

Outsourcing Legislative Responsibility? An Explorative Study on Purchasing Legal Advice in the German Law-Drafting Process

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Abstract

The topic of private law firms that provide draft bills on behalf of federal ministries has received much media attention but as yet little academic interest. Drawing on the policy advice and contracting out literature, purchasing legal advice in the law drafting process at the German federal level is conceptualized as a highly specific (formulation of a draft bill) and formalized (contractual relationship) form of policy advice that takes place between the ministerial bureaucracy and private law firms. In order to inform this conceptualization with explorative empirical evidence, this study relies on a small scale questionnaire distributed among conference participants and count data from a minor interpellation. According to the questionnaire, the growing complexity of legal issues and time pressure on law drafting are seen as potential push factors for purchasing legal advice. In contrast, evidence from the interpellation indicates that reductions in ministerial staff seem to have little explanatory power for the purchase of legal advice.

Zusammenfassung

Das Thema von Anwaltskanzleien, die im Auftrag von Bundesministerien

¹ Corresponding author. The datasets and Stata command files are available for replication purposes.

Gesetzentwürfe erstellen, wurde aus politikwissenschaftlicher Perspektive bisher kaum untersucht. Ausgehend von der Literatur zur Politikberatung und zum Contracting Out wird der Einkauf von juristischer Expertise im vorliegenden Artikel als eine hochgradig spezifische (Formulierung eines Gesetzentwurfs) und formalisierte (Vertragsverhältnis) Form der Politikberatung konzeptualisiert, die zwischen der Ministerialbürokratie und Anwaltskanzleien stattfindet. Um diese Konzeptualisierung empirisch zu unterfüttern, wird auf eine Umfrage unter KonferenzteilnehmerInnen sowie auf Daten aus einer Kleinen Bundestagsanfrage zurückgegriffen. Die Umfrageergebnisse zeigen, dass die gestiegene Komplexität von zu regelnden Sachverhalten sowie gesteigener Zeitdruck als potentielle Ursachen für den Einkauf juristischen Wissens wahrgenommen werden. Im Gegensatz dazu liefern die Informationen aus der Kleinen Anfrage Hinweise darauf, dass der Abbau von Personal in der Ministerialverwaltung kaum Erklärungskraft zu besitzen scheint.

1 Introduction

In 2009, a letterhead of the international law firm *Linklaters* was found on a draft version of the *Law Amending the Banking Act*.² At the peak of the banking crisis, the Federal Ministry of Economics and Technology hired the private firm to write the draft bill. The writing of draft bills, however, used to be considered as a core function of Germany's ministerial administration (Mayntz 1985: 183f; Machura 2003). Thus, a harsh political dispute emerged on the benefits and boundaries of purchasing legal expertise through public bodies. A law firm which also represents investment banks was considered to be unable to write an impartial draft bill on the regulation of bank insolvencies (Süddeutsche Zeitung 2009a). Being accused by the left party (*Die Linke*) of pursuing clientele politics, the responsible minister justified the purchase of legal advice with the lack of in-house expertise (Bundestags-Drucksache 16/14133 [2009]: 1), which in turn urged the president of the union of civil servants (*Deutscher Beamtenbund*) to complain about continuous staffing cutbacks in the federal administration (Süddeutsche Zeitung 2009b).

The *Linklaters* case might be a good example for the dynamics

² Translated from "Gesetz zur Ergänzung des Kreditwesengesetzes".

of political scandals, but more than that it points out to the issue of mandating private firms in the law drafting process. This topic has so far received little scientific attention and therefore raises at least two questions: First, what is the difference between purchasing legal advice and related phenomena such as outsourcing and policy advice? Secondly, what are the potential dimensions of the political dispute over the use of such practices in the federal law making process? In trying to answer the first question, this study suggests a preliminary theoretical conceptualisation of the phenomenon. Drawing on research on policy advice and contracting out, purchasing legal advice in the law drafting process will be characterised by its specific purpose, i.e. the formulation of draft bills, and the contractual relationship between private law firms and the federal bureaucracy. As regards the second question we seek to identify the underlying dimensions of political conflict that are linked to potential causes and consequences of purchasing legal advice.

