



**To: Aarhus Convention Compliance Committee**

30 May 2023

**PRE/ACCC/C/2022/195 (Spain)**

**Response to questions by the Committee**

Dear Ms. Marshal,

Please find attached written response to the question posed by the ACCC towards the determination of the preliminary admissibility of the communication during its seventy-ninth meeting (Geneva, 13-16 June 2023).

Yours sincerely,

A handwritten signature in black ink that reads "Sabela". The signature is written in a cursive style and is underlined with a single horizontal line.

**Sabela Iglesias Garrido**  
Asociación Verdegaia

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**Question to the communicant:**

- *Recalling that the Compliance Committee is not a redress mechanism, please specify which of the points of non-compliance alleged in your communication are illustrative of a wider systemic failing regarding access under article 9 of the Convention to challenge contraventions of criminal law relating to the environment in Galicia or, more generally, in the Party concerned. For each such point that you allege to be due to a wider systemic failing, please provide evidence from the applicable legislation or relevant case-law to substantiate that the failing is indeed of a systemic character.*
1. Verdegaia does not seek redress through its communication. All available national and international redress mechanisms have been exhausted and the main goal of Verdegaia is to prevent ongoing systemic non-compliance to continue. In our response, we will first present the case for wide systemic failing of the judiciary in Spain and, secondly, present concrete examples from cases Verdegaia has direct experience with.

## Overarching failures of the Spanish judiciary, with a focus on environmental crime

2. The Compliance Committee has previously expressed great concerns about the Party's wide systemic failures to comply with Article 9 which are reflected again in the more recent cases involving Verdegai in this Communication. When failures of Spain's judicial system were brought to the attention of the ACCC, the ACCC decided against Spain under Article 9 in ACCC/C/2008/24 (Spain) ("*In its findings, the Compliance Committee held that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice.*") and ACCC/C/2009/36 (Spain). In the final ACCC report on ACCC/C/2008/24 and ACCC/C/2009/36 from its February 2011 meeting (ECE/MP.PP/C.1/2011/2/Add.7, paras. 22, 30), the ACCC expressed disappointment with Spain's inadequate actions to remedy its violations of Article 9, paragraphs 4 and 5 for small NGOs to access judicial review:

*"Considering this provision of Law 27/2006, the Committee finds that the law in Spain provides for free legal aid for environmental NGOs. However, as the facts and the response of the Party concerned demonstrate, there is a problem in the implementation of these provision." The Recommendations include:*

- (g) Recognize that further efforts, in particular in the area of access to justice, are needed, to overcome any obstacles of fully implementing article 9, paragraphs 4 and 5, of the Convention;*
- (h) Invite, therefore, the Party concerned to thoroughly examine, with appropriate involvement of the public, the relevant legislation and in particular the court practice with regard to:*
  - (i) Injunctive relief in cases of environmental interest;*
  - (ii) Award of legal aid to environmental NGOs; and*
  - (iii) The rule of dual representation....*

Unfortunately, while Law 26/2006 has been a satisfactory transposition of the Aarhus Convention into national law, it is the Communicant's view that the Party has made little progress regarding ongoing and systemic obstacles to implement article 9 which are related to broader problems related to the Spanish judiciary.

3. It is broadly acknowledged, both internally and externally, that in Spain "[p]oliticised appointment processes have allowed political parties to seek influence or control over courts by installing loyal people in key judicial positions."<sup>1</sup> At the apex, this is evident through the extreme politicization of the General Council of the Judiciary, the main institution of judicial self-government in Spain, that has hindered it from protecting judicial independence from political interests.<sup>2</sup> Political influence in the judiciary is particularly critical to cases involving infringements or corruption by officials, which is relevant to the facts presented in this Communication.
4. A 2022 *Report by the European Network of Councils for the Judiciary* (ENCJ) found that almost half of the Spanish judges indicated in a survey (over 1,000 respondents) that the

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<sup>1</sup> Tsereteli, N. (2022). "Battle for the judiciary in Spain: How does it compare to Poland and Hungary" (Democracy Reporting International) <https://democracy-reporting.org/en/office/EU/publications/battle-for-the-judiciary-in-spain-how-does-it-compare-to-poland-and-hungary>

<sup>2</sup> Perez, A. (2018). "Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain", *German Law Journal*, 19(7), 1769-1800. <https://doi.org/10.1017/S2071832200023233>

government as well as parliament have failed to respect their independence in the past three years.<sup>3</sup> This occurred through numerous ways, including the “*allocation of specific cases to specific judges, if the allocation mechanism allows for discretionary decisions by, for instance, court management, can determine the outcome of these cases in foreseeable ways. This may be brought about by external pressure, and is a potential inroad for corruption.*” (26% of judges in Spain believed this to happen in their judiciaries).<sup>4</sup> Verdegaia believes that in the cases presented in its Communication, as in many others, politically motivated judicial decisions have led to non-compliance.

