

From: Margarida Marcelino

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To: ECE-Aarhus-Compliance

Cc: Teresa Barros; Águeda Silva; Paulo Monteiro; Ana Isabel Tavares ; Francisco Teixeira; Augusto Serrano

Subject: RE: PRE/ACCC/C/2021/186 (Portugal) - questions to the Party concerned and the communicant

Dear Fiona:

Herewith you can find Portugal answers to the questions from the Compliance Committee of Aarhus Convention last 22nd September on the document "toPartiesC186_22.09.2021" in view the session on the preliminary admissibility of communication PRE/ACCC/C/2021/186 (Portugal):

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

The Commission for Access to Administrative Documents (CADA) is an independent administrative entity, which operates at the Assembly of the Republic and its purpose is to ensure compliance with the legal provisions regarding access to administrative information, in particular Law 26/2016, of August 22, which approves the regime for access to administrative and environmental information and the reuse of administrative documents.

According to Article 30 (1) of the above Law, the CADA shall:

- a) *draw up its internal regulations, to be published in the 2nd series of the Diário da República;*
- b) *examine complaints submitted to it in accordance with Articles 16 and 26;*
- c) *give an opinion on access to administrative documents, in accordance with Article 15 (1) (e) of the Law;*
- d) *issue an opinion on the communication of documents between Public Administration departments and bodies, at the request of the requested or interested party, unless the risk of data interconnection is foreseen, in which case the matter is submitted to the National Commission for Data Protection;*
- e) *to give an opinion on the system of registration and classification of documents*
- f) *to give opinions on the application of the LADA as well as on the preparation and application of complementary diplomas;*
- g) *draw up an annual report on the implementation of the LADA;*
- h) *draw up a report every three years on the availability of public sector information for re-use and the conditions of its availability, in particular in relation to charges for the re-use of documents that are higher than marginal costs and practices in relation to means of redress;*
- i) *to contribute to the clarification and dissemination of the different means of access to administrative documents within the scope of the principle of open administration;*
- j) *to issue deliberations on the application of fines in the administrative offence processes foreseen in the LADA."*

The opinions of the CADA are not binding. Nevertheless, should the public authority decide not to follow the opinion of the CADA, applicants may challenge such decision in court pursuant to Article 16 paragraph 6 of the LADA which provides that "6 - Both the decision and the failure to take a decision within the time limit referred to in the preceding paragraph may be challenged by the interested party before the administrative courts, the rules of the Code of Procedure of Administrative Courts being applicable, with the necessary adaptations, to the summons procedure referred to in paragraph 2".

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?

According to articles 41 and 42 of Law 26/2016, of August 22, which approves the regime of access to administrative and environmental information and reuse of administrative documents is provided:

"Article 41 - Judicial Challenge 1 - A challenge to decisions of the CADA shall be in the form of a complaint, to be filed within 10 days of the notification of the decision. 2 - Upon such challenge, the CADA may amend or revoke its decision and notify the defendants of the new final decision. 3 - If the previous decision is maintained, the CADA shall forward the complaint, within 10 days, to the Public Prosecutor's Office attached to the Administrative Court of the District of Lisbon".

"Article 42 - Proceedings 1 - It shall be incumbent on the CADA to forward all information necessary and relevant to the proceedings to the Public Prosecutor's Office for completion of the case file and submission to the judge. 2 - The judge may decide the matter in accordance with the provisions of this law by simple order, if not opposed by the defence, the Public Prosecutor or the CADA. 3 - If a hearing takes place, the respective formalities shall be reduced to the minimum indispensable and there shall be no recording of evidence nor the hearing of more than three witnesses for each alleged administrative offence. 4 - The judge is always competent to arbitrate an indemnity for those who believe they are entitled to it. 5 - The judge's final decision may be appealed per saltum to the Supreme Administrative Court, which shall decide as of right."

In the scope of judicial review, it is possible for the interested party to request

- subpoena the administrative entity to provide information, to allow the consultation of documents or to issue certificates, article 104 et seq. of the Code of Procedure in Administrative Courts (CPTA);
- the administrative action to condemn the Administration to perform a due act, articles 66 to 71 of the CPTA, and,
- the right to popular action, article 52 of the Constitution of the Portuguese Republic (CRP) and Law 83/95, of August 31.

The subpoena process for consulting documents or obtaining certificates, a summary process especially suited to verifying the reasons for rejection of requests submitted by private individuals to public entities, provided for in the CPTA, approved by Law 15/2002 of February 22, as amended by Law 59/2008 of September 11, Law 63/2011 of December 14, and Decree-Law 214-G/2015 of October 2, shall apply.

The right to popular action is enshrined in article 52 of the CRP and grants all citizens personally or through associations for the defense of the interests in question, regardless of whether or not they have a direct interest in the claim, the right to obtain judicial protection in the event of violations against public health, consumer rights, quality of life and preservation of the environment and cultural heritage, including the right to promote the prevention, assignment and prosecution and to request the corresponding compensation. The cases and terms under which this right may be exercised are defined in Law 83/95, of August 31, Right to Participation Procedure and Popular Action. The exercise of this right takes the form of procedural administrative action or civil popular action. The administrative popular action may take any of the procedural forms foreseen in the CPTA. The parties intervening in a popular action proceeding may request the competent authorities to provide the certificates and information they deem necessary for the success or dismissal of the claim, to be provided in a timely manner. The refusal, delay or omission of indispensable data and information, except when justified by reasons of state or judicial secrecy, shall make the agent responsible incur civil and disciplinary liability.

As previously reported, **we recall that the Montescola Foundation has not exhausted internal judicial means. In fact, it did not bring any action of subpoena for information against the Agência Portuguesa do Ambiente, I.P.** (it is clarified that this entity is a public institute, with its own personality and judicial capacity, not to be confused with the legal person State, nor represented by it, in this type of action).

