the report and proposals of the Environmental Impact Assessment Commission. An appeal against the decision of the competent authority may be filed to the Ministry of sustainable development and tourism (MSDT). Decision of MSDT is final, and administrative dispute may be initiated against it.

***(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes).***

Game can be hunted by natural persons who have a permit for hunting issued by the Directorate of Forests, and a hunting card, in accordance with the Law on game and hunting ("Official Gazette of Montenegro", no. 52/08, 40/11, 48/15). Permit for hunting shall be issued for each hunting ground separately, and a hunting map for all







hunting grounds in Montenegro. Permit for hunting and hunting card shall be issued to a natural person, other than a foreigner, who has passed the hunting exam and has an approval for carrying hunting weapons and who is a member of the appropriate hunting organisation. Hunting exam shall be taken before the board of examiners on the proposal of the Hunting Association established by the Ministry. Appeal can be filed against a decision to issue permits for hunting to the Ministry of Agriculture and Rural Development. Decision of the Ministry is final. A party may initiate an administrative dispute against the decision of the Ministry.

The statute of the Hunting Association of Montenegro, in Article 44, stipulates that the work of the Hunting Association is public. Hunting Association shall take the necessary measures to inform all interested parties about the work of the Hunting Association. Notice of work of the Hunting Association, is issued through electronic and other forms of communication, and then by submitting materials and information to the members of the Hunting Association, by issuing their own newsletters or through media.

Usage in closed systems, deliberate release into the environment, placing on the market and transit of GMOs or products containing, consisting of or derived from GMOs, is allowed only after obtaining the approval of the competent administrative authority, under the conditions and in the manner prescribed by the Law on genetically modified organisms ("Official Gazette of Montenegro", no. 18/12). The procedure for granting the approval for the above mentioned is initiated on the basis of the application submitted in written or electronic form. The notice containing basic information about the applicant and the subject of the application and the time and place in which available information may be reviewed in accordance with the law shall be published by a competent state authority, upon the receipt of the application, in at least one daily newspaper distributed on the territory of Montenegro, the electronic media and on the web site of the competent authority. The competent administrative body organizes and conducts a public hearing, which must last for at least 45 days from the date of publication.

Activities of trade in hazardous chemicals may be performed only by supplier on the basis of permit issued by the Environmental Protection Agency. The permit is issued at the request of a supplier that distributes a chemical. Permit for performance of activities of trade in hazardous chemicals may be issued to a supplier that has adequate space for storage and keeping of hazardous chemicals in a manner that prevents persons from the access to use it in illegal purposes. Appeal may be filed to the Ministry of sustainable development and tourism against the decision of the Environmental Protection Agency. Second instance decision of the Ministry is final and administrative dispute may be initiated against it. The Law on Chemicals ("Official Gazette of Montenegro", no. 18/2012") does not regulate the area of informing the public. Information on permits issued in the field of chemicals management is available to the public on the website of the Environmental Protection Agency, in accordance with the provisions of the Law on Environment.

**4. The structure of the judiciary in your country (types of judicial bodies, jurisdiction in judicial review of authorities' decisions, acts or omissions in environmental matter). Are there judges specializing in environmental cases? Do the courts have technicians of their own? Do judges have education and training in environmental law and the Aarhus Convention? Please indicate if you know what training methodologies and tools are used?**

This Law on courts ("Official Gazette of Montenegro", no. 11/15) regulates establishment, organisation and jurisdiction of the courts.

The courts are: 1) misdemeanour court; 2) higher misdemeanour court of Montenegro; 3) basic court; 4) higher court; 5) Commercial court of Montenegro; 6) Administrative court of Montenegro; 7) Appellate Court of Montenegro; 8) Supreme Court of Montenegro. Judiciary system is organized on the territorial principle and the principle of specialization. Court divisions established within courts are: 1) in a basic court – civil, criminal, enforcement and other divisions; 2) in a higher court – criminal, civil and other divisions; 3) in a commercial court – division for commercial disputes, registration and bankruptcy division, division for economic offences and division for enforcement and security and no contentious matters; 4) in the Appellate Court – civil and commercial division and criminal division; 5) in the Administrative Court – administrative division; 6) in the





Supreme Court – civil, criminal, administrative and case-law divisions. Civil and criminal legal protection related to the environment is provided before all courts apart from the misdemeanours courts. Misdemeanour court is competent to decide on the request for misdemeanour proceedings.

Higher misdemeanour court is established for the territory of Montenegro, and its seat is in Podgorica. Higher misdemeanour court decides on appeals filed against decisions of the misdemeanour courts, decides on conflict of jurisdiction between the misdemeanour courts and performs other duties prescribed by law.

Basic courts have jurisdiction at first instance for civil and legal protection as well as for criminal and legal protection relating to the environment, for criminal offences punishable by law by imprisonment of up to 10 years (this relates to the majority of criminal offences from this field). Higher court at second instance decides on appeals against decision of basic courts. As for the criminal offence for which imprisonment more than 10 years is envisaged, Higher court has the jurisdiction at the first instance, and the Appellate court decides on appeals. Appellate court also decides on appeals against decisions of commercial courts.

