



Report no. 102/2021

Procedure no. 67/2021

Complainant: Fundação Montescola

Defendant: Agência Portuguesa do Ambiente (APA)

I - Facts and request

1. The Montescola Foundation, an environmental non-governmental organization, registered in Spain requested the Portuguese Environment Agency “*access preferably by electronic means and in the original digital format*”, to the following documents relating to concession C-100 “Mina do Barroso”, in the municipality of Boticas, Vila Real:
 - 2020 Environmental Impact Assessment (EIA) reports, with all the additional documentation required by APA and other Administrations;
 - 2020 Mining Plan/Mine Plan;
 - Reports and requirements made by the Administration in relation to the documentation submitted by the company Savannah Lithium Lda.
2. The requested entity replied: “*the environmental impact assessment (EIA) procedure (...) (EIA no. 3353 concerning the Enlargement of Barroso Mine project) is still in the phase of analysis of the conformity of the respective Environmental Impact Study (EIS), pursuant to the provisions of article 14 of Decree-Law no. 151-B/2013, of 31 October, as amended and republished by Decree-Law no. 152-B/2017, of 11 December. / This phase aims to assess whether the referred study contains all the necessary information for the environmental assessment of the project or if, on the contrary, it is necessary to submit additional elements. In this context the procedure is suspended, under the terms of the aforementioned article 14. / If it is concluded, as a result of the analysis of the conformity of the EIS, that all the necessary information is gathered, the Assessment Committee (AC), appointed under article 9 of Decree-Law no. 151-B/2013, of 31 October, as amended, proceeds with its technical appraisal, while the EIA authority, in turn, will promote the publicity and disclosure of the EIA procedure, initiating public consultation, which takes place for a period of 30 working days and under the terms of article 28 of the same law. / For the purposes of public consultation and participation, the documentation submitted by the applicant will be made available, namely the EIS and respective Addenda which may be presented within the context of the above mentioned conformity analysis. / You are hereby assured that when the public consultation is triggered, you will be notified thereof, so that you may access the information available on the project and its environmental assessment and, if you so wish, express your opinion thereon. / It should also be noted that after conclusion of the EIA procedure, the decision issued by the EIA authority, the Opinion of the Evaluation Committee and the Public Consultation Report will be made available to the public, through the EIA Information System lodged in this Agency’s internet site (...). / Finally, it is informed that within the scope of the EIA procedure in question, a transboundary consultation with the Kingdom of Spain will be promoted, in compliance with the requirements laid down in Community and international legislation in force on the environmental assessment of projects and under the terms of the “Protocol of Action between the Government of the Portuguese Republic and the Government of the Kingdom of Spain on the application to environmental assessments of plans, programmes and projects with transboundary effects”.*



3. In view of the content of the said reply, the applicant lodged a complaint with the Commission of Access to Administrative Documents (CADA) as it considered, in summary, that
 - Making the environmental information in question available in the context of future public consultation cannot constitute an impediment to the right of access;
 - The 30-day period set aside for public consultation *“is clearly insufficient for a documentation of enormous volume (thousands of pages) and technical complexity, on which it will be necessary to commission external technical [opinions]”*;
 - Although it does not expressly invoke it, in its response the defendant seems to intend to apply to the case the provisions of article 6, no. 3 of Law no. 26/2016, of 22 August *“Access to administrative documents preparatory to a decision or contained in unfinished proceedings may be deferred until the decision has been taken, the proceedings have been closed or one year has elapsed since they were drawn up, depending on which event occurs first”*. In the applicant’s view, this is contrary to *“the interpretation of the Aarhus Convention (see Article 4(3)(c)) and the decisions of the UNECE Aarhus Convention Compliance Committee itself.*

II - Legal assessment

1. The regime of access to environmental information in force in the national legal order is generically foreseen in Law nº 26/2016, of 22 August (LADA), which transposes Directive 2003/4/EC of the European Parliament and of the Council, of 28 January 2003, on public access to environmental information.
2. This Directive aims, inter alia, at aligning Community law with the commitments entered into by the European Community under the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (*“the Aarhus Convention”*¹) - see Recital 5 of the Directive.
3. Under the terms of that Convention, subsequently incorporated in the Directive, the right of every individual to live in an environment adequate to his or her health and well-being and, on the other hand, the duty of individuals or groups of individuals to protect and improve the environment for the benefit of present and future generations depend on the signatory parties guaranteeing three rights in environmental matters (see Preamble and Article 1):
 - a. access to information;
 - b. public participation in decision-making;
 - c. access to justice.
4. The exercise of the right of access and the right of public participation presuppose the availability of environmental information by the entity that holds it. However, these are distinct rights, and the exercise of one does not consume the exercise of the other.
5. The right of access is to know, upon request, the environmental information held by the administrative entity that holds it, without any interest having to be invoked (cf. art. 4 of the Convention).
6. The right of public participation in the decision making process concerns the intervention and influence in decision making regarding specific activities with

¹ Portugal signed this Convention in 1997 and it was ratified in 2003, through the Decree of the President of the Republic no. 9/2003, having been approved for ratification through Resolution of the Assembly of the Republic no. 11/2003, of 25 of February.



