Formal notice for the provision of information, process consultation or issuance of certificates

Case No 121/21.6BEMDL

I – REPORT

MONTESCOLA FOUNDATION has brought this formal notice for the provision of information, process consultation or issuance of certificates against the **MINISTRY OF ENVIRONMENT AND ENERGY TRANSITION**, as the Ministry responsible for supervising the **PORTUGUESE ENVIRONMENT AGENCY, I.P.** (hereinafter simply referred to as **APA, I.P.**), both better identified in these proceedings, requesting the following:

"Terms in which these proceeding shall be granted and, consequently:

i) The APA shall be notified to provide the requested documents via DOC. 1 in this articulated pleading within a period not exceeding ten days;

ii) The Chairman of the APA's Administrative Board is to be sentenced to pay 100.00 euros as periodic penalty payment for each day of delay regarding the period established for the enforcement of the sentence;"

To that effect, the **Applicant has claimed**, in summary, the following:

– On 07/01/2021, they requested the provision of the documents listed in DOC. 1 to the APA, I.P. which is attached and is herein deemed reproduced for all legal purposes, a request that was made under the environmental impact assessment process (EIA) to expand the Barroso Mine;

– The APA, I.P. did not reply nor did they supply the requested documents within the period to which they are bound to under Law No. 26/2016 of 22/08;

– On 08/03/2021, they received a communication from the APA, I.P., within which that Agency, in accordance with Doc. 2, which is attached and herein deemed reproduced for all legal purposes;

– Due to not accepting the reply they had received, on 10/03/2021 they filed a hierarchical appeal to the Minister of the Environment and Energy Transition, which is attached and is herein deemed reproduced as Doc. 3;

– Until now, such hierarchical appeal waits for a reply;

– Meanwhile, on 01/02/2021, the Applicant has filed a complaint to the Commission for Access to Administrative Documents (CADA), which is herein deemed reproduced for all legal purposes as Doc. 4;

– During the conclusions, the mentioned Commission stated that *"(...) - In the absence of access restrictions, the requested documents are public and freely available, / - The public consultation or cross-border consultations phases do not constitute restrictions on the right of access to environmental information, nor does it extinguish the right of access to what has been requested; / - Access shall be provided in view of the mentioned framework";*

– They were notified with the Opinion No. 102/2021, issued by CADA on 26/03/2021 (Doc. 5, which is attached and herein deemed reproduced for all legal purposes) and one has to assume that the APA, I.P. would have also been notified on the same date;

– Until this moment, and even with the opinion favourable to the Plaintiff from CADA, the requested documents were still not provided by the APA, I.P.;

– The fact that the APA, I.P. does not provide the requested documents is not a minor issue;

– Firstly, because a set of documents regarding a project was requested (expansion of the Barroso Mine), which, predictably, will have a major environmental impact;

– Secondly, because, regardless of the ongoing environmental impact assessment process and, more specifically, the public consultation procedure that began on 22/04/2021, apart from the circumstances listed in Article 18 of Law No. 26/2016 of 22/08, the Public Administration cannot deny, through action or omission, the delivery of documents/information on environmental matters to anyone who requests them;

– Under the Aarhus Convention, the right that every person has to live in an environment adequate to his or her health and well-being, and, on the back of it, the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations depend on the guarantee of three environmental rights:

- Right of access to information;

- Right of public participation in decision-making;

- Right of access to justice.

– The right of access to information cannot be mistaken with the right of public

participation in decision-making;

– What the APA, I.P. has done with the letter sent to the Plaintiff, now Applicant, on 08/03/2021 is mixing the right of access to information with the right of participation;

– Moreover, the evidence that the applicant's request still makes perfect sense (not that it matters for what brings us here, which is simply the obligation of the APA, I.P. to deliver the requested documents to the Plaintiff) is that the public consultation process regarding EIA No. 3353 began on 22/04/2021, which made available a set of documents but not some of the ones requested by the Plaintiff, but some that the latter agrees are essential for the materialisation of one of the pillars of the Aarhus Convention, i.e., participation in the decision-making;

– Furthermore, even though a set of documents regarding this EIA process were made available in the public consultation process (the documents made available in the public consultation can be seen via this link: https://siaia.abambiente.pt/AIA.aspx?ID=3353), it is true that a substantial set of documents are still not available, namely:

- **EIA Annexes - Annex I Climate and Climate Change**
- **EIA Annexes - Annex VI - Soils**
- **EIA Annexes - Annex III - Water Resources**
- **Project - Annex II - 24 - Flocculants**
- **Project - Annex III - 1 - Barroso Mine – Parameters – Heaps**

I.e., due to an accidental or intentional mistake, the APA, I.P. is still not providing the documents essential to an informed participation in the public consultation process of the environmental impact assessment;

– Regardless of this omission, the deadline has already begun and it is underway;

– In view of the above, the APA, I.P. shall be ordered to provide the documents listed in DOC. 1 herein within a period not exceeding 10 days to the applicant - see Article 108 of the CPTA [Code of Procedure in the Administrative Courts];

