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Secretary to the Aarhus Convention Compliance Committee
 United Nations Economic Commission for Europe
 Environment Division
 Palais des Nations
 CH-1211 Geneva 10, Switzerland

Dear Secretariat/Members of the Committee

I. & II. As a Swedish journalist based in Denmark, I have come to the conclusion that the Swedish state does not comply with the Aarhus Convention by neglecting to consider arguments enshrined in the Convention, and corresponding EU-legislation. This assumption of mine is based on a rejected request for environmental information described in the following.

III. Facts of the communication

In 28 November 2018 a request was filed by me to the Swedish Chemicals Agency (Kemikalieinspektionen) for access to a non-redacted version of a document held by the agency, emanating from the European Food Safety Agency (EFSA). This document is a draft report on arguments for and against a renewed approval of the pesticide chlorpyrifos, submitted to EFSA and its member countries by the reporting member state Spain. The existing approval of chlorpyrifos is due to expire 31 January 2020. There is therefore an urgent need for the public to learn if, and on what grounds, a renewed approval will be granted before a decision is taken.

In my request references were made not only to the Swedish legislation on access to documents but also to the EU-directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003, mirroring the Aarhus Convention in EU-legislation for member states.

My request was rejected on the ground that it could be assumed that a release of the requested information may deteriorate Sweden's possibilities to take part in international cooperation (My translation – original correspondence to and from the Agency in Swedish only.)

References were made to the Swedish law on access to documents and secrecy (OSL – Offentlighets- och sekretesslagen 2009:400, chapter 15 article 1 a **ANNEX 1** quoted sentence under subhead 3.2 Kemikalieinspektionens bedömning).

As the Chemical Agency made no reference to the Aarhus Convention or its implementation in Swedish legislation and as the Agency in no way showed how and to what extent Swedish a release could weaken Swedish positions an appeal of the rejection was filed to the Court of appeal (Kammarrätten) in Stockholm 28 December 2018. (ANNEX 2 – see marked sentence page 2)

In the appeal the following arguments were presented:

- The Chemical Agency had failed to demonstrate in what way a release could weaken Sweden's position in international cooperation.
- The referred article in OSL 2009:4009 says a request should be rejected if it **may deteriorate** ("kan försämra") Sweden's possibilities to take part in international cooperation. This specific article was introduced *after* Sweden's ratification of the Aarhus Convention. It does in my mind not correspond to the Convention's article 4.4 (b) which says requests may be refused inf the disclosure would **adversely affect**, international relations. In other words, Sweden in 2009 lowered the barrier for denying access by introducing the term **may deteriorate** which is weaker than **adversely affect**, without considering the wording nor the spirit of the Aarhus Convention.
- The Agency in its correspondence with the court claimed that Spain's request for confidentiality was based on the EU-regulation 1107/2009 on marketing of pesticides, where article 63 gives a ground to reject access in order to protect commercial interests. This is in my mind irrelevant as the said regulation explicitly states that **information on emissions** to the environment **cannot** be withheld on the ground for protection commercial interests (article 63.2) – in the line of the Conventions article 4.4 (d).

In my appeal I also made references to two decisions by the European Court of Justice (C-673/13P and C-442/14) where the Swedish state intervened in favour of access to information regarding approval of pesticides.

In 19 February 2019 the court dismissed my appeal and upheld the decision by the Chemical Agency stating the following (ANNEX 3 quoted sentence below marked on page 6):

"According to the Court of Appeal's assessment, it is not obvious that the information in the masked pages has such significance from an environmental point of view that the interest in general knowledge of the tasks takes precedence over the interest in not impairing Sweden's opportunity to participate in the current EU cooperation." (My translation from Swedish)

Like the Chemical Agency the Court of Appeal made no references or comments to my claim that Aarhus Conventions article 4.4 (d) states that information om emissions cannot be withheld for commercial reasons.

Following the decision by the Court of Appeal yet another appeal was filed to the Supreme Court of Administration (Högsta förvaltningsdomstolen) 12 March 2019 presenting the following arguments (ANNEX 4 – in Swedish page marked paragraphs page 3):

- The Court of Appeal has seemingly not taken into account the obvious and well documented environmental hazards of the pesticide chlorpyrifos and thus failed to

strike a balance between the public's right to know and the interest of not deteriorating Sweden's participation in international cooperation as stated in the Conventions article final wording of article 4 (*"The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."*)

- The Court of Appeal failed to comment my arguments that protection of commercial interest cannot be used as reason for non-disclosure regarding information on emissions to the environment.
- A new judgement of 7 March 2019 by the General Court in Luxembourg in the combined cases T-716/145 and T-329/14 once more stated that the public's interest in access to environmental information related to pesticide - in this case glyphosate – trumps the interest of protecting commercial interests. This position was actively supported by representatives of the Kingdom of Sweden.
- I thus find it noteworthy that official Swedish positions presented in Luxembourg are not reflected in the decision by the Court of Appeal. This is even more remarkable as the combined cases mentioned concern the pesticide glyphosate designed to kill unwanted plants with chlorophyll (weeds) and is *believed* to cause cancer in humans, whereas the pesticide chlorpyrifos is *known* to be lethal to living organism, and to affect development of the nerve system. Chlorpyrifos is known to interfere with brain development in animals including humans. (ANNEX 5 in English)