5. In “Fighting Environmental Crime in Spain: A Country Report”, the European Union Action to Fight Environmental Crime initiative found that “*lack of resources explains the frequency of dismissed environmental criminal pre-trial investigations as well as some failures to prove the existence of criminal offences in the trial.*”<sup>5</sup> This is in spite of problems in Spain encompassing: “(a) *Legalization of forms of pollution and environmental destruction*”; “(b) *The failure of Administrations to update environmental regulations*”; “(c) *The Administrations’ failure to control over the lack of compliance with authorizations given for the exercise of polluting activities*”; and “(d) *The Administrations’ failure to enforce existing environmental regulations.*”<sup>6</sup>
6. Even Spain’s specialized environmental gendarmerie force (SEPRONA) “*laments low judicial support, due to lack of awareness by judges or the objective difficulty in proving the real damage inflicted on the environment by the offence.*”<sup>7</sup> While lack of awareness and difficulties in generating proof of environmental damage may play an important role, this is further aggravated by clear political interference when cases revolve around crimes involving politically-designated officials.

### **Systemic failures illustrated by the Communication**

7. The Communication presents evidence on how access to justice is impeded by creating spaces of impunity for criminal acts for which the **legal period of pre-trial investigation has been exceeded** despite the fact that acts are not time-barred, as well as creating and extending this impunity for new crimes and for continuing crimes that have never been investigated. The Communication presents evidence from criminal cases **DPA 223/2017** and **DPA 370/2019** in which Verdegaia was a party. In its March 2023 response to questions by the Committee, evidence from another case involving alleged offences by officials regarding the San Finx mine (**DPA 2296/2021**) was presented in which again the expiration of the legal period of pre-trial investigation was used as grounds to preclude any investigation to take place or the initiation of trial phase. It should be noted that no investigation regarding the facts was carried out during the pre-trial investigation period.

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<sup>3</sup> ENCJ, “ENCJ Survey on the Independence of Judges” at 16 (2022) <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%202022/Report%20ENCJ%20Survey%202022.pdf>

<sup>4</sup> Id., p. 28.

<sup>5</sup> European Union Action to Fight Environmental Crime (2015). “Fighting Environmental Crime in Spain: A Country Report” at 57 [https://wedocs.unep.org/bitstream/handle/20.500.11822/9633/-Fighting Environmental Crime in Spain A Country Report-2015Spain\\_FightingEnvironmentalCr.pdf?sequence=3&isAllowed=](https://wedocs.unep.org/bitstream/handle/20.500.11822/9633/-Fighting%20Environmental%20Crime%20in%20Spain%20A%20Country%20Report-2015Spain_FightingEnvironmentalCr.pdf?sequence=3&isAllowed=1)

<sup>6</sup> Id., p. 19.

<sup>7</sup> Colantoni, L., Sarno, G. and Bianchi, M. (2022). *Fighting Environmental Crime in Europe. An Assessment of Trends, Players and Action*. Rome: Istituto Affari Internazionali, p. 154. [https://www.iai.it/sites/default/files/ambitus\\_report.pdf](https://www.iai.it/sites/default/files/ambitus_report.pdf)

The same N.º 3 Court of Instruction of Santiago had been responsible for case **DPA 2226/2021**, using the same strategy of delay and inaction to allow for the expiration of the investigation phase and subsequent impunity and impossibility to access justice.

8. The obnoxious (and intentional) effect of Article 324 of the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*) that established the time limitations for pre-trial investigation was introduced in 2015. This provision led to numerous instances that have generated impunity and denial of judicial review, particularly in complex cases involving corruption. This was even acknowledged by legislators when reforming Art. 324 through Law 2/2020 (*Ley 2/2020 de 27 de julio*), in which preamble stated: “*simply setting a maximum limit on the duration of the investigation has **proved to be pernicious in that it can lead to impunity in the prosecution of complex crimes.***”<sup>8</sup> Unfortunately, the 2020 reform, while extending the time limitations for pre-trial investigation, has not addressed the systemic problem in which these periods are intentionally exhausted to preclude the conclusion of the investigation phase and opening of trial phase.
9. Additionally, in our December 2022 statement regarding “Determination of preliminary admissibility”, we showed how No. 3 Court of Instruction of Santiago, in proceedings DPA 2226/2021, imposed a disproportionate 3,000 € deposit to Verdegaiá and prevented its right to appeal the decision. This action violated Article 9, paragraph 4, of the Aarhus Convention, providing that remedies should not be “prohibitively expensive”. We have already shown in our March 2023 statement how this is not an isolated response, but how it has been used systematically to prevent access to justice, as similar deposits were imposed by the same No. 3 Court in case DPA 2296/2021. This practice has already emerged in other ACCC cases regarding Spain, including ACCC/C/2008/24, in which “*The Magistrate’s Court shelved the case and imposed upon the communicant a “bond” (deposit) requirement of €60,000 in the event the Court decides to take up the case*”.

To conclude, the wide systemic denial of access to environmental reviews in Spain’s judicial system is indeed tragic. As a specific example, Verdegaiá’s claims should have been promptly and fairly adjudicated in Spain’s courts. Along with these recent failures by Spain to comply with Aarhus Convention Article 9, paragraphs 4 and 5, there is overwhelming evidence of numerous other specific and systemic violations in Spain’s environmental reviews including in previous decisions by the ACCC and reports by the European Union Action to Fight Environmental Crime, ENCJ, SEPRONA, and scholars. In providing evidence of Verdegaiá’s recent experiences and harms, the Communicant urges the Compliance Committee to address Spain’s wide systemic failures to protect rights to environmental reviews in courts.

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<sup>8</sup> [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-8633](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-8633)