



**Secretary to the Aarhus Convention Compliance Committee**  
United Nations Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10, Switzerland  
[aarhus.compliance@un.org](mailto:aarhus.compliance@un.org)

13.10.2021

Procedure: **PRE/ACCC/C/2021/186 (Portugal)**

Response to questions to the parties from the Committee

Dear Secretariat,

Please find attached our responses to Questions to both the Party concerned and the communicant issued by the ACCC regarding the process of determination of preliminary admissibility of communication PRE/ACCC/C/2021/186 (Portugal). Supporting documents are provided separately and a list has been included.

Yours sincerely,

Xoán Evans Pin, Director  
**Fundação Montescola**

## A) Questions to both the Party concerned and the communicant:

### 1. Are decisions of CADA binding or rather non-binding recommendations/opinions? Is there any legal mechanism to enforce a CADA decision?

- 1.1. CADA is the primary remedy established in Art. 16 of Law no. 26/2016, of August 22 (LADA) as “an independent administrative body attached to the Assembly of the Republic and is responsible for ensuring compliance with the provisions of this law.” (Art. 28 LADA). In the Communicant’s understanding, decisions by CADA are not binding in the same regard as any other administrative decision, which are subject to judicial revision.
- 1.2. Judges are not bounded by the opinion issued by CADA on the basis of the principle of separation of powers, regulated in Art, 2 and 111 of the Portuguese Constitution, even if, as the Party acknowledged in case ACCC/C/2019/166 “it is observed that the Administrative Courts, in their decisions, mostly accept and follow the underlying legal orientations of the opinions of the CADA.”<sup>1</sup> **However, in the present case, the Party failed to challenge CADA’s decision in the Administrative Courts pursuant to Art. 41 LADA.** Therefore, it accepted it as valid and should have enforced its decision.
- 1.3. The judicial enforcement of a CADA decision can be obtained through a judicial summons to the Administrative Courts for the Provision of Information, Process Consultation or Issuing of Certificates, in accordance with the provisions of article 104.º of the Code of the Process of Administrative Courts (CPTA).

### 2. What administrative and judicial domestic remedies exist under Portuguese law to challenge a public authority’s refusal of a request for environmental information? What remedies other than those already used by the communicant are still available?

#### 2.1. We hereby refer to the Party’s response in case ACCC/C/2019/166:

*“Therefore, any applicant who considers that his request for information has been disregarded, unduly rejected – in whole or in part –, has received an inadequate response, or has received a treatment not compliant with what the law provides, has two different types of guarantee at his disposal: administrative guarantees and judicial guarantees.*

*Regarding administrative guarantees, we should mention the following:*

- a) The administrative complaint – challenge addressed to the author of the act (CPA, Article 191);*
- b) The hierarchical appeal – challenge addressed to the hierarchical superior of the author of the act (CPA, Articles 193 ff.);*
- c) Special administrative appeals – challenge addressed to the body exercising supervisory powers; for an organ exercising oversight powers; to a collegial body (in this case, acts or omissions of any of its members, commissions or sections), or to the delegating authority or sub delegating authority of the acts practiced by the delegate or sub-delegate (CPA, Articles 199 ff.);*
- d) The complaint directed to the Ombudsman; and*
- e) The complaint to CADA.*

*On the other hand, in the scope of the judicial challenge, it is possible for the interested party to use:*

- a) The summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance – “intimação da entidade administrativa a prestar informações, permitir a consulta de documentos ou passagem de certidões” – CPTA, Articles 104 ff.; and*

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<sup>1</sup> [https://unece.org/DAM/env/pp/compliance/C2019-166/Correspondence\\_with\\_the\\_Party/frPartyC166\\_28.06.2019.pdf](https://unece.org/DAM/env/pp/compliance/C2019-166/Correspondence_with_the_Party/frPartyC166_28.06.2019.pdf)

b) *The right of popular action (“ação popular”) – provided by Article 52 of the Portuguese Constitution (CRP) and in Law 83/95, of August 22.*”