– In case the order is not complied with, it is hereby requested that the Chief Executive Officer of the APA, I.P.'s Executive Board, Mr. Nuno Lacasta is ordered to pay a periodic penalty payment based on a daily fine of 100,00 € (one hundred euros) for each day of delay the order is not complied with;

– For the purposes of the previous paragraph, the member of the body is: **Mr. Nuno**

Lacasta;

– The Plaintiff foundation is an environmental non-governmental organisation (ENGO);

– To that extent, the legal framework regarding NGOs contained in Law No. 35/98 of 18/07 applies;

– Under paragraph 5 of the mentioned Law, with the heading "Access to information", it is provided that:

"1 - In accordance with the law, ENGOs have the right to consultation and information within the Public Administration bodies regarding administrative decisions and documents related to the environment, namely on:

(...)

f) Environmental impact assessment processes;

(...)

2 - The mentioned consultation in the previous paragraph is free, with access to administrative documents being governed, namely its reproduction and issue of certificates, by the provisions in general law.

3 - In accordance with the law, the ENGOs have standing to request a formal legal notice to the public entities for the provision of documents or processes consultation and for the issue of the appropriate certificates".

It is hereby attached five (5) documents and power of attorney (see docs. 1 to 31 attached with the application initiating proceedings / SITAF registration No. 008466191).

*

Duly notified, the Defendant, the **Ministry of Environment and Climate Action** (hereinafter simply referred to as **MAAC**) has submitted their reply (see pages 55 to 62 of the digital case, SITAF registration No. 008466200), defending by exception, where they stated, amongst other things, that:

– The Applicant in this case, as we have seen, has made two cumulative requests, which limit the object of the action, more specifically, *"i) the APA shall be notified to provide the requested documents via Doc. 1 in this articulated pleading within a period not exceeding ten days, ii) The Chairman of the APA's Executive Board is to be sentenced to pay 100.00 euros as periodic penalty payment for each day of delay regarding the period established for the enforcement of the sentence"*.

– From the analysis to the requests made by the Applicant, it is clear that their claims

are directed at a single public entity, the APA, I.P.;

– What is important to know now is if the Applicant correctly identified, in view of our laws and previously mentioned, the entities that should be the defendants, whether they have judicial personality to that effect or they are a legitimate party (their position as counterparty in the relationship in dispute, as established by the plaintiff);

– And, in our opinion, the Applicant did not make the correct identification, at least concerning the Ministry of Environment and Climate Action. And because, in the case at hand, the entity from which the Applicant requests the action is the APA, I.P.;

– However, the Ministry of Environment and Climate Action has nothing to do with this, given the legal nature of the APA, I.P.;

– Therefore, under Article 1(1) of the Decree-Law No. 56/2012 of 12/03, **the APA, I.P. is a public institute under indirect State administration**, endowed with financial autonomy and with separate property;

– And, in accordance with the provisions in the **Framework Law on Public Institutes** (Article 4(1)), those institutes – such as the APA, I.P. – are **legal persons governed by public law**, which are governed by the provisions applicable to the public legal persons in general and, as such, the APA, I.P. shall have to be represented in court proceedings or legal transactions by the chief executive officer or by two members of the board, or else by agents appointed to that effect (Article 21(3) of that Framework Law);

– Therefore, taking into consideration its legal status and nature, they shall be represented in court by their own bodies or by whomever they nominate (see Article 10(2) of the CPTA – *"In the proceedings brought against public entities, the defendant is the legal person governed by public law..."*);

– Therefore, with the APA, I.P. being a legally entity separate from the State, which only exerts oversight and supervisory powers over the APA, I.P. Through the MAAC (Article 1(2) of the Decree-Law No. 56/2012 and Article 28(4) of the Organic Law of the XXII Constitutional Government), unequivocally excluding hierarchy, and therefore lacks any power of management over it;

– In view of the above, the useful effect of the sentence is not obtained, which, as a simple academic hypothesis, which is not accepted, came to condemn the Defendant MAAC, when they do not have the capacity to exert their rights/duties in this action; and they do **not have the power** to **direct** the APA, I.P. to execute the legal transactions or to comply with the behaviours requested by the Applicant;

– Therefore, the conclusion is that the Ministry of Environment and Climate Action does not have legal hierarchical jurisdiction over the APA, I.P., only the latter may be the

defendant regarding the executed actions and omissions, as it follows from the provisions in the 1st part of Article 10(2) of the CPTA;

– With the Applicant requiring the execution of certain actions, the entities that might be affected by the decision that shall eventually come are the ones that have the functional power to issue those administrative acts or omit their execution, i.e., the **APA, I.P.**;

– This proceeding was brought against the Ministry of Environment and Climate Action with the purpose of ordering the APA to provide the Applicant with the documents the latter has requested due to this public entity, so far, not having done so;

– However, the MAAC is completely unrelated to such acts and omissions, as previously shown;