The Administrative Court of Montenegro has the jurisdiction for deciding in administrative disputes (on the legality of administrative acts, and legality of other individual acts as provided by law, as well as on extraordinary legal remedies against final and enforceable rulings in misdemeanour proceedings).

The Supreme court as the highest court in Montenegro decides on extraordinary legal remedies against decisions of the courts in Montenegro (except for the retrial of the procedure in which the court that issued a decision at the first instance shall decide).

There is a possibility of initiating constitutional appeal before the Constitutional court due to the violation of human rights and freedoms after all effective legal remedies have been exhausted.

In Montenegro, there are no specialized judges and prosecutors in the field of the environment, the courts and the prosecutor's offices do not have their own technicians in this area but certainly judges have judicial assistants, who help them in their work, drafting decisions and performing other professional affairs independently or under their supervision or in accordance with their instructions. Their research in the environmental field may help judges in their reaching of legitimate decision.

The Centre for Training in Judiciary and State Prosecution is the only institution in the state which is authorized, in accordance with the Law on Training in Judiciary and State Prosecution, to train judges and prosecutors from the field of environment and implementation of the Aarhus Convention. The Centre has no field of environment in its annual training programme for 2016.

***5. Does the public (individuals and eNGOs) have a right to challenge in court the decisions on specific activities relating to the environment, in relation to article 6, paragraphs 1 (a) and (b), paragraphs 10, 11 and Annex I, paragraph 22, of the Aarhus Convention?***

Law on mining stipulates that an appeal may be filed to the Ministry against the act of the competent authority. Administrative dispute may be initiated against the Ministry's decision. Law on genetically modified organisms prescribes that provisions of the law regulating general administrative procedure shall be applied to the procedures conducted in accordance with this law.

***6. Does the public (individuals and eNGOs) have a right to challenge in court acts/omissions by public authorities "which contravene provisions of its national law relating to the environment" (article 9, paragraph 3, of the Aarhus Convention)?***

Natural or legal person has the right to initiate the administrative dispute if he/she considers that certain right of theirs or legally determined interest are violated by an administrative or other act. A state authority, organization, settlement, group of persons and others who do not have the attribute of a legal person may be parties, if they are entitled to be holders of rights and obligations or legal interests on which the procedure has been started.





If an administrative act violates the law in favour of a natural person, legal person or other party, administrative dispute may be initiated by a public prosecutor or another competent authority. Administrative dispute may be initiated by a state prosecutor or another competent authority if an administrative or another act violates the law to the detriment of the state, local self-government unit, institution or other legal entity. If a second instance authority failed to pass a decision within 30 days or within a shorter period of time defined by law on the party's appeal against the first instance decision, and fails to do so within the following seven days, after repeated request, the party may initiate an administrative dispute as if the appeal is rejected.

## II. Who can be reviewed?

**7. Decisions of which public authority under article 9, paras. 2 and 3, of the Convention are subject to judicial and administrative review? Are all decisions of these authorities subject to judicial review? If not, which decisions or public authorities are not subject to such checks and on what grounds?**

The Law on Administrative Procedure stipulates that administrative review is not allowed when it is explicitly forbidden by law (Art. 119 (1)). Party to the proceedings may be any natural or legal person. State authority,

organization, settlement, group of persons and others who do not have the status of legal persons may be parties, if they are holders of the rights and obligations or legal interests which are the subject of the proceedings (Art. 51).

An appeal may be filed against a first instance decision issued by a ministry only when determined by the law and in matters in which an administrative dispute is excluded (LAP Art. 119 (2)). Complaints are inadmissible if lodged against decisions of the Government (LAP Art. 119 (3)).

Law on Administrative Dispute stipulates that any individual or organization can file a suit to the Administrative court of Montenegro against an administrative or another act which was passed at the second instance, and the decision of which he/she is not satisfied with (Article 7 and Article 15).

An administrative dispute may not be conducted against acts that have been passed in matters decided on directly by the Parliament and the President by virtue of constitutional authority.

On the basis of the Law on the Protector of Human Rights and Freedoms (Ombudsman) ("Official Gazette of Montenegro", no. 42/11, 32/14) if it is discovered that there was a shortcoming in the administrative work, Ombudsman will make recommendations on how the perceived shortcoming should be remediated (which means that he/she does not issue decisions but provides recommendations which are not binding for public authorities, but which should be applied and as such are not subject to review).

## III. What decisions, acts or omissions can be reviewed

**8. What public authorities' decisions/acts/omissions are subject to judicial and administrative review in the areas of decision-making as indicated below that can be initiated by the members of the public meeting the criteria laid down in the national law? Are there differences of criteria for eNGOs and individuals? Is there time-limit for decisions/acts/omissions to be reviewed? Please elaborate in light of article 9, paras. 2 and 3, of the Aarhus Convention.**

### **(a) Construction requiring Environmental Impact Assessment**

The building permit for a structure to be built shall be issued by the local government authority. By way of derogation, the administrative body shall issue a building permit.