In order to enrich and consolidate the debate on purchasing legal advice with the so far limited available empirical evidence, the empirical analysis takes a rather unconventional approach: First, we conducted an anonymous postal-survey among the participants of a symposium on legislative outsourcing.³ Secondly, we use ministry-specific information taken from the federal government's answer to a minor interpellation (Bundestags-Drucksache 16/14133 [2009]) and minister-specific data for an analysis of the frequency of purchasing legal advice for 15 federal ministries from 1990 to 2009. The data is not representative, nor is it suited to test the validity of the theoretical conceptualization. Yet, it provides first preliminary evidence on its plausibility and the potential political dimensions of purchasing legal advice.

The following section reviews the contracting out and policy advice literature in order to derive a first conceptualization of purchasing legal advice. Afterwards we describe the analytical

³ "Outsourcing legislative responsibility – Lawmaking though Lawyers?" (Gesetzgebungsoutsourcing – Gesetzgebung durch Rechtsanwälte?), HU Berlin, September 24, 2010.

approach, data, and methods and present some explorative empirical evidence. Finally we summarise the study and discuss its further implications.

2 Towards a Conceptualization of Purchasing Legal Advice

2.1 Purchasing Legal Advice and the Regular Process of Federal Law-Making

In order to gradually develop a first conceptualization of purchasing legal advice, it is purposeful to begin with a presentation of the more regular process of federal law making in Germany. The basic rules of the legislative process are set out in the Basic Law (Art. 76-78; 82) and the Joint Rules of Procedure for the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*, GGO). According to Article 76 of the constitution, bills may be introduced to the parliament (Bundestag) by the federal government (Bundesregierung), by the federal council (Bundesrat) or from the floor of the parliament. Draft bills that are introduced by the federal government and a substantial share of draft bills introduced by the parties of the government coalition from the floor of the parliament are prepared and written by ministerial staff (Mayntz 1985: 183f; Machura 2003). The federal government accounts for about two-thirds of all introduced draft bills. In the legislative period 2005-2009, for example, it introduced 59 per cent of all draft bills; the floor of the parliament introduced 29 per cent, including the parties of the government coalition; and 12 per cent of the bills were introduced by the federal council (Deutscher Bundestag 2010).⁴ Hence, in practical terms, it is not the parliament but the ministerial bureaucracy that is the centre of the formulation of draft bills.⁵

⁴ For the legislative periods 1976-2005 cf. Ismayr (2008: 391).

⁵ In a rather humorous sense one of the participants of the above mentioned symposium on legislative outsourcing stated that Members of Parliament have already “outsourced” law drafting to the ministerial bureaucracy. Now, these bureaucrats have started to “outsource” law drafting to private firms and consultancies.

The initial decision to prepare a draft bill lies with the minister. The minister charges the appropriate section of the ministry with the preparation of the first version, the so-called *Referentenentwurf*. However, it would be wrong to believe that ministries are exclusively waiting for an instruction of their ministers before getting active. In contrast, it is part of their mission to observe and reflect the political and social debates within their area of responsibility so that they can offer solutions to a political problem whenever it is required (Busse 2010: 225). Thus, although ministers may initiate the writing of draft bills, this is mostly based on the initiative of the ministerial bureaucracy.

In the following phase there exist various forms of external involvement in the preparation of the draft bill (Döhler 2010: 5). For example, the ministerial administration collects scientific policy advice, e.g. from federal agencies, research institutions, and advisory bodies (Ismayr 2008: 395). Besides, there are different forms of cooperative law making. According to §47 GGO, draft bills are to be developed in cooperation with the Länder and national associations of local authorities as well as central and umbrella associations and expert communities if their interests are affected. The actual decision on which of the associations and expert communities are informed and which of these groups are invited to contribute their expertise lies with the responsible federal ministry. Finally, once the responsible section of the ministry has gathered the necessary information it formulates the *Referentenentwurf*.