- 2.2. In the present case, the Communicated used the following remedies:
- 2.2.1. Montescola filed a **complaint before CADA** pursuant Art. 16 LADA. The complaint led to process 67/2021 that was completed by the issuing of CADA’s Report 102/2021 on 24/03/2021. **The Party failed to contest CADA’s report at the Administrative Courts. It also failed to comply with LADA in relation to the said report by CADA.**
  - 2.2.2. On 10/03/2021 Montescola also challenged the decision issued by APA on 08/03/2021 through a **Hierarchical (administrative) appeal** pursuant CPA, Articles 193 ff. Within the 30-day time limit established in CPA, Article 198°, **no decision was received.** Additional hierarchical appeals were filed as explained.
  - 2.2.3. Montescola also presented a **complaint before the Ombudsman** in March 2021, leading to procedure Q/2658/2021. On 13/05/2021 the Ombudsman issued a decision closing the procedure on the basis that the matter was under consideration by the Administrative Courts. The decision stated: *“the intervention of the administrative courts alone will provide sufficient guarantee to the legitimate rights and interests in question, making the concomitant intervention of this organ of State unnecessary, for which reason I consider the consideration of this complaint to be concluded.”*
  - 2.2.4. On 27/04/2021 Montescola initiated an urgent **judicial “summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance”** action pursuant CPTA, Art. 104. **A decision by the Administrative Court of the Circle of Lisbon regarding procedure 121/21.6BEMDL is currently long overdue and explanation on the Court’s inaction has not been received.**
  - 2.2.5. Additionally, Montescola presented **Criminal claim at the Public Prosecutor.** This claim led to criminal procedure 572/21. The Communicant has no information on the state of this procedure.
- 2.3. The above illustrates how **the Communicant used all administrative and judicial domestic remedies that exist under Portuguese law to challenge a public authority’s refusal of a request for environmental information.** It should be noted that the use of the Special administrative appeal and the right of popular action were not applicable to the situation in the present case. **No other remedies are available.**
3. **What costs would an environmental non-governmental organization (NGO) incur to bring a challenge before the administrative court against a public authority’s failure to respond to an environmental information request? Is it mandatory for an NGO to be represented by a lawyer in such a case?**
- 3.1. The judicial “summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance” action pursuant CPTA requires the nomination of a lawyer – and the payment of his/her professional fees. Fees are designated by each lawyer. Based on available tables,<sup>2</sup> **fees for filing an administrative judicial claim have a fee of approximately 1,000 euros.** This may vary from case to case, and some lawyers can act on a pro-bono basis.
  - 3.2. Exemptions or reductions of court fees (RCP, Art. 12) should apply to Environmental NGOs, but it is at this stage unclear if Montescola, not being a Portuguese but a Spanish NGO, will be entitled to such reductions, as they are mentioned in Art. 11 of Law 35/98 on ENGOs for entities with such status.

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<sup>2</sup> <http://antoniosoareshoch.com/direito/honorarios-de-advogados-advogados-precos>

**4. Are environmental NGOs entitled to legal aid to challenge an environmental information request before the administrative court? If so, please provide the relevant legislative provisions explaining the eligibility requirements and what the legal aid would cover, together with an English translation thereof.**

4.1. Montescola is not entitled to a public defender (*Defensor Público*) or any other form of legal aid. ENGOs in general are not entitled to legal aid.

**5. Does the legislation of the Party concerned set a deadline by when an administrative court must decide a challenge regarding a request for environmental information, and if so, what is the required timeframe? If not, what is the typical timeframe for an administrative court to decide a challenge regarding a request for environmental information? Please provide any relevant evidence to support your answer.**

5.1. In a response by the Party in case ACCC/C/2019/166 it was indicated that “*we can safely say that national law ensures a speedy judicial decision in these cases*”. It was also mentioned that “*although official data on the average completion time of these processes is not available because the current method of collection in place does not allow for the provision of information with this degree of disaggregation, the fact is that its decision period is relatively short (less than a month)*.” However, **this is evidently untrue.**