The chief administrator shall decide upon appeal against the decision on building permit issued by the local government authority, and the Ministry of sustainable development and tourism shall decide upon appeal against the decision issued by the administrative body.

It is possible that NGOs as well have the right to appeal against the decision on the building permit, for example, when a building permit is issued for a structure which has a negative impact on the environment, Article 72 of the Law on Environment stipulates that, in an environmental decision-making process, the interested public has the right to initiate the procedure of reviewing the decision before the competent authorities, i.e. the court in accordance with the law.





**(b) Permit(s) allowing releases into the environment**

**(c) (City) Planning procedures**

**(d) Licensing /permitting procedures for mining**

**(e) Other decision-making procedures (i.e. for (i) hunting, (ii) releases of genetically-modified organisms, (iii) registration of pesticides and (iv) import/export of chemicals and hazardous wastes)**

Law on game and hunting, Law on chemicals, Law on mining and the Law on genetically modified organisms stipulate the right to appeal against the decision and the initiation of an administrative dispute. The provisions of the Law on general administrative procedure apply to these laws, in terms of administrative and judicial review of decision-making.

**(f) Other decisions/act/omissions not covered by above in light of article 9, para. 3, of the Aarhus Convention.**

Law on Administrative Dispute stipulates that any individual or organization can file an appeal to the Administrative court of Montenegro against an administrative or another act which was passed at the second instance, the decision of which he/she is not satisfied with. Party to the proceedings may be any natural or legal person. State authority, organization, settlement, group of persons and others who do not have the status of legal persons may be parties, if they are holders of the rights and obligations or legal interests that are the subject of the proceedings.

Administrative proceeding can be initiated when the competent authority, at the request or appeal of the party, does not adopt an administrative act under the conditions stipulated by the Law on General Administrative Procedure (administrative silence). The administrative procedure and the administrative dispute recognize no difference between NGOs and individuals.

The interested public has a right to appeal against the decision of the authority competent for environmental protection, and the right to file a case to a competent court in accordance with specific regulations. As for the time limits within which decisions/acts/omissions should be reviewed, the Law on administrative procedure stipulates that: if a proceeding is initialized on a party's request or ex officio, if it is in the interest of the party, and if it is not necessary to conduct a special examination procedure before issuing a decision, and if there are no other reasons for issuing a decision without delay (determination of previous matter etc.), the authority shall issue a decision and deliver it to the party as soon as possible and no later than 20 days from the date of a duly filed application or from the date of initiation of the procedure ex officio, if a shorter deadline is not stipulated by a special law. In other cases, when procedures are initialized on a party's request or ex officio if this is in the interest of the party, the authority is obliged to issue a decision and deliver it to the party not later than in a month, unless a shorter period is provided by a special law.

In Montenegro, there is a specific Act providing for legal protection of the right to trial within a reasonable time limit (Law on the protection of the right to trial within a reasonable time limit ("Official Gazette of Montenegro", no. 01/07, 38/13). A party and a party intervening in civil court proceedings, the party and the person concerned in an administrative dispute, the defendant and the injured party in the criminal proceedings have the right to judicial protection for the violation of the right to trial within a reasonable time limit, if the procedures are related to the protection of their rights in terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

**9. Is an administrative appeal required for the decisions/acts/omissions indicated in question 8 prior to judicial review? What is the relationship between administrative appeal and judicial review?**

Law on mining and Law on genetically modified organisms stipulate the right to appeal against the decision and the initiation of an administrative dispute. The provisions of the Law on Administrative Procedure apply to these laws, in terms of administrative and judicial review of decision-making. If a relevant ministry, as the second instance authority, issues the decision, an appeal cannot be filed against that decision subject to the Law on administrative procedure. The party has the right to appeal against the decision made at the first instance. An administrative procedure may be initiated even if the competent authority has not adopted an administrative act, in accordance with the conditions stipulated by this Law (administrative silence).

**10. Which system of jurisdiction is competent to verify these decisions/acts/omissions indicated in question 8? Please indicate if different for individuals or NGOs.**





The Law on administrative procedure provides for the principle of two instances (right to appeal) in resolution. The party shall be entitled to appeal against a decision made in the first instance. It may only statutorily be prescribed that in certain administrative matters appeal is not allowed but only if the protection of rights and legal interests of the party, i.e. the protection of legality, is provided in another way.