In this ideal-typical process the formulating of draft bills constitutes a core function of Germany's ministerial administration (Mayntz 1985: 183f; Machura 2003). The literature on the German ministerial bureaucracy clearly shows that the majority of draft bills is prepared by the ministries' sections, thus being the backbones of legislative policy-making. In this regular process of federal law-making, the use and role of private law firms in the preparation of draft laws is not recognized. As a matter of fact, it is neither codified in laws and regulations nor has the "outsourcing" of law making until recently (Battis 2009; Krüper 2010; both from the perspective of

legal studies) been the subject of academic interest. As a consequence, one is inclined to conclude that the purchase of legal advice presents a novelty in the federal law-making process. However, before hastily qualifying the purchase of legal advice as a new phenomenon, it makes sense to look for a conceptualization that could be based on existing concepts.

2.2 Purchasing Legal Advice and the Related Phenomena of Outsourcing and Policy Advice

For the conceptualization of purchasing legal advice in the law drafting process, we relate it to apparently similar phenomena, namely policy advice and contracting out. The conceptualization is organized around three fundamental questions: First, what type of good or service is provided (*content*)? Secondly, who are the purchasers and the providers (*agents*)? Thirdly, how is the relationship between the purchaser and the provider organized (*relationship*)?

Content: First, how does the purchase of legal advice differ from the goods and services that are part of the literature on policy advice and outsourcing? Although during the last 15 years the research on policy advice grew rapidly, there exists no coherent definition. While “Politikberatung” was for a long time understood exclusively as the institutionalised delivery of scientific expertise to political decision makers (cf. for example Murswieck 1994; Krevert 1993), during the last few years the term has undergone a considerable broadening, including not only institutionalised policy advice and political consulting for example during election campaigns, but also public affairs and lobbying (Lösche 2006; Falk et al. 2006; Siefken 2010). Generally speaking, policy advice concerns the provision of context-specific policy expertise. In contrast, contracting out refers to a “business arrangement between a government agency and a private entity in which the private entity promises, in exchange for money, to deliver certain products or services to the government agency or to others on the government’s behalf” (Kelman 2002: 282). The contracting out literature focuses on the

delivery of goods and services formerly provided and/or produced by the government (e.g. water supply, electricity, waste disposal, etc.).

The content of the purchase of legal advice concerns the full or partial formulation of a draft bill. It is evident that purchasing legal advice is qualitatively different from the outsourced production and delivery of consumer goods and services. In particular, it is difficult for the contractee to assess the quality of legal advice (Gilardi and Braun 2002; Lane 2005; Miller 2005). Thus, contracts on purchasing legal advice in the law drafting process ought to be particularly prone to suffer from information asymmetries between the purchaser and the provider of expertise. The subjective perception of the scope of such asymmetries and their impact on the behaviour of agents is likely to shape the opinion towards purchasing legal advice (see Section 3).

Agents: The second question refers to the purchaser and the provider of legal advice. By definition, the providers of outsourced public goods and services are private companies. In contrast, policy advice is provided by a diverse and highly fragmented group of advisors. Attempting to systematize the complexity of advisory arrangements in Germany, Murswieck (1993: 90ff) distinguishes between advice sources that are internal and sources that are external to the federal government. Internal arrangements include (1) permanent or time-limited formal advisory bodies that have either broad or specifically defined tasks and are composed of representatives of organized interest groups and independent experts; and (2) formal and informal organizational units and interdepartmental arrangements with various designations such as inter-ministerial committees, study groups, commissions, and task forces; they are composed of officials or both officials and experts from outside. External arrangements include (1) advisory councils (mainly mandated by law), policy research institutes (financed by government) and enquete commissions; these institutions are established permanently or temporarily outside the government and give advice on specific policy matters without being involved in actual policy-making activities; and (2) different kinds of party or parliamentary institutions such as committees and working

groups within parties. In a more recent typology Eichhorst and Wintermann (2006: 274) distinguish five types of providers of policy advice: “1. public research institutes, 2. social partners’ think tanks, 3. private think tanks and research institutes, 4. permanent expert committees, and 5. temporary committees with either corporatist or noncorporatist composition.” Coming back to the purchase of legal advice, the legal expertise in the form of a pre-formulated draft bill is rather provided by private law firms than by public research institutes, interest groups or private think tanks. Thus, with respect to the above outlined typologies, these companies are external and profit-oriented actors.