In 16 May 2019 the Supreme Administrative Court said it would not consider my appeal as it did not live up to any of the three conditions (ANNEX 6 in Swedish under subhead SKÄLEN FÖR AVGÖRANDE):

- An decision by the Court would be important for the management of the law ("ledningen av rättstillämpningen")
- There are specific reasons for an appeal
- An appeal is needed because of grossly overlooked circumstances or gross mistakes by the lower instance.

The Supreme Administrative Court found no reason to grant a right to appeal on any of these grounds.

IV. Provisions of the Convention with which non-compliance is alleged

As shown above I believe the Swedish state has in this case not lived up to the Aarhus Convention's article 4 on access to environmental information, by

- referring to the self-imposed wording "*may deteriorate*" regarding Sweden's position in international cooperation as a ground for non-disclosure, whereas the Conventions article 4.4.(b) states that non-disclosure can be justified if a disclosure *would adversely affect* international relations.
- disregarding article 4.4 (d) which says information on *emissions* which is relevant for the protection of the environment shall be disclosed, in spite of the interest to protect commercial information. Spreading of a lethal pesticide known to harm developing nerve

systems in all animals constitutes in my understanding an emission very relevant for the environment.

- disregarding the article 4's general provision regarding grounds to refuse access:
"The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."

V. Nature of alleged non-compliance

While trying to get access to the document mentioned above, I've been in contact with legal experts to help me understand the legislation, and for advice on how to proceed.

One of them, Oluf Jørgensen, former Head of Research in Media Law, Danish School of Media and Journalism comments in an email on the rejection of my appeal by the Supreme Court for Administration:

"Your complaint is well-founded, and it's very surprising that the Supreme Court of Administration refuses to try the case without further justification. This means that Sweden does not meet the requirements for public disclosure of emissions to the environment, which follows from the EU directive on public access to environmental information and European Court of Justice rulings on this."

Feel free to quote from the above."

In 2014 Oluf Jørgensen published the following:

"In Sweden and Finland access to environmental information is covered by the general rules on access to information. Sweden has supplemented this, with a special law on access to information for certain private law bodies. The Annex to the law on access to information and secrecy only covers some bodies and tasks and does not provide a special right to environmental information."

Oluf Jørgensen:

Access to Information in the Nordic countries, pages 15-16
 Nordic Information Centre for Media and Communication Research
 University of Gothenburg 2014
 ISBN 978-91-98523-99-2

<https://www.nordicom.gu.se/sv/publikationer/access-information-nordic-countries>

This publication in English is based on a more comprehensive version in Danish ("Offentliggjort i Norden") published in Nordicom-Information No 3/2014, Nordicom, University of Gothenburg.

Conclusion

Based on my experiences as described above, notably the reluctance to relate to the Aarhus Convention demonstrated by the Chemical Agency and the two courts, I feel inclined to conclude in line with Oluf Jørgensen's observation that Sweden does not live up to its obligations as a ratifying state of the Convention neither by adopting necessary legislative amendments, nor by interpreting the Convention's requirements as shown in this case. I thus hope the Compliance committee will take the claims in this communication into consideration and act accordingly.

VI. Use of domestic remedies

No other domestic remedies were used as I wrongfully assumed that first the Agency and later the Courts would grant me access to the requested information.

VII. Use of other international procedures

Besides making references to judgements by the European Court of Justice, no other international procedures were used.

VIII. Confidentiality

I have no wish to ask for confidentiality, rather the opposite as I believe transparency in this matter is important and serves the purpose of this communication.

IX. Supporting documentation (copies, not originals)

ANNEX 1: Rejection of requested access by the Chemical Agency (Kemikalieinspektionen)

Facts of communication paragraph 4, page 1

ANNEX 2: Appeal to the Court of Appeal (Kammarrätten)

Facts of communication paragraph 5, page 2

ANNEX 3: Rejection of appeal by Kammarrätten

Facts of communication paragraph 11, page 2

ANNEX 4: Appeal to the Supreme Court of Administration (Högsta förvaltningsdomstolen)

Facts of communication paragraph 14, page 2

ANNEX 5: Article published on website EUobserver.com with links to relevant research and findings

Facts of communication paragraph 19, page 3

ANNEX 6: Rejection of appeal by Högsta förvaltningsdomstolen

Facts of communication paragraph 20, page 3

X. Signature

Copenhagen 2019-07-03

Staffan Dahllöf