Administrative dispute may be initiated against administrative or another act against which an appeal is not allowed in administrative or another procedure. Administrative dispute may be instituted if the competent authority has not issued an appropriate administrative or another act on the request, or the appeal of the party, under the conditions stipulated by the Law on administrative dispute. The Law on Administrative Procedure, does not distinguish between physical and legal entities and NGOs in terms of protection of their rights and legal interests. An administrative dispute is resolved by the Administrative court of Montenegro and the Supreme court of Montenegro. In the administrative dispute the court decides by a judgment or decision. The court decides by judgement on the claim. The court decides by a decision on issues concerning the procedure and the issues determined by this law. Extraordinary legal remedies may be taken against the final decision of the Administrative court, namely: the request for extraordinary review of a court decision and a request for retrial. The Supreme Court decides on the request for an extraordinary review of a court decision, while the request for the reopening of proceedings is decided by the court that issued the decision against which the request is submitted.

Protector of human rights and freedoms takes measures for the protection of human rights and freedoms when they are violated by an act, action or omissions of state authorities, state administration bodies, local self-government authorities and local government authorities, public services and other holders of public powers.

Article 68 of the Law on the constitutional court provides that a constitutional appeal may be filed by any natural or legal person, organization, settlement, group of persons or other organizations which do not have the status of a legal entity, if they consider that there has been the violation of a human right or freedom guaranteed by the Constitution, individual act, action or inaction of state agencies, bodies of state administration, local authorities, local self-government authorities, or local government authorities, a legal person or other entity exercising public powers. The constitutional appeal may be filed after the exhaustion of effective legal remedies, which implies that the applicant of the constitutional appeal in the proceeding has exhausted all remedies and to which he was entitled in accordance with the law, including effective and extraordinary legal remedies and other special legal remedies which may lead to amendments of an individual act in favour of the applicant of the constitutional appeal, or to the termination or amendment of the action, or termination of a failure to act by a state authority, state administration body, local self-government authorities, local government authorities, legal person or other entity exercising public powers.

**11. Which kind of legal recourse is open against these decisions indicated in question 8? What are the relevant legal proceedings in this matter?**

Article 55 of the Law on administrative dispute stipulates that the provisions of the Civil Code Procedure shall be applied to matters of the procedure in administrative disputes that are not regulated by this Law. This means that the prosecutor has the right to file a suit for compensation of damages in accordance with the rules governing civil procedure.

**IV. The grounds for review and its intensity**

**12. Which control does the judge exercise on public authorities' decisions that are being challenged? Does the judge monitor substantive and procedural legality (e.g. the formal requirements of law, legal proceedings and/or reasons for these decisions)?**





The judicial power is independent from the executive and the legislative powers. Judicial decisions are obligatory for all and may not be subject to extrajudicial control and everyone is obliged to respect the executive judicial decision.

In the administrative dispute regarding the procedure, the provisions of the Code of Civil Procedure (Art. 55 of the Law on Administrative Disputes) apply accordingly. In the administrative dispute, Administrative Court examines the legality of administrative or other act within the scope of the claim in the complaint, but is not bound by the reasons stated in the complaint (Art. 34 of the Law on Administrative Disputes).

When the court annuls an act which has been disputed, the case returns in the state it was before the annulled act was passed. If, by the nature of the matter that was the subject of the dispute, there must be another act in the place of annulled one, competent authority is obliged to adopt the new act, without delay, and no later than 30 days from the date of delivery of the judgment. The competent authority is thereby bound by the legal opinion of the court, as well as by the remarks of the court regarding the procedure. (Art. 57 of the Law on Administrative Disputes).

If the competent authority, following the annulment of the act, does not adopt the act in accordance with the judgment of the court, and a prosecutor has filed a new lawsuit, the court shall annul the challenged act and, as a rule, decide the matter by a judgment. Such judgment shall replace the act of the competent authority (Art. 58 of the Law on Administrative Disputes).

**13. What is the basic philosophy of the courts' control of administrative decisions? Do the courts rely in the evidence that is produced by the other parties to the proceedings, or do they have a responsibility of their own to investigate the case in line with the so called inquisitorial principle?**

In civil proceedings, the court evaluates whether to accept the evidence submitted by the parties. If the proposals of the parties fail to attend, the court will not conduct evidence ex officio, i. e. in the line of duty.

In civil proceedings on the appeal court examines the decision in so far as it is contested by the appeal, within the limits of the reasons stated in the appeal, taking the line of duty on the application of substantive law and essential violations of civil procedure rules referred to in Art. 367 paragraph 2, items 3, 7 and 12 (art. 379).

**14. For which kind of public authorities' decisions does the judge have limited control (e.g. only towards facts, procedural rules, errors in the applied laws or irrelevant matters taken into considerations, other)? In contrast, for which kind of public authorities' decisions does s/he exercise thorough control?**

In the administrative dispute the court decides on the legality of administrative acts and legality of other individual act when the law prescribes.

When conducting the proceedings and deciding in administrative matters, the authorities and courts are obliged to enable parties to protect and exercise their rights and legal interests more easily, taking into account that the exercising of their rights and legal interests is not to the detriment of the rights and legal interests of other persons, or contrary to the law laid down in the public interest.

The procedure must establish correctly and completely all the facts and circumstances that are important for making a lawful decision (decisive facts). Before making a decision, the party must be allowed to comment on the facts and circumstances which are relevant for taking the decision.