5.2. Art. 107 of the Code of Procedure in Administrative Courts establishes that: “*1 - Once the request for summons has been presented, the registry shall automatically summon the defendant entity and the counter-interested parties to respond within 10 days. / 2 - Once the response has been presented or the respective time limit has elapsed and the necessary steps have been completed, the judge shall issue a decision within five days.*”

5.3. Montescola initiated the proceeding in 27/04/2021. On 29/04/2021 the Administrative Court of Mirandela issued a decision stating that the process should be referred to the Administrative Court of Lisbon, where it was assigned process No. 121/21.6BEMDL. On 26/05/2021 the Court referred the matter to the defendant. On 12/10/2021 the Communicant inquired directly to the Court in relation to the state of the procedure but no response has been received before the deadline for this letter.

5.4. **The five-day deadline established in Art. 107 CPTA has long since passed (months ago) without a sentence having been pronounced. Therefore, at this moment Montescola faces deep impotence in the face of such inaction by the Court.**

**6. The Party concerned states that the public consultation on the Mina Barroso mine was from 22 April – 16 July 2021. Please confirm that this means that the public had the opportunity to send written comments from 22 April to 16 July 2021?**

6.1. Montescola sent its comments on 15/07/2021, a day before the deadline.

6.2. The complexity of the project is notorious. One of the proposed mine tailings dams, the one to the south of the concession, would store 50.1 million tonnes of waste rock and 14.0 million tonnes of tailings, and would be between 149 and 193 metres high. **It would be the largest filtered tailings dam in the world**, as the tallest is 70 metres, and would be three to five times higher than the Cerro do Lobo tailings dam, at only 40 metres. The lack of analysis of the possible consequences of the collapse of the mine waste facility is worrying and inconceivable in a project of this scale. A detailed report by hydrologist Dr. Steven H. Emerman, “**Evaluation of the Tailings Storage Facility for the Proposed Savannah Lithium Barroso Mine, Northern Portugal**” (Document **No. 1 and 2**) refutes claims that the water content of the tailings will be less than 15%, as such a promise exceeds the capacity of current technology and does not take into account the

possibility that this percentage can be exceeded by other means. Increasing the water percentage above 15% can lead to a phenomenon called liquefaction, which causes the tailings to lose strength and behave like a liquid. Since the dam would be built using the upstream method, liquefaction could cause the dam to collapse. Based on a statistical model of previous mine tailings dam failures, if the dam breaks, the spillway breach would release 8.5 million cubic metres of mine tailings with a flow distance of 86 kilometres, with an impact on numerous communities along the Tâmega and Douro rivers. In the worst case scenario (loss of 100% of the stored mining waste), 30.5 million cubic metres of mining waste will be released and reach the Atlantic Ocean (128 kilometres) during the initial run-off. This was once of the reasons for which non-conformity in the present consultation procedure was demanded in numerous comments.

**7. On what date were each of the following documents posted on the APA website:**

- (a) EIA annexes – Annex I – Climate and climate alterations;
- (b) EIA annexes – Annex VI – Soils;
- (c) EIA annexes – Annex III – Water resources;
- (d) Project – Annex II - 24 – Flocculating agents;
- (e) Project – Annex III - 1 – Barroso Mine – Parameters – Waste dumps;
- (f) “Compensation measures report” on Iberian wolf (*Canis lupus signatus*) populations.

7.1. The documents under a), b), c), d), and e), totalling to 430 pages including 57 figures, **were added to the APA website on 12/05/2021**, by updating the previously broken links on AIA page 3353 (URL: <https://siaia.apambiente.pt/AIA.aspx?ID=3353>). The elements were added without, however, indicating the updated items and also in changing the order of the existing list of 103 downloadable elements.

7.2. The posted documents a) to e) did not only add a considerable volume to the EIA documentation, adding 430 pages to the already available documentation of 5,268 pages. They also revealed that most of their content, including relevant information on tailings and waste storage, was only made available in English language, lacking translation into Portuguese. The internal dates of the added documents is 4.12.2019 (earliest) and 20.4.2021 (latest).