– And Article 10 of the CPTA provides that to ascertain the standing to be sued it is necessary to establish an interconnect between the object of the dispute and the public legal person(s) to whom the duty intended to be obtained in this case is attributed;

– It should only be considered the possibility of loss towards the MAAC and, consequently, interest in contesting the Applicant's request if the duty to execute the legal transactions or compliance with the intended behaviours lied with the former or some of its bodies or services, which is not the case;

– The underlying right to the Applicant's claim in this action and its admissibility shall not interfere or directly harm the interests of the MAAC and, in that manner, the latter does not have any direct interest in contesting the claim that had been brought against them and, as such, lacks a standing to be sued for the notification at hand;

– Regarding the requests petitioned by the Applicant, **the defendant** shall **only be the APA, I.P.** and not the Ministry of Environment and Climate Action;

– Given the above, we are faced with a situation of proper **lack of standing to be sued** because the Applicant requests a public entity – the Ministry of Environment and Climate Action –, which is not the counterparty in the material relationship in dispute, the way it is established in the application initiating proceedings;

– Therefore, the **Ministry of Environment and Climate Action** shall have to be considered as an unlawful party to this formal notice and, consequently, be absolved from the proceedings under paragraph 2 and point (e) of paragraph 4 of Article 89 of the CPTA.

Finally, they ended claiming *"the exception of lack of standing to be sued must be granted under paragraph 2 and point (e) of paragraph 4 of Article 89 of the CPTA, acquitting the Defendant MAAC of the proceedings."*

An order is attached (see doc. in pages 52 of the digital case / SITAF registration No. 008466198).

*

By order of 26/05/2021, the Applicant was notified with the content of the reply supplied by the Defendant (see pages 55 to 62 of the digital case), having been granted a period of 5 days to answer to the exceptions raised there, if they so wish it. (see order in page 68 of the digital case / SITAF registration No. 008467924).

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Following the notification to answer to the exceptions, the Applicant alleged that the Defendant is wrong and, in that sense, amongst other things, stated the following:

– The formal notice proceedings were brought against the MAAC because this is the one who supervises the APA, I.P.;

– What is intended with these formal notice proceedings is that the supervisor Ministry corrects the omission of the supervised entity, the APA, I.P.;

– What is intended is that the MAAC performs the action that the APA, I.P. refuses to perform, regardless of the opinion of the Commission for Access to Administrative Documents (CADA) in the judicial records;

– What is intended is that the supervisor Ministry ensures compliance with certain values deemed essential;

– And what are those values?

– Starting forthwith, the possibility of exercising an environmental citizenship, which bestows upon each citizen the possibility to intervene in the environmental decision-making process;

– It is worth remembering that this case began because the APA, I.P. refused to deliver the environmental documents requested by the Plaintiff as part of an environmental impact assessment process, which would soon take place and the access of which is key for the making of a well-founded participation within the scope of the public consultation of the expansion project of the Barroso mine, still underway;

– But also, to exercise, if that is the case, another aspect of the exercise of environmental citizenship, i.e., access to justice to protect the environment;

– In fact, what is intended is to access documents and information not contemplated in the ongoing public consultation process and that might be useful to substantiate the access to environmental justice, in case of disagreement with the decision;

– If there is a part of the Portuguese State (APA, I.P.), even if it's an indirect

administration, that does not comply with their own duties, whether due to the Constitutional Law or the international Conventions to which the Portuguese State acceded to, or by ordinary Law, and if that part of the State is subject to the supervision of the Defendant MAAC, that supervision shall be exerted, wherein one form of exercising it is through substitutive supervisory [tutela substitutiva], taking place whenever the supervised person does not perform the actions they are legally bound to perform. The supervisory body – in this case, the defendant – can (and should) take the place of the supervised entity's bodies and perform the legally required actions;

– Unless the MAAC waives the supervisory powers they have over the APA, I.P., which does not seem to us to be the case.

They concluded calling for the inadmissibility of the exception claimed by the Defendant. (see "reply" in pages 72 to 75 of the digital case / SITAF registration No. 008474104).

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II – THE VALUE OF THE CLAIM

Under Article 31 and paragraphs 1 and 2 of Article 34 of the CPTA and Article 296(1) and paragraphs 1 and 2 of Article 306 of the Code of Civil Procedure (hereinafter CCP) *ex vi* Article 31(4) of the CPTA, the value of the claim is established at 30 000.01 € (thirty thousand euros and one cent).

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III – CURATIVE ACTS

The Court has jurisdiction in view of the nationality, subject matter, hierarchy, and territory.

The case is regular and has no nullities that invalidate it in its entirety.

The parties have judicial personality and capacity, are the rightful parties, and are duly represented.

There are no other nullities, exceptions or previous matters which the court is required to consider and preventing understanding of the merits of the claim. However, it must be considered if there is or not the raised dilatory exception of lack of standing to be sued, which shall only be done after establishing the relevant factual evidence because its consideration needs a prior analysis of the factual evidence.