**15. While exercising judge's power of judicial review how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?**

The Court conducts a judicial review on the basis of the evidence on which the party bases its claim or which refutes the statements and evidence of the opposing party. The court decides which evidence is to be carried out to determine the relevant facts. The Court conducts the presentation of evidence: by investigation,





document, witnesses, interrogation of parties. In 'ecological litigations' they need special expert commission, several experts of different professions. In those environmental litigations, the outcome of the dispute depends mainly of expert evidence.

As a rule, one expert witness and, if the expert inquiry/evaluation is complex, two or more expert witnesses shall be ordered. Expert inquiry/evaluation may be entrusted to the relevant professional institution (hospital, chemical laboratory, faculty etc.) If there are specialized institutions for specific types of expertise, such expertise will be entrusted primarily with those institutions.

Departments sessions are convened and chaired by the President of the Division determined by the annual disposition of the court.

**16. Do the courts have different approaches on e-NGOs' lawsuits and lawsuits of individuals?**

The right to initiate an administrative dispute has any natural or legal person who believes that an administrative or other act violated their right or legally based interest. NGOs have the right to participate in the process if they express their legal interest. That condition is met when the NGO claims to be included in the procedure for protection of their rights or legal interests (interested party).

The state organ, organization, settlement, group of persons or others who do not have the status of legal entity, may initiate an administrative dispute if they can be holders of rights and obligations that have been decided on in administrative procedure. Article 72 of Law on Environment stipulates that the interested public in the procedure of exercising the right to a healthy environment protection as a party has the right to initiate procedure to review the decision before the competent authority or court in accordance with the law. The public has a right to appeal against the decision of the competent authority for environmental protection, and the right to submit complaints to the competent court in accordance with specific regulations. It can be concluded that in an administrative dispute the Administrative Court does not have different approaches to complaints of eNGOs and complaints of a natural person.

Courts in Montenegro in the civil proceedings have a small number of cases (e.g. compensation of damage) in which NGOs appear as a plaintiff.

The Civil Procedure Code neither contains the concept of participation of NGOs in decision-making relevant to the protection of nature, as it has the Nature Protection Act, nor the provision whether the plaintiff may be a non-governmental organization that has no legal interest defined by the rules of civil procedure (i. e. not directly damaged by harmful influence) to take part in civil proceedings. However, the court may, exceptionally, with legal effect in a particular lawsuit, recognize the capacity of the party to those entities, if it determines that, with regard to the subject matter of the dispute, in essence meet the essential conditions for acquiring party capacity, especially if they dispose of the property on which execution can be carried out.

NGOs do not have the possibility to be exempted from payment of court costs (except for court fees under certain conditions), so legal costs are a barrier to access to justice in these cases. Humanitarian organizations are exempted from the payment of court fees. Because of this, a part of non-governmental organizations that would not otherwise engage in humanitarian work, put in the statutes of their organization humanitarian work as their activity and with the addition of this formal reason is freed from paying the tax.

**V. What are the outcomes of judicial review**

**17. Do the courts have only cassation or also reformatory rights in cases under article 9 of the Convention?**

The Administrative Court decides in full jurisdiction rarely. In decision of full jurisdiction Administrative Court may have reformatory function. The Administrative Court decide in a concrete matter by verdict so that a lawsuit may be: rejected as unfounded and the second instance decision confirmed or the Court may adopt the lawsuit and void the second instance decision. In case lawsuit is adopted, the Administrative Court may decide the administrative matter or refer the case back to the second instance authority for decision. In its reasoning of the





judgment the Administrative Court highlights the legal opinion and objections how to arrive to the legal decision in the new process. Court decisions rendered in an administrative dispute are executed by an authority responsible for enforcement of an administrative or other act.

Law on Administrative Disputes, in the article 57, stipulates when the court nullifies an act, against which an administrative dispute has been started, the case shall be restituted to the condition in which it was before the nullified act had been passed. The competent authority shall thereby be bound by the legal concept of the court, as well as by the remarks of the court with regard to the procedure. If, following the nullification of an administrative act, the competent authority should fail to issue an administrative act in compliance with the judgment of the court, and the plaintiff files a new complaint, the court shall nullify the disputed act and, generally, decide itself on the matter by a judgment. Such a judgment shall substitute the act of the competent authority in all (Art. 58).

In civil proceedings, the appellate court may, at a session of the panel or based on discussions held, revoke the first instance judgment and return to the first instance court to re-draft the verdict, revoke the first instance judgment and decide on the request of the parties or modify the first instance judgment.

#### **18. What are the limits of discretion by public authorities after the court decision?**

The Law on Administrative Disputes does not provide for specific sanctions when competent authority failed to adopt an administrative act for the purposes of execution of the judgment or, that is, after the annulment of an administrative act, issued an administrative act which is contrary to the legal opinion of the Court in terms of procedure.

