



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

11.04.2022

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

Comments following contributions from the Party concerned of 04.04.2022

Dear Secretariat,

Please find attached a short response following Portugal's contribution of 04.04.2022.

Yours sincerely,

Xoán Evans Pin, Director
Fundação Montescola

Comments from the Communicant following Portugal's contribution of 04.04.2022

1. In the Party's response, it is clear that **an unfounded interpretation of the concept of "material in the course of completion" (per Article 4, para. 3 (c) of the Convention) continues to be sustained**. We request that, through admissibility, **this fundamental issue is addressed**, on the basis of ACCC's findings (i.e., paragraph 85 of 28/03/2014 Decision on case ACCC/C/2010/51). Montescola has shown evidence of the systemic misuse of this exception to deny or defer access (until information is no longer relevant) and **can provide further documentary evidence**.
2. The communicant wishes to refute the Party's claim that national remedies had not been exhausted. **The Party admits that Montescola filed in Court a subpoena action for the provision of information, consultation of processes or issuing of certificates**. Indeed, **this action was filed against the Ministry for the Environment and Energy Transition, as the ministry that exercises oversight over APA**. On October 21, 2021, in case n. 121/21.6BEMDL, the Administrative Court of Lisbon issued a Judgement stating that the case should have been brought against APA and not against the Ministry, but this matter was subject of legal interpretation and Montescola's lawyer, acting in good faith and on the basis of legal precedent, considered that the action was to be directed against the overseeing Ministry. It should be noted that APA failed to indicate in any of its decisions or communications (or in publicly available information regarding how requests for accessing information should be made) how should its decisions be appealed, a common practice in most jurisdictions. **APA's failure to provide information on applicable remedies should not be considered as grounds for dismissal**.
3. Separate actions initiated by Montescola illustrate legal uncertainty in terms of appeal: in January 2022 a separate subpoena action for the provision of information, consultation of processes or issuing of certificates was initiated against a decision by the Directorate General of Geology and Energy (DGEG), regarding the "Borralha" mine. In this case, following the earlier October 21 Judgement, **the action was initiated both against DGEG and the Ministry for the Environment and Energy Transition**. **It turned out that the Court, contrary to the earlier Judgement, considered that the action should be followed against the Ministry and not DGEG**.
4. The Party indicates that Montescola could still have filed a new judicial action against APA once the Court dismissed its original claim in October 21, but **this would not only be considered inadmissible due to the deadlines for such actions but would have no purpose** once the public participation phase of the EIA procedure had ended months ago, and the information had no practical relevance any more. Or that it could have initiated a popular action or other legal procedures, ignoring the cost and lengthiness of such actions, essentially having no purpose.
5. Given the costs and length of subpoena actions for the provision of information, consultation of processes or issuing of certificates, **these are clearly inaccessible and unpractical**. While the Party **systematically ignores the decisions by CADA**, the preferential remedy established by law that is both free, accessible and relatively expedited. Again referring to the parallel case initiated by Montescola regarding the Borralha mine, Montescola had made a request for environmental information on 28.03.2021 (See paragraph 16.3 of our 13.10.2021 Reply to the Committee's questions) in relation to a public consultation that had just been initiated. On 08.09.2021 CADA issued a decision concluding that access should be provided. Heavily redacted access of no practical relevance was only provided on 05.01.2022. A subpoena action was initiated on 11.01.2022. At the time of this communication no judgement had been issued following dilatory actions by the Ministry. While the Party effectively prevented timely access to the information (which has limited utility one year after the public consultation closed and the final decision has been made regarding the granting of the mining concession) Montescola hopes to establish binding jurisprudence through this case, to avoid such practices in the future. It is equally hoped that the Committee's findings in this case may help in guiding the Party in the correct understanding of Article 4, para. 3 (c) of the Convention.