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IV – FACTUAL GROUNDS

Based on the documentation attached to the judicial records, it is important to establish the relevant proven facts for understanding the exception raised in the proceedings:

A) On 07/01/2021, the Applicant, MONTESCOLA FOUNDATION, sent to the Portuguese Environment Agency (APA, I.P.) the document identified as *"ENVIRONMENTAL INFORMATION REQUEST Regarding "BARROSO MINE" (C-100)", which is herein deemed reproduced, where the following is stated:* (...)

montescola

ENVIRONMENTAL INFORMATION REQUEST
Regarding "BARROSO MINE" (C-100)

Portuguese Environment Agency
< arhn.geral@apambiente.pt >

The **MONTESCOLA Foundation**, with tax identification number G70572128, a non-profit-making entity for general interest purposes, registered in the Foundation Registry in the jurisdiction of the Kingdom of Spain, with number 2239 by *Resolution of 24 September 2019 of the Directorate-General of Registry and Notary Services* (published in the *Boletin Oficial del Estado* of 6 July 2020[1]) with the main purpose of "protecting the environment", established in Frojám no. 5, Lousame 15212, A Coruña (Galicia) and with the electronic mail info@montescola.org, by the undersigned Chief Executive Officer Xoán Evans Pin, citizen of the Kingdom of Spain, hereby submits to the Portuguese Environment Agency the following **ENVIRONMENTAL INFORMATION REQUEST**:

1.- The applicant foundation is an environmental non-governmental organisation, in light of the definition of point (e) of Article 3 of Law No. 19/2006 of 12 June, which governs citizens' access to environmental information, and transposes into Portuguese law Directive 2003/4/EC of the European Parliament and of the Council of 28 January on public access to environmental information, and repealing Council Directive No. 90/313/EEC, which was adopted by the European Union in order to comply with the provisions of the Aarhus Convention.

2.- Pursuant to the constitutional principle of right to information and the mentioned Law No. 19/2060 of 12 June, which governs citizen's access to environmental information, the applicant foundation **REQUESTS ACCESS**, preferably by electronic means and in the original digital format, to the following documents with information on the environment and are being held by the APA:

- Environmental Impact Assessment (EIA) reports of 2020,[2] with all additional documentation[3] requested by the APA and other Administrations
- Exploration Plan/Mining Plan of 2020
- Reports and requirements carried out by the Administration regarding the documentation submitted by the company Savannah Lithium Lda.

Signed by digital electronic certificate in Lousame, on 7 January 2021,

[1] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-7340
[2] https://www.publico.pt/2020/06/01/economia/noticia/savannah-ja-entregou-estudo-impacto-ambiental-mina-barroso-1918918
[3] https://diarioatual.com/savannah-conclui-mais-uma-etapa-do-estudo-de-impacto-ambiental/

(...)

see doc. 1 attached with the application initiating proceedings in pages 1 to 31;

B) On 27/04/2021, the Applicant, Montescola Foundation, brought this formal notice against the Ministry of Environment and Energy Transition in the Administrative and Tax Court of Mirandela – see doc. identified as *"Application Initiating Proceedings"*, in pages 1 to 31 of the digital case.

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Grounds:

The decision of the factual evidence was based on the critical review of the documents attached to the judicial records, namely, the ones attached with the application initiating proceedings, considering the position of the parties in their articulated pleadings, as mentioned in every point of the evidence, pointing out the fact that neither document was contested.

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There are no unproven facts to be recorded with relevance for the resolution of the claim.

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The remaining alleged matter was not considered proven or unproven because it is irrelevant for the decision, whether in allegations of a conclusion matter or in simple de jure allegations.

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V – LEGAL BASIS

THE DILATORY EXCEPTION OF LACK OF STANDING TO BE SUED OF THE DEFENDANT, THE MINISTRY OF ENVIRONMENT AND CLIMATE ACTION

As mentioned above, in its reply, the Defendant raised the dilatory exception of lack of standing to be sued and said, amongst other things, *"[i]t is clear from the analysis to the requests made by the Applicant that their claims are directed at a single public entity, the APA"* and that *"in the case at hand, the entity from which the Applicant requests the action is the APA"*. And that *"[t]herefore, taking into consideration its legal status and nature, they shall be represented in court by their own bodies or by whomever they nominate (see Article 10(2) of the CPTA – "In the proceedings brought against public entities, the defendant is the legal person governed by public law...")"*

They also added that *"[t]he defendant, regarding the requests petitioned by the Applicant, shall only be the APA and not the Ministry of Environment and Climate Action"* and, as such, *"(...) we are faced with a situation of proper* ***lack of standing to be sued*** *because the Applicant requests a public entity – Ministry of Environment and Climate Action –, which is not the counterparty in the material relationship in dispute, the way it is established in the application initiating proceedings;"* They concluded stating that *"(...) the Ministry of Environment and Climate Action shall have to be considered as an unlawful party to this formal notice and, consequently, be absolved from the proceedings under paragraph 2 and point (e) of paragraph 4 of Article 89 of the CPTA.*