### **VI. Case-law**

#### **19. Please, if possible, briefly describe relevant case-law.**

##### **1. Case study**

In the first case in which a party in an Administrative Court case called upon the Aarhus Convention, the Court declared itself incompetent. The lawsuit was filed by a group of citizens from the NGOs MANS, Forum 2010 and Green Home, seeking annulment of the Concession Act for the Morača hydropower project and the Prequalification tender for the same activity on the grounds of the alleged violations of the Concession Law. Since the Concession act cannot even be reviewed by the Constitutional Court, because it does not have the status of an administrative legal act and was not published in the Official Gazette, in their view the public was actually denied the right to a trial. Three NGOs submitted two complaints: to the Ministry of Economy and to the Administrative Court.

The complaint accused the Ministry of Economy of violating the Concession Law for its vagueness in defining the subject of the concession, instead of precisely defining it as required by law. Furthermore, the law was also flagrantly violated when the Ministry called upon an invalid document – i.e. the Detailed Spatial Plan for Multipurpose Reservoirs on the Morača – that had yet to be adopted and had no legal force. Similarly, even though the Proposal of the Detailed Spatial Plan only mentioned Technical Solution I for the hydropower stations on the Morača, the Ministry added Technical Solution II to the Concession Act. In this way, the Ministry left open alternative possibilities that can be suggested by the future concession-holder. These two technical solutions have not gone through public hearings nor were they worked out in the Draft Detailed Spatial Plan and the Strategic Impact Assessment, which means that there was no legal basis to include them within the concessionary procedure.

Similarly, the Ministry drew on a study that was allegedly prepared by the University of the Mediterranean in making its case during the public hearings on the Draft Concession Act. Representatives of the University later announced that their institution had not authored that study. Following the end of the public hearings, the Ministry went on to present completely different economic data in the Concession Act documents. It then went on to claim that the information was prepared by an – until then unknown – team of experts. In this way, the







public was knowingly being misled since it was presented with unrealistic (and positive) projections relating to the building of hydropower stations on the Morača.

The complaint also seeks the annulment of the pre-qualification tender for the hydropower stations, given that the Ministry also violated procedural norms and made substantive errors in law when it issued its Request for Proposals (RFP) from qualified bidders.

The three NGOs informed the representatives of international community on these cases, and a great encouragement in this regard gave them the European Parliament Resolution on Montenegro. By means of this Resolution, the Montenegrin authorities have been warned that large dams often have a negative impact on the environment, and that they must ensure transparency and include the whole public and civil sector in the process, before making decisions related to their construction. Unfortunately, the Government has not endorsed the recommendations of European officials in this regard, and the tender for the Morača dams project, in which public and NGO comments have not been duly considered, is being continued without any change. The three NGOs also invited the Chief State Prosecutor to get involved.

## 2. Case study “Vasove vode”

The case deals with problem of temporary storage of waste. 1996 Spatial urban plan of the Municipality of Berane anticipated the landfill at the site “Vasove vode”. At that time members of the public did not take part in public hearings.

At the end of 2012 the Study on the environmental impact assessment of the project on the regional landfill for municipal waste storage Vasove vode was elaborated. Experts’ findings pointed to significant problems with that location but the bottom line was that the site meets the technical and legal requirements for the construction of a regional landfill.

For more than half a year members of the local community Beranselo organized a blockade of waste disposal at the specified location, citing violations of the Law on Waste Management and the relevant regulations (disposal is carried out without separation of municipal and other, hazardous waste; landfill is not even fenced and it is in close vicinity of the settlements, agricultural area and the river).

There were several court proceedings initiated by the members of the public and the municipality (administrative dispute, misdemeanour, criminal and civil proceedings). The municipality has initiated two cases of trespassing and the imposition of provisional measures (requests were rejected in the repeated procedure); conducted several misdemeanour proceedings for obstructing official persons in performing their duties against individual citizens from Beranselo (pronounced more than 70 fines, of which diversified into a number of imprisonment).

The Eparchy and the local community Beranselo have succeeded in the dispute against the declaration of an agreement signed between the municipality and the local community of Gornje Zaostro on the temporary location for waste disposal "Vasove vode"; the procedure on the complaint of a local man was conducted against the Municipality for the removal of billboards with pictures of unregulated landfill "Vasove vode" that the prosecutor won (Billboard was returned and a plaintiff was awarded compensation for emotional distress); NGOs have filed several criminal complaints against the Public Company "Communal" from Berane and local self-government officials and Ministers responsible for the Environment protection and Health (criminal charges were dropped).

The most important court decision is the one that was brought by the Administrative Court upon the complaint of the local community Beranselo, in which the plaintiff referred to the violation of Arts. 6 and 9 of the Aarhus Convention, the Administrative Court issued a decision to annul the prior decision of the Mayor regarding the location for the temporary storage of waste, due to essential violation of the rules of procedure.

