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EU states appeal court ruling on transparency

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BY LEIGH PHILLIPS

BRUSSELS - EU member states are set to launch an appeal of a lower court decision with the European Court of Justice hoping to prevent greater transparency in decision-making - even about transparency rules themselves.

Anxious that a recent landmark court ruling could radically open up to public scrutiny decision-making in the Council of Ministers - the European Union's 'upper house', or the institution representing the member states - a full 20 EU countries have jumped aboard an appeal of the decision.



The member states want to keep decision-making confidential (EUobserver)

According to EU law, the result of all legislative votes in the Council must be made public. But long before this stage of the process, most of the real negotiations happen at a working-group level - and the secrecy of positions at this stage are jealously guarded by all those involved.

Earlier this year, Access Info, a Spanish transparency NGO that aids journalists and citizens in making freedom of information requests across Europe, got wind that some member states in a Council working group in late 2008 had proposed amendments to water down existing EU transparency rules.

Their request for the document naming the countries pushing in this direction was effectively denied - it was released but with all the country names blacked out - and the group appealed the decision with the EU General Court in Luxembourg. The UK and Greece intervened in the case arguing against greater openness.

In March, the court ruled that the Council must indeed reveal the identities of the member states taking these positions.

EUobserver has since learnt that a "clear majority" of EU countries are now to appeal the ruling to the European Court of Justice, frightened that it sets a precedent that would force the Council to release the names of member states and the positions they take in all working groups.

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Such a development would radically roll back the diplomatic secrecy that has been the norm in the Council since its origins with the European Coal and Steel Community in 1957.

An EU source told EUobserver that potentially the positions of states on all subjects and discussions at the level of working group could be opened up for public scrutiny: "The decision-making process as established, the 'space to think' must be protected. This is what is at stake."

An April Council document minuting discussions on the subject notes "A clear majority of delegations indicated their support for an appeal," and one source close the matter told EUobserver that a full 20 member states are backing the legal action.

Finland however, abstained from voting on whether to mount an appeal, and told its fellow EU states that it is happy to see the positions of the country released.

The Nordic country has a tradition of freedom of governmental information legislation dating back as far as 1766, when it was still a Swedish-governed territory.

Helen Darbishire, the director of Access Info explained to this website why it is the identities of countries taking positions in the working groups that counts, rather than the final vote that is meaningful.

"There are hundreds of working groups, but there is no public list of their members. They don't keep minutes and this is where the real negotiations are made," she said. Some 85 percent of all EU laws are decided in the 150 working groups and committees consisting of delegates from the member states.

"The vote at the end is frankly just a bit of theatre. It doesn't show you anything about the process that has gone on. By the end, most decisions are unanimous, so you have no idea about who is responsible, who is taking different positions."

"What you read on the Council website about transparency is really misleading to the public because that only represents a fraction of the process, not where the debate about future legislation takes place."

Founded as a formation essentially involving negotiations between diplomats from the foreign affairs departments of the different member states, the EU and the Council working methods in particular have had more in common with the secret bargaining in matters of war, defence and peace-making than the openness of parliamentary tradition for other matters of law, say critics of EU decision-making.

EU diplomats for their part argue that they need to protect this secrecy to enable freer discussion than would be permitted if there were greater public scrutiny of the process.

"We believe that disclosing the delegation that has put forward certain proposals would limit member states' opportunity for frank and candid policy discussion," one diplomat told EUobserver.

Explaining why the Council and a majority of member states will be appealing the case, the source said the legal action is necessary "in order to prevent its decision-making processes from being undermined."

The member states have indicated that if they lose the case, they will simply switch to verbal agreements and limiting what is committed to paper so that such documents cannot be released as they would not exist.

During the initial case before the General Court, pressed by judges to explain how the decision-making process is harmed by disclosure, "[the Council] said that if these documents are to be made public, we'll just have to stop putting things in writing," according to Darbishire.

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