In terms of the adversarial procedure regarding the exception matter under analysis, the Applicant came to contest this exact understanding, stating, amongst other arguments, that "*[w]hat is intended with these formal notice proceedings is that the supervisor Ministry corrects the omission of the supervised entity, the APA.* Furthermore, *"what is intended is that the MAAC performs the action that the APA, I.P. refuses to perform, regardless of the opinion of the Commission for Access to Administrative Documents (CADA) in the judicial records"*. They also stated that *"[i]f there is a part of the Portuguese State (APA, I.P.), even if it's an indirect administration, that does not comply with their own duties, whether due to the Constitutional Law or the international Conventions to which the Portuguese State acceded to, or by ordinary Law, and if that part of the State is subject to the supervision of the Defendant MAAC, that supervision shall be exerted, wherein one form of exercising it is through substitutive supervisory [tutela substitutiva], taking place whenever the supervised person does not perform the actions that are legally bound to perform. The supervisory body – in this case, the Defendant – can (and should) take the place of the supervised entity's bodies and perform the legally required actions".*

We have already stated that the Applicant has no grounds regarding the Defendant's standing to be sued in this formal legal notice, hereby stressing that the absolute bar proceeding with a case of the standing to be sued regarding the formal notice for the provision of information, process consultation or issuance of certificates cannot be mistaken with the powers of oversight and supervision that the Defendant, the Ministry of Environment and Climate Action, has over the APA, I.P. and with the alleged virtuality of those same powers imposing the duty of guaranteeing access to information on the part of the APA, I.P., i.e., a legal person governed by public law, to whom the environmental information request is addressed to, as results from point (A) of the evidence.

In these proceedings, it must be noted that what is at issue is the enforcement of Law No. 26/2016 of 22 August, which regulates access to administrative documents and administrative information, including in environmental matters, transposing Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC into Portuguese internal law. In fact, in these proceedings the issue is exactly an *"environmental information request"*, as results from point (A) of the evidence.

Furthermore, regarding its subjective scope, Article 4 of that legal regulation provides a vast list of entities subjected to the duty of guaranteeing access to information and that same legal regulation is constructed in the sense of establishing a broad concept of substantive administrative activity, which, except for legal restrictions, cannot be limited to acts of public management and covers all of its acts, i.e., there is a duty to inform, to allow access to all documents that they have.

Having done this brief introduction, let us now move to analysing the applicable law.

Firstly, Article 8-A of the CPTA, under the heading "*Judicial personality and capacity*", provides the following:

"*1 - Judicial personality and capacity respectively consists in the susceptibility to be a party and to appear in person before the court.*

2 - One who has judicial personality has legal personality and one who has judicial capacity has the capacity to exercise rights, with the remedy of the incapacity provided in civil procedural law being applicable to the administrative process.

3 - Apart from other cases of extension of judicial personality established in civil procedural law, the ministries and bodies of the Public Administration have judicial personality corresponding to the standing to sue and to be sued conferred upon by this Code.

(...)

5 - Under Article 10(4), the unlawful bringing of an action against an administrative body has no procedural

consequences".

In turn, Article 10 of the CPTA states – under the heading "*Standing to be sued*" – the following:

1 - Each action must be brought against the other party in the material relationship in dispute and, where applicable, against persons or entities who hold interests opposite to the ones of the plaintiff.

2 - In the proceedings brought against public entities, the defendant is the legal person governed by public law, except in the cases against the State or the Autonomous Regions, which concerns the action or omission of bodies integrated in the respective ministries or regional secretaries, in which the ministry or ministries or the regional secretary or secretaries are the defendants, to whom the practiced acts are awarded to or over which bodies there is the duty to perform the legal transactions or to comply with the intended behaviours.

3 - The proceedings regarding acts or omissions by an independent administrative entity without legal personality are brought against the State or another legal person governed by public law to whom that entity belongs to.

4 - The provisions in paragraphs 2 and 3 shall not prevent the action from being considered to have been lawfully brought when there is the indication in the application that a body belonging to a legal person governed by public law, to the ministry or to the regional secretary shall be the defendant.

5 - In the situation provided in the previous paragraph, when the notification is made within the body stated in the application, the legal person, the ministry or regional secretary to which the body belongs to shall be considered to have been notified.

6 - Having a joinder of claims, brought against different legal persons or Ministries, the requests made must be brought against the legal persons or Ministries.

7 - When the main request should be brought against a Ministry, it also has standing to be sued regarding the requests that are joined with that one.

8 - In the cases regarding disputes between bodies of the same legal person, the action is brought against the body the conduct of which originated the dispute.