## 3. Case study NGO Ozon

In 2016 NGO Ozon from Niksic has learned from the media about intended reconstruction of the central urban area of Freedom Square in Niksic, which involves the removal of many decades’ avenue of lime and chestnut





trees, without prior public discussion, and conducted procedure of environmental impact assessment. Acting as interested public and referring to the Law on free access to information and the Aarhus Convention, they asked the responsible Secretariat for spatial Planning and environment for the assessment of the state of lime alley on the Freedom Square and the environmental impact assessment for the environment.

Since they did not get a response they submitted a complaint for violation of the rules of procedure to the same Secretariat, which is under the Law obliged to forward a letter to the Agency for Personal Data Protection and Free Access to Information. Again, they faced with the “silence of the administration”.

The Constitution of Montenegro guarantees the right to participate in decision-making concerning the environment, and they launched a petition in order to make the local government give up planned activities and suggested that it is necessary to first carry out a public consultation, and organize an international tender for the best conceptual design of the Square.

A petition signed by 1,211 people was handed over to the local government.

They have not received any response to their initiative so they lodged the complaint with the Ombudsman about the work of local administration of the municipality of Niksic, emphasizing violation of the right to participate in decision-making.

On 15 July, they were informed from the Ombudsman office that proceedings have been initiated. To date they have not received any other answer. In spite of a clear violation of the right to information and participation in decision-making, including the right to legal protection, the local administration of the municipality of Niksic has freely realized the planned felling of trees ignoring all of the above, as well as the initiative of 1/3 of councillors of the local parliament who initiated holding a referendum on the issue.

In addition, NGO Ozon addressed the Municipal Police and the Directorate for Inspection Affairs with the initiatives for inspection of the site due to violations of the Law on Spatial Planning and Construction, for not providing for information table in the construction work area with the data on the investor and the building permit. However, neither of these institutions instituted either misdemeanour or criminal proceedings.

### Sources of information

- M. Kostić-Mandić, Application of the Aarhus Convention in Montenegro – accesses to justice, European Movement in Montenegro, Podgorica, 2014.
- M. Kostić-Mandić, Responsibility for crimes within the field of environmental protection, National Convention on European Integration of Montenegro (NKEI 2013-2014), European Movement in Montenegro, Podgorica, 2014.

### Legislation

1. Zakon o životnoj sredini ("Službeni list Crne Gore", br.52/16) (Law on Environment ("official Gazette of the Republic of Montenegro", no. 52/16)
2. Zakon o procjeni uticaja na životnu sredinu ("Službeni list Republike Crne Gore", br. 80/05, Službeni list Crne Gore", br. 40/10, 73/10, 40/11, 27/13) (Law on environmental impact assessment ("Official Gazette of the Republic of Montenegro", no. 80/05, "Official Gazette of Montenegro", no. 40/10, 73/10, 40/11, 27/13))
3. Zakon o strateškoj procjeni uticaja na životnu sredinu ("Službeni list Republike Crne Gore", br. 80/05, Službeni list Crne Gore", br.73/10 , 40/11, 59/11) (Law on strategic environmental assessment ("Official Gazette of the Republic of Montenegro", no. 80/05, "Official Gazette of Montenegro", br.73/10 , 40/11, 59/11)
4. Zakon o integrisanom sprječavanju i kontroli zagađivanja životne sredine ("Službeni list Republike Crne Gore", br. 80/05, Službeni list Crne Gore", br. 54/09, 40/11, 42/15) (Law on integrated pollution