7.3. The document under f) or equivalent information has not been made available.

**8. Has the final decision on the Barroso Mine yet been taken by the decision-maker? If so, on what date? Has Montescola Fund or any other members of the public sought to challenge that decision on the grounds that the public did not have a reasonable timeframe to examine the information relevant to the decision-making and to participate effectively in the decision-making? If so, what was the outcome of those proceedings?**

8.1. The Communicant is not aware of any final decision in the EIA procedure. Lack of compliance with the Aarhus Convention during the whole process was raised by Montescola and other members of the public mention in their comments during the public consultation period. However, **continuing lack of access to the full administrative files will undermine the capacity to challenge the final decision when the possibility arises.**

## B) Questions to the communicant:

### 9. The Party concerned claims that APA provided the requested documents to Montescola Fund on 22 April 2021. Do you agree with that statement? If not, please specify whether there is any further information within the scope of your information request of 7 January 2021 which has to date not been disclosed.

- 9.1. On 22/04/2021 APA initiated the 30-day public consultation as part of the EIA procedure. For that purpose, it uploaded 493 digital files with a size of 2,8 Gigabytes containing 5,268 pages, 2,103 graphics and another 56 elements. At least five folders containing responses to deficiencies in the documents presented by Savannah Resources were withheld by error or deliberately, and could not be downloaded (including Annex III-3 on waste dumps; Annex III on water consumption; Annex II-24 on chemical reagents; Annex VI on soils; and Annex I on climate). The documents made available on 22/04/2021 did not include any of the administrative documents referred to in Montescola's 07/01/2021 request c), which remain important to assess project deficiencies and impacts noted by the Administration and also to verify if the administrative procedure has been carried out following applicable laws.
- 9.2. On 06/09/2021, APA sent a letter in which it provided access to administrative documents regarding the analysis of the conformity of the Environmental Impact Study (EIS), on the basis that such **documents had been produced over one year ago**. Ignoring CADA's decision and ACCC rulings on the concept of "material in the course of completion", APA continues to invoke in this most recent communication 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*") to prevent access to the full administrative files of the EIA procedure.
- 9.3. Therefore, regarding the Communicant's initial request "*c) reports and requisitions issued by the Administration in regards to the documentation presented by Savannah Lithium Limitada*", APA only provided in September 2021 (9 months after the request) the administrative documents that were produced before September 2020. **All other administrative documents (i.e., those produced as part of the EIA process after September 2021) have to date not been disclosed.**
- 9.4. This includes at this point documents related to the extension of the public consultation period, which has been subject of a separate EIR request by a third-party. The request was subsequently ignored by APA leading to CADA process 69/2021 and final report 145/2021<sup>3</sup> that concluded: "*(a) the receiving agency has failed to comply with the duty to reply pursuant to 1 of Article 15 of the LADA; b)The requested documentation that exists shall be provided and the applicant shall be informed of that which does not exist. (b)the applicant shall be provided with the requested documentation that does not exist.*"

### 10. In your communication you state that separate complaints to CADA were filed "on 19/03/2021 against the refusal by the DSEF-RG to provide access to the environmental information requested by Montescola on 14/03/2021 and, following the shift in the decision at the CCDR-N, on 08/04/2021". Has CADA handed down its decision on each of the complaints yet? If so, please provide the full text of its decisions, along with an English translation of the relevant parts. If CADA decided that DSEF-RG and/or CCDR-N should disclose the requested information, did DSEF-RG and CCDR-N

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<sup>3</sup> <https://www.cada.pt/files/pareceres/2021/145.pdf>

**comply with CADA’s decisions? If not, what if any further remedies have you sought with respect to your requests to DSEF-RG and CCDR-N?**