As to the purchasers of legal advice, another novelty may lie in the fact that the ministerial bureaucracy rather than politicians delegates the formulation of draft bills to private actors. The outsourcing of public goods and services takes place on behalf of a public authority such as a governmental agency, while policy advice tends to refer explicitly to political actors requiring external advice, also because they disfavor bureaucratic advice (e.g. Boston 1994). Purchasing legal advice, in contrast to both of these arrangements, is presumed to take place between the ministerial bureaucracy and a private company, i.e. a law firm, rather than between policy-makers and a private company or policy advisors.

Relationship: The third question refers to the degree of formalization of the relationship between the purchaser and the provider of legal advice. While outsourcing arrangements are based on a contractual relationship, the organization of the relationship between the recipients and providers of policy advice can be more diverse. Policy expertise can for example be provided in the course of formal or informal hearings during the legislative process. However, it can also be more market oriented as a result of a contractual relationship between the advisor and the policy-maker. In the case of the purchase of legal advice, the relationship between the ministerial bureaucracy and the private law firm is based on a contractual relationship.

Against the background of this characterization of purchasing legal advice one could object that the preparation of draft bills by external actors is an established practice in the German

legislative process. Professors of public law, for example, have formulated (parts of) draft bills. This was the case during the reform of the criminal law in 1966; moreover, in the 1990s the Federal Environment Ministry and the Federal Environment Agency assigned a group of professors with the formulation of a draft of the Environmental Code. Additionally, there are documented cases in which lobby groups formulated (parts of) draft bills.⁶ However, in contrast to these examples, purchasing legal advice concerns the formulation of draft bills by private law firms on a contractual basis rather than formal or informal consultation procedures.

Summing up, purchasing legal advice represents a specific type of policy advice. However, it moves beyond mere advice since the product is a draft bill rather than for example a report. Similar to the phenomenon of contracting out, the provider of this “good” is a private company, in this case a law firm. But in contrast to outsourcing and public procurement the product is ordered by the ministerial administration and not by the political decision makers. Thus, in relating it to outsourcing and policy advice, the purchase of legal advice can be conceptualized as a highly specific (formulation of a draft bill) and formalized (private contract) form of policy advice between the ministerial bureaucracy and a private law firm. The stylized differences between purchasing legal advice, outsourcing and policy advice are summarized in the following table.

⁶ The oldest example is the farm bill from 1955 which was based on a slightly amended draft provided by the German Farmer’s Association.

Table 1: Stylized differences between purchasing legal advice, outsourcing and policy advice

	Outsourcing	Purchasing Legal Advice	Policy Advice
Content	public goods and services	draft bill	policy expertise (reports, statements and briefings)
Agents	politicians and private companies	ministerial bureaucracy and private law firms	politicians and public/private policy advisors
Relationship	contractual relationship	contractual relationship	hearing (formal / informal) or contractual relationship

3 Political Dimensions of Purchasing Legal Advice

The political debate on purchasing legal advice did not evolve around the question whether it presents a novelty to federal law drafting but mainly around its assumed causes and consequences. In this section we seek to systematize the potential political dimensions that are linked to the purchasing of legal advice along these two lines.

3.1 Assumed Causes for Purchasing Legal Advice

The first source of conflict refers to the assumed driving forces behind the purchase of legal advice. One can distinguish rather functionalist views considering the purchase of legal advice as a necessary response to new pressures in federal law making from actor-centred views focussing on the role of political agents in the process of purchasing legal advice.

