

Open Rule-Making

Presentation for the
EU Ombudsman / ReNEUAL conference

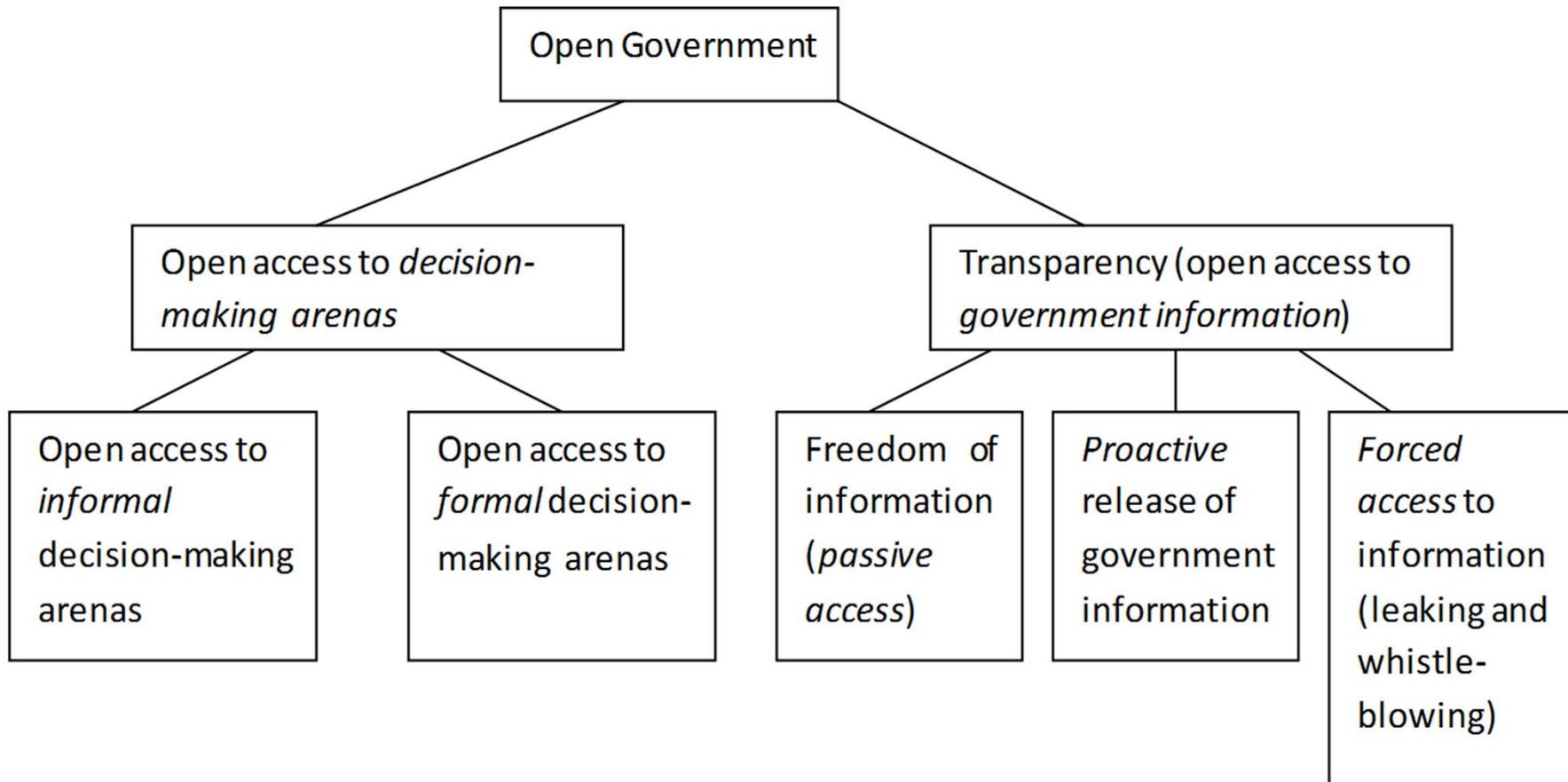
Towards an EU administrative procedure law ?