- 10.1. On 22/03/2021 Montescola presented a complaint at CADA against DSEF-RG leading to Procedure n.º 172/2021 ending with CADA Report 185/2021 of 15/07/2021 (Document No. 3). The report concludes that while the documents that refer to an ongoing EIA procedure should generally be provided by the Environmental body (APA), and other bodies should forward the request to the said body for its decision, this does not apply to documents produced over one (1) year ago that are held by the body to which the request has been made. **DSEF-RG failed to issue a final decision, ignoring CADA and the requirements of LADA in terms of EIR.** As Montescola had already initiated a judicial “summons of the administrative authority to provide information” against APA involving the same documents, making a separate judicial claim was not necessary or affordable (involve a cost in excess of 1,000 Euros).
- 10.2. On 09/04/2021 Montescola presented a complaint at CADA against CCDR-N leading to Procedure n.º 285/2021 ending with CADA Report 187/2021 (Document No. 4). The report concludes that access should be provided directly by CCDR-N (and not by referral to APA) as it involves documents produced 1 year ago: “8. *Therefore, in the case of documentation drawn up more than a year previously, it will be the responsibility of CCDR Norte to provide access, under the terms of the provisions of articles 6, n.º 3, in fine, conjugated with article 18, n.º 2, of the LADA. / 9. Once this opinion has been received, the requested authority shall communicate to the the applicant its final reasoned position, within 10 days, under the Article 16 (5) of the LADA.*” On 06/09/2021 CCDR-N amended its earlier decision providing access to documents produced over one (1) year ago meeting its legal obligation under LADA following CADA’s report.

**11. Please provide an update on the status of your proceeding for a “summons of the administrative authority” submitted on 27 April 2021.2 If the court has issued its decision on your proceeding, please provide the full text of the court’s decision along with an English translation of its relevant parts.**

- 11.1. Montescola initiated the proceeding in 27/04/2021. On 29/04/2021 the Administrative Court of Mirandela issued a decision stating that the process should be referred to the Administrative Court of Lisbon, where it was assigned process No. 121/21.6BEMDL.
- 11.2. On 26/05/2021 the Court referred the matter to the defendant. Rather than addressing the merits of the case, the Ministry for the Environment (as defendant) petitioned the court to dismiss the claim as inadmissible, arguing that APA was “*a legally distinct entity from the State*” and that the Ministry “*only exercises over the APA powers of mere tutelage and superintendence*”. This is a virtually unprecedented stance in view of numerous courts decisions, including by the Supreme Administrative Court,<sup>4</sup> on which the Ministry for the Environment acted as Defendant in the face of claims presented against administrative decisions of the APA.
- 11.3. Montescola’s lawyer responded in due time concluding that: “*If there is a part of the Portuguese State (the APA), albeit indirect administration, that does not comply with the duties to which it is bound, whether by Constitutional Law, or by the international Conventions to which the Portuguese State has adhered, or by ordinary Law, and if that part of the State is subject to the guardianship of the herein Defendant, MAAC, that guardianship must be exercised, and one of the ways in which it can be exercised is by*

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<sup>4</sup> Also see:

<http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/c5e93188a643cdc1802577280048b4c0?OpenDocument>

*means of substitutive guardianship that occurs whenever the person under guardianship fails to perform acts that are legally binding upon it. The guardianship body, in this case the Defendant herein, may (and must) substitute itself for the bodies of the guarded entity and perform the acts that are legally due.”*

11.4. On 12/10/2021 the Communicant inquired directly to the Court in relation to the state of the procedure but no response has been so-far received.

11.5. Art. 107 of the Code of Procedure in Administrative Courts establishes that: “*1 - Once the request for summons has been presented, the registry shall automatically summon the defendant entity and the counter-interested parties to respond within 10 days. / 2 - Once the response has been presented or the respective time limit has elapsed and the necessary steps have been completed, the judge shall issue a decision within five days.*” **The five-day deadline established in Art. 107 CPTA has long since passed (months ago) without a sentence having been pronounced. Therefore, at this moment Montesola faces deep impotence in the face of this inaction by the Court.**

**12. Please provide an update on the outcome of criminal procedure 572/21 submitted to the Public Prosecutor on 10 April 2021.**

12.1. As stated in Montescola’s Communication, on 22/04/2021 a notice was received from the Prosecutor’s office indicating that the report “*had been referred to the competent entity*”.