From a functionalist perspective, the delegation of the formulation of draft bills to private actors is attributed to the fact that the existing internal and external arrangements of policy advice are not adequate in the face of an increasing complexity of the policy environment, i.e. developments that create a need to broaden the sources of policy advice, incorporating the “involvement of actors both within and beyond the governmental system” (Halligan 1995: 137). In this respect we may identify

two external pressures that make the ministerial bureaucracy increasingly dependent on external legal expertise: First, the constantly growing number of legal issues and the increasing complexity of the policy environment have been considered to cause an increased demand for advice (Kusche 2008: 18; Falk et al. 2006: 11ff; Wehrmann 2007: 44). New laws need to be consistent with existing legal standards and international regulations (e.g. EU law, international trade agreements, etc.). Besides, most laws are amendments to existing laws which often depend on practical experiences that have been made with the law to be amended (von Beyme 1997: 155). Federal ministries have different areas of responsibility and thus have to deal with subjects that require different kinds of technical expertise (e.g. on financial markets, internet security, etc.). In this regard, the need to purchase external legal advice is likely to vary across ministerial resorts. The German ministerial administration is still dominated by lawyers and economists (Derlien 2003; Schwanke and Ebinger 2006). This specific feature of the occupational composition of the ministerial workforce might increase the need for external expertise on legal issues that require profound technical expertise. Secondly, the speed with which politicians and the public respond to political events has accelerated in recent years. These dynamics could have put more time pressure on the preparation and writing of draft bills. As providing low quality draft bills is not a viable option, the use of external legal advice might be a short-term solution. Even if one does not agree that political processes are faced with severe time pressure, we should bear in mind random external shocks to the economic and political system, which require immediate political response. The mandating of *Linklaters*, for example, took place under very severe time restrictions during the high tide mark of the recent banking crisis.

Actor-centred views on purchasing legal advice in federal law drafting remind us to consider the personnel resources of a ministry as a potential determinant of the decision to contract out. Civil servants are the core resource of the German ministerial administration. Concerning the capacity of federal ministries it has been argued that continuous staff cutbacks caused a lack of

in-house expertise. The union of civil servants and an analysis of the Federal Council of Auditors on the secondment of external advisors to ministries support this line of argument (Süddeutsche Zeitung 2009b; Federal Court of Auditors (Bundesrechnungshof) 2008: 18). Yet, it is an empirical question whether the purchase of legal advice is linked to a general decline in the ministerial workforce.

Amirkhanyan et al.'s (2007) remarks on the political context of contracting out decisions stresses the political motives of purchasing legal advice as a second actor-centred explanation. The question is whether purchasing legal advice is more consistent with right wing ideology than with left wing attitudes. There is hardly a final answer to this question, but considering the literature on the implementation of *New Public Management* (Christensen and Laegreid 2003; Pollitt and Bouckaert 2004; Pollitt, Van Thiel and Homburg 2007), i.e. private sector management techniques in the public sector, one could presume that purchasing external advice is generally more consistent with right wing attitudes. This presumption is consistent with the standard partisanship approach, which expects left wing parties to hold more state interventionist views and right wing parties to favour market-(like) solutions (Tufté 1978; Franzese 2002).

Finally, the policy advice literature reminds us to think more carefully about the self-reinforcing dynamics in purchasing legal advice (Argote 1999). Expertise in writing a draft law can be considered as tacit knowledge, namely knowledge that is difficult to transfer from person to person. In this case, expertise increases with practice and experience, or to put it more colloquially "learning by doing". If the ministry decides to purchase legal advice this might hamper the accumulation of in-house expertise within the ministerial administration. The next time the ministry is confronted with a similar issue it is more likely to depend on external expertise.