Brussels, March 15-16th 2012

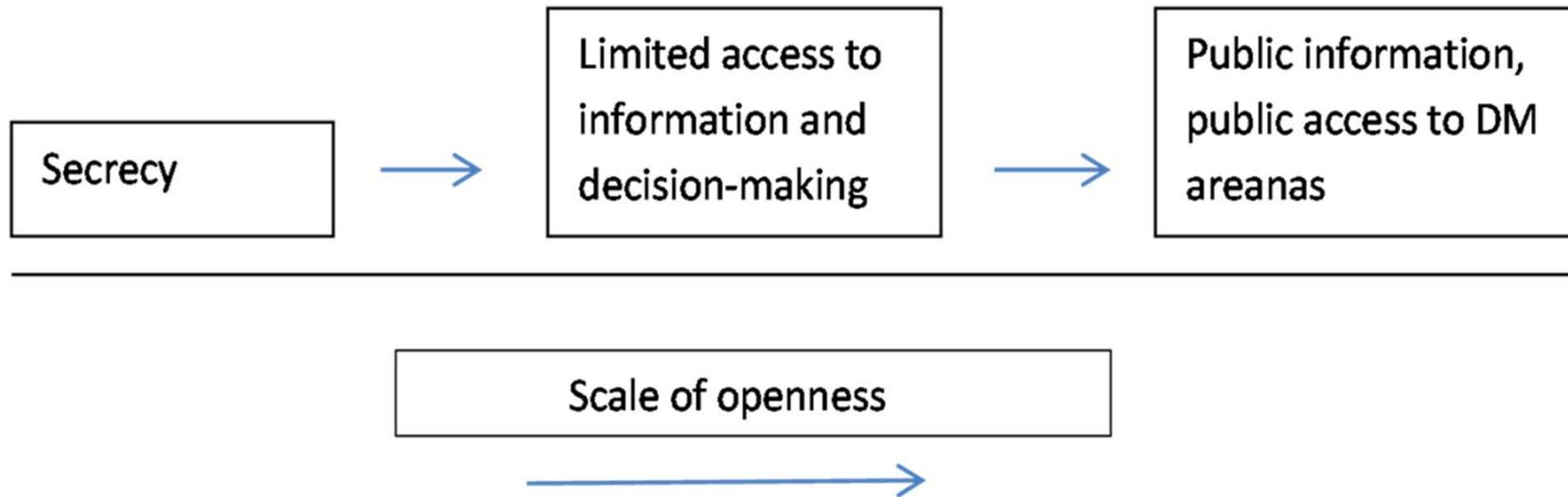
The Opacity of Transparency? An overview

- Concepts: Openness, Transparency and Secrecy
- Why? Pre-participation and pre-accountability
- Status Quo: Committees, Agencies (and Council)
- Expanded executive rule-making (NB external relations)
- Structural problems of oversight
- The way forward: horizontal rules on openness, transparency and oversight

Relations between openness and transparency



Sliding scale of openness and secrecy



Three (hierarchical) concepts

- **Openness** (Open Government): vision and voice (Art. 1 TEU, 10(3) TEU)
 - “In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible” - Art. 15(1) TFEU.
- **Transparency** (access to documents)
 - “Any citizen of the Union [...] shall have a right of access to documents of the Union institutions, bodies, offices and agencies [...] subject to the principles and conditions as defined in accordance with this paragraph” - Art. 15(3).
 - Regulation 1049/2001, as under revision.
 - Specific legislation (e.g. data protection).
- **Secrecy** (classification and declassification)
 - Council Decision of 31 March 2011 on the security rules for protecting EUCI.
 - Decision of the Bureau of the EP of 6 June 2011, concerning the rules governing the treatment of confidential information by the EP.
 - (Draft) Inter-institutional agreement between the EP and the Council concerning the forwarding and handling by the EP of classified information held by the Council on matters other than those in the area of CFSP. 16 February 2012.
 - Council Security Committee, Guidelines on Downgrading and declassifying Council documents, 2 September 2011.

The status quo: fragmentation and opacity?

- Rulemaking by (comitology) **committees / Commission**
 - implementation/delegation
 - public access versus inter-institutional information provision

- Rulemaking by **EU-agencies**
 - external relations

- Rulemaking by the **Council**
 - internal rules applied broadly
 - external relations

Structural problems of oversight

- Executive ambivalence
 - 'administrative convenience' and 'international relations' (secrecy)
 - Inter-institutional approach
 - Member State input into legislation and policy
- Legislative ambivalence
 - Access to its own informal trilogues
 - Access to Member States input
 - Revision of access to documents law
- Judicial ambivalence (access to court documents and Member States observations)
 - Yet critical role of interpretation eg Scope of judicial review of administrative activity (Commission rule-making) and access by court to documents.

ORCON (Originator Control Principle)

- *Case 135/11 P, IFAW*, Advocate General Opinion of 1 March 2012, Non disclosure of MS documents on request MS (Art 4(5), Regulation 1049/2001).
- Reason giving requirement to enable judicial review of the reasons necessitated Court's direct access to the disputed (MS) document.
- "For the purposes of its review in camera the General Court should have ordered the production of the disputed document so that it could verify for itself the existence and therefore the applicability of the exceptions put forward by the institution and originally invoked by the MS."(para 70)

The way forward?

- A horizontal *presumption* of openness (ie access)
- Passive and active implementation: mandatory rules
- Legislative rules on EU secrecy procedure
 - Including horizontal rules on declassification and oversight
- EU wide oversight mechanisms and information provision
- Linking public access and (inter-) institutional access?