- environmental impact, plans, programmes, policies or normative texts, which presupposes the prior public availability of the environmental information in question (6th, 7th and 8th of the Convention).
7. Article 17 of the LADA provides: *“the organs and entities to whom the present law applies shall ensure the right of access to environmental information”*.
 8. The general rule of access, applicable to environmental information, is stated in Article 5, paragraph 1 of the LADA: *“Everyone, without the need to state any interest, has the right of access to administrative documents, which includes the rights of consultation, of reproduction and of information about their existence and content”*.
 9. The refusal of the request for environmental information is foreseen for the cases specifically listed in Article 18 of the LADA, and the respective justifications must be interpreted in a restrictive way vis-à-vis the public interest underlying the disclosure of the information, which prevails when the request concerns information about emissions to the environment (cf.)
 10. Even if there is material subject to access restriction, the receiving agency must give access to the rest, with the removal of the reserved matter (cf. Article 18.6 of the LADA).
 11. It shall be incumbent on the receiving agency to invoke and justify any restrictions preventing access, under the terms of Article 15(1)(c) of the LADA.
 12. In the present situation, the request for documentation refers to a procedure of environmental impact assessment, for which it is also necessary to consider Decree-law no. 151-B/2013, of 31 October, which approves the legal regime of environmental impact assessment (RJAIA) of public and private projects likely to produce significant effects on the environment, transposing into national law Directive no. 2011/92/EU, of the European Parliament and of the Council, of 13 December 2011, amended and republished by Decree-law no. 152-B/2017, of 11 December.
 13. Section VII of Chapter III of this law regulates *“Access to information and public participation”*.
 14. The general principle governing access to information of the EIA, verification of environmental conformity of the implementation project and post-evaluation procedures is regulated in Article 28: *“The EIA, verification of environmental conformity of the implementation project and post-evaluation procedures are public, and all its elements and procedural documents are available at the EIA authority, with the exception of those covered by industrial or commercial secrecy, including intellectual property, or which is relevant for the protection of national security or the conservation of natural and cultural heritage.”*
 15. Article 29 concerns the public consultation procedure and Article 30 the active dissemination of information.
 16. Articles 32 and 33 regulate the procedures for providing environmental information, respectively, to a State or a Member State of the European Union, whose territory may be affected by a project with transboundary environmental impact.
 17. In the assessment of the present complaint it is therefore necessary to consider the above legal framework.
 18. Returning to the case.
In the reply to the request the respondent entity does not question the right of the applicant to know the requested documentation and does not invoke any restriction of access, under the terms foreseen in article 18 of the LADA.
 19. Neither does it invoke the inexistence of any of the documents.



20. The issue underlying the complaint lies in the understanding of the respondent entity that access should take place within the public consultation phase and within the timeframe foreseen for this purpose. According to the respondent, the Kingdom of Spain - a State potentially affected by the environmental impact of the mining concession in question - will be consulted on a transboundary basis during the EIA procedure.
21. It follows from the above legal framework that:
 - The EIA, verification of the environmental conformity of the implementation project and post-evaluation procedures are public;
 - All the elements and procedural documents of those procedures are available at the EIA authority, except those concerning the following reserved matters: industrial or commercial secrecy, including intellectual property, with relevance for the protection of national security or the conservation of the natural and cultural heritage;
 - As the requested entity did not invoke the existence of reserved matters and as this is not to be presumed, the documents in question are public and freely accessible;
 - The public consultation or transboundary consultation stages do not constitute restrictions to the right of access to environmental information nor do they consume the exercise of the right of access to the requested.
22. For the above reasons, since the respondent holds the requested documentation, it must make it available to the applicant, within the framework of the right of access.
23. Regarding the form of access.

As a rule, the form of access is chosen by the applicant, from among those provided for in Article 13 of the LADA. In this case, the applicant has chosen reproduction by electronic means; specifically, digital format (cf. Article 13(1)(b)).
24. The requested entity did not invoke any circumstances which prevent the satisfaction of access in the form requested, and their existence is not to be presumed. Thus, as there is no obstacle to granting access in the form requested, the requested entity must make the digitalised document available to the applicant.
25. Upon receipt of this opinion, the requested entity must communicate its final, reasoned position to the applicant, within 10 days, under the terms of Article 16(5) of the LADA.

III – Conclusion

- In the absence of access restrictions, the documents requested are public and freely accessible;
- The public consultation or transboundary consultation phases do not constitute restrictions on the right of access to environmental information nor do they consume the exercise of the right of access to the requested information;
- Access must be provided within this framework.

Let it be known.

Lisbon, 24 March 2021.

Pedro Mourão (Rapporteur) - Carlos Abreu Amorim - João Miranda - Antero Rôlo - Renato Gonçalves - Paulo Braga - João Perry da Câmara - Alberto Oliveira (President) [signature]