12.2. On 23/04/2021 Montescola communicated with the Prosecutor’s office indicating “*As the participating foundation intends to be constituted as an assistant (article 69, no. 1 of the Code of Criminal Procedure) during the enquiry phase, it requests to know the necessary information regarding the competent entity to formalise its constitution as assistant.*” No further response has been received.

**13. The Party concerned claims that NGOs such as Montescola Fund are “exempt from preparations, costs and stamp duty” for proceedings such as subpoenas for the provision of information. You however claim that Montescola Fund had already incurred €1000 for its court proceeding. What costs did the €1000 cover?**

13.1. The status and benefits of ENGOS is determined by Law 35/98 on ENGOS. In principle, such benefits only apply to NGOs that are registered in APA’s National Registry of ENGOS. Among other requirements, entities must have over 100 members and must be incorporated in Portugal (which is not the case of Montescola).<sup>5</sup> Existing exemptions or reductions of court fees (RCP, Art. 12) in theory only apply to Portuguese ENGOS which have more than 100 members and are part of APA’s registry. It is unclear at this stage unclear if Montescola, not being a Portuguese but a Spanish NGO, will be entitled to such reductions, or will have to pay judicial fees.

13.2. Montescola stated, in regards to the “summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance” action, that “*The costs for such an action exceeds 1,000 Euros*”. As stated in 3.1. this action requires the nomination of a lawyer and, based on available tables, an average lawyer’s fee for such an action is 1,000 Euros, in addition to other judicial fees. Preparation fees, if not waived through exemption, are 306 Euros.

**14. What, if any, domestic remedies, have you used with respect to your allegations under article 6 (3) and (4) of the Convention that the Party concerned failed to make the**

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<sup>5</sup> <https://apambiente.pt/apa/registo-nacional-onga>



**documents listed in question 7 above available online for the full period of the public consultation and to provide a reasonable timeframe to examine the documentation?**

14.1. As stated, on 27/04/2021 Montescola initiated a judicial “summons of the administrative authority to provide information, allow the inspection of documents or official certificate issuance”. Paragraph 17 of the judicial claim noted:

*17- It should be added that, even though a series of documents were made available consultation process, a set of documents were made available documents relating to this EIA process have been made available, the fact is that a considerable number of documents are still not available, namely:*

*EIA Annexes - Annex I Climate and Climate Change*

*EIA Annexes - Annex VI - Soil*

*EIA Annexes - Annex III - Hydric Resources*

*Project - Annex II - 24 - Flocculants*

*Project - Annex III - 1 - Barroso Mine - Parameters - Heaps*

*In other words, by fortuitous error or deliberately, APA continues to fail to make available documents that are fundamental for informed participation in the public consultation process of the environmental impact assessment. environmental impact assessment.*

The claim was made known to the Party/defendant on the same day.

14.2. The matter was also immediately made public. On 29/04/2021 one of Portugal’s largest daily newspapers “*Público*” published a full-page story on Montescola’s claim (Document No. 5 and 6).<sup>6</sup> The newspaper story states: “[...] ***Even now there are documents that are still not accessible digitally, despite being listed in the process, they [Fundação Montescola] claim. This is the case - as PÚBLICO found out this Thursday - of the document that establishes the parameters of the mining waste heaps, or another referring to soils or the annex on climate and climate change. "There are five annexes that are not available. They are on the list, but are not available on the server and are documents that have to do with crucial aspects", says Nik Völker of MiningWatch Portugal.***”

14.3. On 29/04/2021 received a communication from APA stating that the EIA documents were available. Montescola responded immediately indicating “*In your letter today, as in the letter from Mr Nuno Lacasta of 19/04/2021, you state that the information we requested "is available in the Environmental Impact Assessment Information System (SIAIA)". However, as can be concluded from the judicial summons, the information made available by the APA in the SIAIA does not cover ALL the environmental information requested by this foundation on 07/01/2021*”.