9 - Individuals or licensees may be defendants in the legal and administrative relationships that involves them with public entities or with other individuals. (…) (bold and emphasis added)

The judicial personality concerns the gathering of "abstract or generally demanded requirements in order to (...) be a party to legal proceedings or to act autonomously regarding the generality of actions or a certain category of actions", being established by resorting to "a criterion of correspondence (coincidence or equivalence) between legal personality (capacity of enjoyment of rights) and judicial personality, with this equivalence being to either natural or legal persons" (see Antunes Varela, J. Miguel Bezerra and Sampaio e Nora, "*Manual de Processo*

Civil", 2nd edition, Coimbra Editora Ld.ª, 1985, pages 108 and 131)

The standing as a "(general) absolute bar to proceeding with a case expresses the relationship between the party in the proceedings and its object (the intention or request) and, therefore, the position that the party must have in order to deal with the request, asserting it or contesting it" (see José Lebre de Freitas and Isabel Alexandre, *"Código de Processo Civil anotado, vol. I"*, 3rd edition, Coimbra Editora, 2014, page 70), therefore, consisting in the susceptibility of being a specific or exact party in a certain action, a position that can be assessed, on the defendant's side, by the direct interest in contesting the material relationship in dispute, as established by the plaintiff.

The coincidence principle between legal and judicial personality provided for in Article 8-A(2) of the CPTA establishes that this absolute bar to proceeding with an action can be met, *as a rule*, only regarding the legal persons governed by public law. However, as laid out in Article 8-A(3) of the CPTA, the ministries and administrative bodies have judicial personality in the cases where they are also bestowed with legal standing.

As a matter of fact, as mentioned by Esperança Mealha, the "question in knowing which public entity is to be indicated as defendant in an administrative action is often seen as a mere problem of standing to be sued because it is Article 10 of the CPTA that, under the heading "standing to be sued", provides the criteria that makes it possible to establish the public entity to be sued". However, strictly speaking, "this principle does not only consider the criterion of establishing the standing to be sued but also the criteria of awarding judicial personality to public entities" (see *Personalidade Judiciária e Legitimidade Passiva das Entidades Públicas*, Publicações CEDIPRE online-2, http://www.cedipre.fd.uc.pt, Coimbra, November 2010, pages 6-7) http://www.cedipre.fd.uc.pt/

In disputes regarding fulfilment of requests made in the exercise of the right to procedural information or access to the administrative archives and records (such as in this case), Article 105(1) of the CPTA bestows standing to be sued – with a consequent extension of judicial personality by application of the provisions in Article 8-A(3) of the CPTA – to the State Ministry(ies), *"the bodies of which have the power to provide the information or the consultation or to issue the certificate"* – entity exclusively responsible, in those cases, for holding the position of defendant.

In administrative disputes, the lack of standing to be sued and consequent lack of judicial personality of the administrative body effectively sued do not necessarily lead, in all situations, to the decision of acquittal of the proceedings.

In fact, in the case of these proceedings, this is not about a situation where the Applicant has indicated an administrative body belonging to the ministry as the defendant that

should be sued and, as a result, the formal notice proceedings shall be – by enforcement of the provisions in paragraphs 3 and 4 of Article 8-A, paragraphs 2 and 4 of Article 10, and paragraph 1 of Article 105 of the CPTA – considered to have been regularly brought against the ministry to which the body with jurisdiction to provide the information belongs to, an entity considered to have been notified, with notification of the body indicated in the application initiating proceedings. As a matter of fact, the Applicant clearly indicates the **Ministry of Environment and Climate Action as the defendant by virtue of its oversight and supervision relationship over the APA, I.P.**

Regarding the formal legal notice for the provision of information, process consultation or issuance of certificates it is hereby noted that it is an urgent procedural mean that aims at guaranteeing the constitutional right of the interested parties to the information, being regulated under Article 104 of the CPTA, which states the following:

"Article 104 Object

1 - When requests made in the exercise of the right to procedural information or the right to access administrative archives and records are not fully satisfied, the interested party may request the corresponding notice under the terms and for the purposes provided in this section.

2 - The notice request is also applicable in the situations provided in Article 60(2) and can be used by the Public Prosecution Service for the exercise of public prosecution."

In turn, regarding the assumptions of the formal legal notice at issue here, Article 105 provides the following (and bold and emphasis added):

"Assumptions

1 - The notice must be brought against the legal person governed by public law, the ministry or the regional secretary, the bodies of which have the power to provide the information or the consultation or to issue the certificate.

***2** - When the interested party asserts the right to procedural information or the right to access administrative archives and records, the notice should be requested within 20 days from the observation of any of the following facts:*

a) Within the period laid down by law, without the defendant having complied with the request that was made to them;

b) Denial of the request;

c) Partial fulfilment of the request."