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?

The costs of legal actions vary according to the value and complexity of the action, in terms of the Regulation of Procedural Costs, approved by Decree-Law 34/2008, of February 26 and attached tables. According to article 11 (1) of the Procedural Code of the Administrative Courts, approved by Law 15/2002, February 22, legal representation is mandatory (i) in lawsuits over 5,000 euros, (ii) in those in which ordinary appeals are always admissible, (iii) in appeals and in cases before higher courts.

For the exercise of the right of popular action, no costs are required and the plaintiff is exempt from the payment of costs provided that the claim is partially granted.

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.

According to the provisions of article 7 of Law 34/2004, of July 29, which approves the law of access to the law and to the courts:

"1 - National and European Union citizens, as well as foreigners and stateless persons with valid residence permits in a member State of the European Union, who demonstrate that they are in a situation of economic insufficiency, have the right to legal protection, in the terms of this law.

2 - Foreigners without a valid residence title in a member state of the European Union are recognized the right to legal protection to the extent that it is granted to Portuguese nationals by the laws of the respective states.

3 - For-profit legal persons and individual establishments of limited liability have no right to legal protection.

4 - Not-for-profit legal persons are only entitled to legal protection in the form of legal aid, and to this end they must provide the proof referred to in paragraph 1.

5 - Legal protection may not be granted to persons who have disposed of or encumbered all or part of their assets in order to be in a position to obtain it, nor, in the case of legal aid, to the assignees of the disputed right or object, when the assignment was made with the purpose of obtaining that benefit."

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.

According to article 2, no. 1 of the Code of Procedure of the Administrative Courts, approved by Law 15/2002, of February 22, the Administrative Courts must decide within a reasonable period of time, which is an undetermined concept to be determined on a case-by-case basis.

According to articles 104 to 108 of the CPTA, the process of subpoena to consult documents or to issue certificates is characterized by celerity and effectiveness: the procedural deadlines are reduced, the deadline for the decision is short, tending to be less than a month, article 107 of the CPTA, and the judge may determine the application of compulsory fines for each day of delay, in case of conviction of the defendant entity, article 108, no. 2 of the CPTA. Once the application is filed, the judge orders the citation of the administrative entity to respond within 10 days. If the action is successful the judge determines the period within which the summons must be served, which cannot exceed 10 days.

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?

According to the legal regime for Environmental Impact Assessment (EIA) defined at national level (Decree-Law 151-B/2013, of October 31) the Public Consultation period was previously set for 30 working days from April 22 to June 2, 2021. However, subsequently, this public consultation period was extended for another 30 working days, thus ending on July 16, 2021. Throughout this period from April 22 to July 16, 2021, the public had the opportunity to submit written 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.

All the documentation was made available on the APA website and on the participa.pt, and was therefore available on April 22nd 2021.

However, it was found that some documents were difficult to download and were put back on the said websites on 11 May 2021. It should be noted, however, that since the public consultation period was extended by 30 working days, the legal period for information availability defined in the Legal Regime of Environmental Impact Assessment (30 working days) was always guaranteed.

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?

After the end of the Public Consultation, the respective Public Consultation report was prepared, which describes the procedure adopted, mentions the entities and individuals who issued comments and summarizes the main issues expressed in the comments received.

A summary of the results of the public consultation was also prepared, which will be included in the report of the Evaluation Committee.

Both in this report of the Evaluation Committee, and in the Environmental Impact Statement itself, the issues of the public consultation are taken into consideration.

It is worth noting that both the Evaluation Committee's report and the Environmental Impact Statement itself include a separate chapter on Public Consultation issues.

The Evaluation Committee is continuing to prepare its report, and is still awaiting communication from Spain, so that it can integrate this information into its report.

The legal regime for Environmental Impact Assessment establishes, in its article 19, specific deadlines for the issue of the Environmental Impact Declaration. However, considering the typology and location of the Barroso Mine project, the stipulations of Article 33 apply, i.e. the notification of the Kingdom of Spain for the purposes of transboundary consultation, as provided for in the Espoo Convention and the EIA Directive. Thus, there is no formal deadline for the Environmental Impact Statement to be issued.

It should be noted that, as explicitly stated in the announcement of Public Consultation, interested parties have the possibility of administrative impugnation, through complaint or

hierarchical appeal, under the Administrative Procedure Code, and litigiously, under the Code of Procedure of Administrative Courts, of any decision, act or omission to the provisions of the Legal Regime for Environmental Impact Assessment.

As already mentioned in our previous submission, it should be noted that access to documents preparatory to a decision or contained in unfinished proceedings may be deferred until a decision is made, the proceedings are closed or one year has elapsed since their preparation. Law 26/2016 of 22 August clarifies in its article 6(3) that the occurrence of the first of these events will determine the final end of such deferral.

Thus, in accordance with Law 26/2016, of 22 August, APA has already sent the requested information to Fundacion Montescola through the following communications:

- S042852-202107-DAIA.DAP, sent on July 6, 2021, and through which the initial version of the environmental impact study (EIS) was made available by hyperlink.
- S051631-202108-DAIA.DAP, sent on September 6, 2021, and through which procedural documentation associated with the assessment of the conformity of the EIS by the Evaluation Committee and consequent request for additional elements was sent.

With my best regards
Margarida Marcelino

Maria Margarida Marcelino

Senior officer | national focal point to Aarhus Convention
Environment Public Participation Unit
Communication and Public Participation Department



Rua da Murgueira 9 – Zambujal - Alfragide
2610-124 Amadora, Portugal
(+351) 214728284 | 214728200
apambiente.pt

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