14.4. On 12/05/2021 an online information session was organized by APA in which Montescola participated. Several participants raised the issue of the missing documents.

14.5. Therefore, APA was made aware by multiple channels of the lacking documents, and still it took several weeks to make them available while the public consultations unfolded.

**15. Upon identifying that the documents listed in question 7 above were not available online, did you send a request for access to those specific documents, and if so, what was the outcome of your request. Please provide copies of your request and the public authority’s reply thereto, together with an English translation thereof.**

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<sup>6</sup> “Mina do Barroso: fundação galega avançou para tribunal”, *Público*, 29/04/2021. Available at: <https://www.publico.pt/2021/04/29/local/noticia/mina-barroso-fundacao-galega-avancou-tribunal-1960492>

15.1. As mentioned in 14.1, Montescola proceeded with a judicial “summons of the administrative authority to provide information” action, which explicitly listed the missing documents referred to in question 7 (Document No. 7). To date, there has been no outcome.

**16. Does your communication claim that the alleged non-compliance is a general/systemic issue in the Party concerned or related to the Barroso mine project specifically? If you claim that the alleged non-compliance is of a general/systemic nature, please provide relevant evidence to support this claim.**

16.1. A number of large ENGOs have expressed concern over general or systemic non-compliance and lack of transparency. For example, one of Portugal’s largest ENGOs, ZERO, denounced on 11/04/2021 a “*blatant omission of information*” and how the Department of Mines “*continues to hide behind competitive secrecy to avoid providing essential data for public consultations*”.<sup>7</sup> More recently, in October 2021, the European Environmental Bureau (EEB) and Friends of the Earth Europe (FOEE) published a study,<sup>8</sup> that includes a case study on the Mina do Barroso project mentioning concerns over lack of transparency and claims of deliberate denial of access to information.

16.2. The cases presented below, based on Montescola’s experience, illustrate a consistent misuse of the argument of “materials in the course of completion” as an alleged basis to refuse timely access, referencing in their decisions Article 6, para. 3 of Law no. 26/2016 of 22 August 2016, as well as in industrial secrecy. This is contrary to the consistent opinion of CADA as well as ACCC’s previous findings and general interpretations (i.e., 28/03/2014 Decision on case ACCC/C/2010/51).

16.3. On 04/03/2021 public consultations were initiated to provide a mining licence for the “Borralha” tin and tungsten mine.<sup>9</sup> However, none of the relevant environmental documents were being disclosed. On 28/03/2021 Montescola requested to DSEF-RG the 3 following documents that were mentioned on the public consultations page: “1. *Characterization of the Borralha Tunstiferous mineral deposit*; 2. *Technical and economical pre-feasibility project for the exploitation of Brecha de Santa Helena-Borralha*; 3. *Metallurgical tests for ore beneficiation of Brecha de Santa Helena and development of a preliminary beneficiation scheme*”. Access was refused, on the basis that this was not an EIA procedure. On 12/04/2021 Montescola presented a complaint at CADA against DSEF-RG leading to Procedure n.º 294/2021 ending with CADA Report 228/2021 (Document No. 8). The report concluded that access should be provided. However, DSEF-RG failed to respond, ignoring CADA and the requirements of LADA in terms of EIR. Montescola has insufficient resources to initiate a judicial “summons of the administrative authority to provide information” for every single EIR, as this would involve a cost in excess of 1,000 Euros per request.