- prevention and control ("Official Gazette of the Republic of Montenegro", no. 80/05, "Official Gazette of Montenegro", no. 54/09, 40/11, 42/15)
5. Zakon o slobodnom pristupu informacijama ("Službeni list Crne Gore", br. 44/12) (Law on free access to information ("Official Gazette of Montenegro", no. 44/12))
  6. Uredba o organizaciji i načinu rada državne uprave ("Službeni list Crne Gore", br. 05/12, 25/12, 44/12, 61/12, 20/13, 17/14, 06/15, 80/15, 35/16, 41/16, 61/16) (Decree on organisation and method of work of state administration ("Official Gazette of Montenegro", no. 05/12, 25/12, 44/12, 61/12, 20/13, 17/14, 06/15, 80/15, 35/16, 41/16, 61/16))
  7. Zakonik o krivičnom postupku ("Službeni list Crne Gore", br. 57/09, 49/10, 47/14, 02/15, 35/15, 58/15) (Criminal Code Procedure ("Official Gazette of Montenegro", no. 57/09, 49/10, 47/14, 02/15, 35/15, 58/15))
  8. Krivični zakonik Crne Gore ("Službeni list Republike Crne Gore", br. 70/03, 13/04, 47/06, Službeni list Crne Gore", br. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15) (Criminal Code of Montenegro ("Official Gazette of the Republic of Montenegro", no. 70/03, 13/04, 47/06, "Official Gazette of Montenegro", no. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15))
  10. Zakon o potvrđivanju konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i prava na pravnu zaštitu u pitanjima životne sredine ("Službeni list Crne Gore - Međunarodni ugovori", br. 03/09) (Law on ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Official Gazette of Montenegro – International treaties", no. 03/09))
  11. Zakon o uređenju prostora i izgradnji objekata ("Službeni list Crne Gore", br. 51/08, 40/10, 34/11, 40/11, 47/11, 35/13, 39/13, 33/14) (Law on spatial development and construction of structures ("Official Gazette of Montenegro", br. 51/08, 40/10, 34/11, 40/11, 47/11, 35/13, 39/13, 33/14))
  12. Zakon o upravnom postupku ("Službeni list Crne Gore", br. 60/03, Službeni list Crne Gore", br. 56/14) (Law on administrative procedure ("Official Gazette of Montenegro", no. 56/14,))
  13. Zakona o sudovima ("Službeni list Crne Gore", br. 11/15) (Law on courts ("Official Gazette of Montenegro", no. 11/15))
  14. Zakon o upravnom sporu ("Službeni list Republike Crne Gore", br. 60/03, Službeni list Crne Gore", br. 73/10, 32/11) (Law on administrative dispute ("Official Gazette of the Republic of Montenegro", no. 60/03, "Official Gazette of Montenegro", no. 73/10, 32/11))
  15. Zakon o parničnom postupku ("Službeni list Republike Crne Gore", br. 22/04, 28/05, 76/06, Službeni list Crne Gore", br. 73/10, 47/15, 48/15) (Law on civil proceeding ("Official Gazette of the Republic of Montenegro", no. 22/04, 28/05, 76/06, , "Official Gazette of Montenegro", no. 73/10, 47/15, 48/15))
  16. Zakon o obligacionim odnosima ("Službeni list Crne Gore", br. 47/08, 04/11) (Law on Contracts and Torts ("Official Gazette of Montenegro", no. 47/08, 04/11))
  17. Zakon o prekršajima ("Službeni list Crne Gore", br. 01/11, 06/11, 39/11, 32/14) (Law on Misdemeanours ("Official Gazette of Montenegro", no. 01/11, 06/11, 39/11, 32/14))
  18. Zakona o Centru za obuku u sudstvu i državnom tužilaštvu ("Službeni list Crne Gore", br. 58/15) (Law on the Centre for Training in Judiciary and State Prosecution ("Official Gazette of Montenegro", no. 58/15))
  19. Zakon o genetički modifikovanim organizmima ("Službeni list Crne Gore", br. 18/12) (Law on Genetically Modified Organisms ("Official Gazette of Montenegro", no. 18/12))
  20. Zakon o divljači i lovstvu ("Službeni list Crne Gore", br. 52/08, 40/11, 48/15) (Law on Game and Hunting ("Official Gazette of Montenegro", no. 52/08, 40/11, 48/15))
  21. Zakon o hemikalijama ("Službeni list Crne Gore, br. 18/2012") (Law on Chemicals ("Official Gazette of Montenegro", no. 18/2012"))
  22. Zakon o lokalnoj samoupravi ("Službeni list Republike Crne Gore", br. 42/03, 28/04, 75/05, 13/06, Službeni list Crne Gore", br. 88/09, 03/10, 73/10, 38/12, 10/14, 57/14, 03/16) (Law on Local Self-Government ("Official Gazette of the Republic of Montenegro", no. 42/03, 28/04, 75/05, 13/06, ("Official Gazette of Montenegro", no.88/09, 03/10, 73/10, 38/12, 10/14, 57/14, 03/16))
  23. Zakon o rudarstvu ("Službeni list Crne Gore", br. 65/08, 74/10, 40/11) (Law on mining ("Official Gazette of Montenegro", no. 65/08, 74/10, 40/11))





24. Zakon o hemikalijama ("Službeni list Crne Gore", br. 18/12) (Law on chemicals ("Official Gazette of Montenegro", no. 18/12))
25. Zakon o svojinsko-pravnim odnosima ("Službeni list Crne Gore", br. 19/09) (Law on Ownership and Proprietary Relations ("Official Gazette of Montenegro", no. 19/09))
26. Zakon o zaštiti prava na suđenje o razumnom roku ("Službeni list Crne Gore", br. 11/07)
27. Ustav Crne Gore ("Službeni list Crne Gore", br. 01/07, 38/13) (Law on the Protection of the Right to Trial Within Reasonable Time Limit ("Official Gazette of Montenegro", no. 01/07, 38/13))
28. Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore ("Službeni list Crne Gore", br. 42/11, 32/14) (Law on protector of human rights and freedoms of Montenegro ("Official Gazette of Montenegro", no. 42/11, 32/14))

**Related web links:**

Agency for the protection of personal data and free access to information / Agencija za zaštitu ličnih podataka i slobodan pristup informacijama <http://www.azlp.me/>

Protector of human rights and freedoms of Montenegro / Zaštitnik/ca ljudskih prava i sloboda Crne Gore (Ombudsman) <http://www.ombudsman.co.me/>