Now that we have reached this point and considering the doctrine and legislative framework stated above and taking into account the last legislative changes introduced in Article 105(1) of the CPTA (the regime of which is now identical to the one in Article 10(2) of

the same code), it should be concluded that the legal capacity to be sued in this formal legal notice does not belong to the Defendant, the Ministry of Environment and Climate Action but on the contrary, it belongs to the APA, I.P., as a legal person governed by public law, who should be a party to legal proceedings in this formal legal notice. To that effect, – it should be noted that it is an uncontested understanding in the legal theory case-law – see the agreed legal theory mentioned by Mário Aroso de Almeida and Carlos Alberto Fernandes Cadilha (see *"Comentário ao Código de Processo nos Tribunais Administrativos"*, 7th Edition, Almedina, 2021, p. 920) where they state that *"[t]oday is clear that in this domain also, the standing to be sued regime of Article 10(2) prevails, therefore, the notice should be requested against the legal person governed by public law, the ministry or regional secretary over which bodies there is the duty to comply with the right to information. Article 105(1) should, thereby, be interpreted in accordance with Article 10(2) for the purpose of understanding that the defendant is, as a rule,* ***the legal person governed by public law*** *(vg., municipality,* ***public institute****, public association, corporate public enterprise, etc.) and only where the case is brought against the State or an Autonomous Region is the ministry or regional secretary the defendant, to which bodies have the duty to provide the information or the consultation or the issuance of certificate. Without any other specification, the principle, when mentioning the legal person governed by public law, the ministry or the regional secretary, will inevitably have to consider the standing criteria mentioned in Article 10(2) (see note 3 to Article 10)"* - (bold and emphasis added)

In this circumspect, the issue of standing to be sued in the notice for the provision of information, process consultation or issuance of certificates has been addressed profusely by the administrative case-law, such as an example, amongst others, Judgment No. 1880/17.6BELSB of the South Administrative Central Court made on 19/12/2017, available for consultation at www.dgsi.pt, where it was clearly stated, in point II of the summary, that *"(...) [i]n accordance with Article 105(1) of the CPTA, the notice for the provision of information, process consultation or issuance of certificates must be requested against the legal person governed by public law, the bodies of which have the power to provide the information or the consultation or to issue the certificate."* (emphasis added)

The Public Administration is represented in their relationships with individuals or public legal persons. Following a criterion (there are several possible ones) of (descending) dependence regarding the State (through the Government), public legal persons are: a) the State; **b) the public institutes**; c) the corporate public enterprises; d) the public associations; e) the local authorities; f) the autonomous regions, and g) the independent administrative entities.

The public legal persons are run by bodies who have to make decisions in their name or to express the desire attributable to the former.

On the other hand, legal persons exist to pursue certain purposes, corresponding to

their responsibilities, and it should be noted that legal persons of territorial basis (examples of which are the State and Local Authorities) have several responsibilities, while the so-called legal persons of institutional basis (such as the public institutes) have specialised responsibilities.

Regarding public institutes, they are legal persons of institutional basis and do not have a corporate nature, belonging to the State or to another public legal person that are included in the Indirect State Administration, i.e., the one that is made on behalf of the State but by other public entities different from the State through their own services.

Therefore, it is undisputable that public institutes are entities with separate legal personality and administrative and financial autonomy, developing an administrative activity aimed at accomplishing the purposes of the State, **within which they perform their own actions.**

In fact, Law No. 3/004 of 15/01, approving the Framework Law on Public Institutes (hereinafter simply referred to as LQIP) in its Article 4 offers the legal concept of public institute, namely:

"Article 4

Concept

1 -Public institutes are legal persons governed by public law with separate bodies and property.

2 - Public institutes shall as a rule meet the requirements governing financial as well as administrative autonomy.

3 - As a duly justifiable exception, public institutes may be set out with administrative autonomy only."

Amongst other things, the mentioned Framework Law provides in Article 21(3) with the heading "Powers" that *"[t]he public institutes are represented namely in court proceedings or legal transactions by the chief executive officer or by two members of the board, or else by agents appointed to that effect."* In turn, in the organic structure of the Portuguese Environment Agency, I.P., approved by Decree-Law No. 56/2012 of 12 March, Article 5(1) provides that the *"[t]he executive board comprises one chairman, one vice-chairman and two members."*

In short, public institutes governed by the LQIP, belonging to indirect State administration, always have legal personality and administrative autonomy and they can also have financial autonomy (see Article 2(1), Article 3(1), and paragraphs 1, 2, and 3 of Article 4 of the LQIP). Specifying it further, public institutes include the customised services of the State, which are administrative services or departments of the general-directorate type, which can be integrated in the legal person of the State and, consequently, under its direct administration were pointed out by the law that set them up as public legal persons for an easier management and, consequently, integrated them under the indirect State administration.

In view of the above, if what characterises the indirect State administration is that it is made, although in the latter's interests, by entities with legal personality, on their own behalf and through bodies also of their own, it shall be concluded that when the law integrates a certain institute in the indirect State administration it is clearly giving it legal personality. Well, that is what occurs with the APA, I.P.