16.4. On 01/03/2021 public consultations were initiated to provide a mining licence for the “Banjas” mine by Beralt Tin and Wolfram (Portugal), S. A.<sup>10</sup> The page referred to a “integrated technical proposal”, but the document was not made available. On 11/04/2021 Montescola made an EIR to DSEF-RG regarding the said document. Access was refused, on the basis that this was not an EIA procedure and the exception of industrial secrecy. On 26/04/2021 Montescola presented a complaint at CADA against DSEF-RG leading to Procedure n.º 323/2021 ending with CADA Report 233/2021 (Document No. 9). The report concluded that access should be provided. DSEF-RG only

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<sup>7</sup> <https://www.jornaldenegocios.pt/empresas/industria/detalhe/associacao-zero-pede-que-consultas-para-exploracoes-mineiras-de-banjas-e-borralha-sejam-anuladas>

<sup>8</sup> <https://eeb.org/library/green-mining-is-a-myth/>

<sup>9</sup> <https://participa.pt/pt/consulta/pedido-de-atribuicao-de-concessao-borralha>

<sup>10</sup> <https://participa.pt/pt/consulta/pedido-de-atribuicao-direta-de-concessao-banjas>

responded in 24/09/2021 (Document No. 10) ignoring CADA's arguments and stating that *"Thus, access to the requested documentation, since it concerns business secrets, is not possible, even taking into account the industrial property rights that the company itself invokes in its claim that all documentation is confidential, in relation to other requests for access to this documentation, which were processed in the context of the same request for direct award of the concession ("Banjas" case)."* Therefore, ***"it is justified in the public interest to restrict access to technical documentation until the public consultation phase of the EIA"***. Montescola has insufficient resources to initiate a judicial "summons of the administrative authority to provide information" for every single EIR, as this would involve a cost in excess of 1,000 Euros per request.

16.5. Regarding the same "Banjas" project, another ENGO, ZERO, made a similar request, and received a similar response. The subsequent complaint to CADA led to procedure 230/2021 and Report 195/2021. (Document No. 11). The report concluded that access should be provided.

16.6. On 09/05/2021 Montescola presented an EIR request *"on the administrative process of the strategic environmental impact study for the award of rights to prospect for and explore for lithium, under the responsibility of the Directorate General for Energy and Geology. The request concerns all administrative documents in DGEG's possession that are part of the referred process, regardless of their status."* On DSEF-RG refused access under the argument that these were "materials in the course of completion". On 20/05/2021 Montescola presented a complaint at CADA against DSEF-RG leading to Procedure n.º 389/2021 ending with CADA Report 278/2021 (Document No. 12). However, on 28/09/2021 a public consultation period for the strategic environmental impact study was initiated,<sup>11</sup> rendering the advance request useless. CADA's report again concluded: *"The public consultation phase does not constitute a restriction on the right of access to environmental information nor does it consume the exercise of the right of access to the requested information."* Montescola never received any further communication from DSEF-RG even after the environmental information that had been requested was "completed" and made available for public consultations, following the same "modus operandi" as with the Mina do Barroso case.

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<sup>11</sup> <https://participa.pt/pt/consulta/consulta-publica-do-relatorio-de-avaliacao-ambiental-preliminar-do-ppp-litio>

**C) List of attached documents [PT: in Portuguese; EN: in English]\***

1. “Evaluation of the Tailings Storage Facility for the Proposed Savannah Lithium Barroso Mine, Northern Portugal” [EN]
2. “Avaliação da Instalação de Armazenamento de Rejeitados da Proposta de Mina de Lítio do Barroso da Savannah Lithium, Norte de Portugal” [PT]
3. CADA Report 185/2021 regarding process 172/2021 [PT]
4. CADA Report 187/2021 regarding process 285/2021 [PT]
5. Full page news piece published in “Público” (29/04/2021) [PT]
6. Full page news piece published in “Público” (29/04/2021) [EN]
7. 27/04/2021 judicial summons of the administrative authority [PT]
8. CADA Report 228/2021 regarding process 294/2021 [PT]
9. CADA Report 233/2021 regarding process 323/2021 [PT]
10. Final decision by DSEF-RG (24/09/2021) [PT]
11. CADA Report 195/2021 regarding process 230/2021 [PT]
12. CADA Report 278/2021 regarding process 389/2021 [PT]

\* Translations of relevant documents can be provided at request.