In this case, it is undisputed that the **APA, I.P. is a public institute under indirect State administration, endowed with administrative and financial autonomy and separate property**, as provided for in Article 1 of the mentioned Law No. 56/2012 of 12 March. Meaning, it is a public institute that *"is responsible for the tasks of the Ministries of Agriculture, of the Sea, of the Environment, and of the Spatial Planning, under the oversight and supervision of the corresponding minister."* (see paragraph 2 of Article 1 mentioned above)

As a matter of fact, from Article 1 of its Organic Law (approved by the Decree-Law No. 56/2012 of 12/03) and from Article 28(4)(a) of the rules governing the organisation and operation of the XXII Constitutional Government (approved by the Decree-Law No. 169-B/2019 of 03/12) clearly results that this Agency does not integrate the direct administration but the indirect State administration, being under the oversight and supervision of the Ministry of Environment and Climate Action, as it is inherent in the customised public services and not under its administration, typical of the hierarchical relationship of the direct State administration.

And, since the APA, I.P. is subjected to the provisions of the LQIP, the provisions in paragraph 3 - regulation already mentioned above - and in point (n) of paragraph 1, both from Article 21, applies to them when it states that it is up to the Executive Board *"to appoint authorised agents before the courts or outside the courts"*, and it is up to the chief executive officer of this body to represent this Agency *" namely in court proceedings or legal transactions"* and, to that extent, there is a legal regulation that awards powers for the legal representation of the Agency at issue.

Taking into consideration that legal standing corresponds to the direct interest in suing or to the direct interest in contesting a certain dispute, respectively assessed by the utility or by the loss that may befall a certain legal entity due to the admissibility of the action, in this case, the Defendant, the Ministry of Environment and Climate Action, regardless of the existence of an oversight and supervision relationship over the APA, I.P. and, consequently, is a government department, the Minister of which *"has the mission to formulate, lead, execute, and assess the policies of the environment, spatial planning, cities, urban, suburban, and road transport, mobility, climate, forestry, nature conservation, energy, geology, and forests, from a sustainable development and territorial and social cohesion perspective"* (see Article 28 of the Decree-Law No. 169-B of 3 December, which

approved the rules governing the organisation and operation of the XXII Constitutional Government and succeeded the Organic Law of the XXI Constitutional Government, approved by Decree-Law No. 251-A/2015 of 17 December, which provided the existence of a Minister of Environment and Energy Transition) and integrates the direct administration of the State, pursuing an activity aimed at accomplishing the purposes of the State in the exact terms mentioned above, what is certain is that it is not the entity with standing to be sued in these proceedings but it is the APA, I.P. because it is this entity who has the interest in contesting these proceedings.

I.e., in these judicial proceedings, the legal standing to be sued clearly belongs to the APA, I.P. due to being a legal person governed by public law to whom the environmental information request was addressed to in accordance with point (A) of the evidence (before this formal legal notice had been brought and that has the duty of providing such information in so far as the APA, I.P. is the competent legal person governed by public law to provide the information at issue in the proceedings), reason why the legal capacity to be sued lies only with the APA, I.P. and not with the Ministry of Environment and Climate Action as a government department exerting powers of oversight and supervision over the former. **In short, from the oversight relationship of the Ministry of Environment and Climate Action over the EPA, I.P. the former has no interest in contesting this formal notice regarding the provision of information, process consultation or issuance of certificates when the corresponding request was not addressed to them, nor do they have the duty to provide such information.**

In view of the above, it shall be concluded that, as a defendant in this formal legal notice, the Ministry of Environment and Climate Action has lack of standing to be sued since, in accordance with Article 105(1), read in conjunction with Article 10(2), both from the CPTA, the legal standing to be sued in these proceedings belongs entirely to the APA, I.P., a legal person governed by public law to whom the wanted information was addressed to.

Therefore, with there being a dilatory exception preventing understanding of the merits of the claim, and with the Ministry of Environment and Climate Action being an unlawful party, naturally their acquittal from the proceedings shall be done [see Article 89(2), first part, read in conjunction with point (e) of paragraph 4 of the same article of the CPTA].

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Consequently, in view of everything that has been said, it shall be concluded that the dilatory exception of lack of standing to be sued of the Defendant, the Ministry of Environment and Climate Action, is admissible, which, in the administrative proceeding, is a dilatory exception, on examination of the court of its own motion, that prevents the Court

from knowing the merits of the case and gives rise to the acquittal from the proceedings [see paragraph 2 and point (a) of paragraph 4 of Article 89 of the CPTA].

*

VI – COSTS

Taking into consideration the principle of causality, and because they are the unsuccessful party, the costs shall be borne by the Applicant in accordance with paragraphs 1 and 2 of Article 527 of the CCP, applicable *ex vi* Article 1 of the CPTA, hereby establishing the amount of judicial fees in accordance with Article 12(1)(b), L.1 of Table I-B of the Litigation Costs Regulation.

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VII – DECISION

In view of the foregoing, I hereby determine the dilatory exception is admissible consistent with the Defendant's lack of standing to be sued and, consequently, acquit the **MINISTRY OF ENVIRONMENT AND CLIMATE ACTION** of the proceedings.

*

Costs borne by the Applicant.

*

Register and notify.

Lisbon, 21 October 2021.

The Honourable Trial Court Judge,

Carlos Costa

(with advanced electronic signature – Article 16(1) of Ordinance No. 380/2017 of 19/12)