3.2 Assumed Consequences of Purchasing Legal Advice

The second dimension of political conflict refers to the assessment of the potential consequences of purchasing legal

advice. We distinguish between three subjective interpretations that have been distilled from the debate about the *Linklaters* case. The first consequence refers to concerns about the agenda setting power of draft bills. The *Referentenentwurf* as such is a non-binding proposal and in practice there is hardly any draft bill that passes the legislative process without amendments. However, it is generally acknowledged that the *Referentenentwurf* contains a certain binding force as it sets out the agenda for further discussions (Busse 2010: 228; Ismayr 2000: 254f; Krüper 2010: 655). It is this power to shape the political agenda that worries critics of the purchase of legal advice most. The problem is not that an “outsourced” draft law passes the legislative process without democratic oversight, but that alternatives are excluded from the parliamentary debate because they are not mentioned in the draft.⁷

A second view on the consequences of purchasing legal advice refers to normative considerations on how the state should fulfil its tasks (Leibfried and Zürn 2006, Hood 1991, 2003). This can either be done with a focus on effectiveness or on efficiency. A focus on efficiency would imply that the ministerial administration needs to be transformed from an “assembler” to a “manager” of the law making process. In this regard, the purchase of legal advice might decrease costs because it is more expensive to hold staff with specialist competences in stock than to sub-contract specialists when they are needed. Advocates of public sector efficiency thus might consider the purchase of legal advice as an instrument to decrease the costs of preparing draft bills while simultaneously speeding up law drafting.

A third view on the potential consequences is not concerned with questions of agenda-setting and efficiency, but refers to the procedural dimension of purchasing legal advice (e.g. Argote 1999, Eavey and Miller 1984). The debate that evolved around the *Linklaters* case indicated that purchasing legal advice could be interpreted as a malfunction of the political or administrative

⁷ This can be illustrated with a quote from a participant of the symposium on legislative outsourcing (HU Berlin, 24 Sep. 2010): “Only that what is on the table will be subject of negotiations.”

system. This evaluation of purchasing legal advice has been linked to questions of who is held responsible for the purchase of legal advice and how an appropriate corrective could look like. Commentators taking this perspective argue in favour of more explicit legal regulation on the purchase of legal advice. Such measures are expected to improve the transparency, thereby facilitating the procedural legitimacy of purchasing legal advice.

4 Data and Methods

In order to inform and consolidate the suggested theoretical conceptualization of purchasing legal advice and to identify the relevant political dimensions linked to the assumed causes and consequences, this study relies on a mixture of explorative techniques.

4.1 Questionnaire among Conference Participants

Since there is hardly any empirical data on purchasing legal advice, we took a rather unconventional approach and distributed a questionnaire among participants of a symposium entitled “Outsourcing legislative responsibility – Lawmaking though Lawyers?” (Gesetzgebungsoutsourcing – Gesetzgebung durch Rechtsanwälte?) which was held at the HU Berlin on September 24, 2010 as part of the 68th German Legal Associations Annual Meeting (68. Deutscher Juristentag). The symposium was addressed to practitioners and the scientific community and included speeches and presentations on various aspects of the topic by legal scholars, members of parliament, senior ministerial officials, and representatives of business consultancies and law firms.⁸ According to the organizers the number of participants was estimated to lie between 130 and 150.

⁸ The local organizer was Prof. Michael Kloepfer (HU Berlin), the president of the Institute for Law Making and Constitutional Law at the HU Berlin (<http://igv.rewi.hu-berlin.de/Veranstaltungen/Gesetzgebungsoutsourcing.htm>). We are grateful to Prof. Michael Kloepfer and Julian von Lucius for their collaboration.

The participants of the symposium serve as a convenience sample as this was the easiest and most efficient way to gather information about the practice of purchasing legal advice. A convenience sample is one that is simply available to the researcher because of its accessibility (Bryman 2008: 183). The shortcoming of such a sampling strategy is that it is impossible to generalise findings since it is unknown which population the sample represents. Following Bryman (2008: 183) we consider convenience sampling as an opportunity for gathering information on understudied phenomena and for pretesting items for larger surveys. Due to the fact that there is hardly any empirical data on purchasing legal advice, the convenience sample is considered as the appropriate approach to gather some preliminary data on the subject.

The questionnaire was conducted anonymously. Each participant of the symposium received a conference map. This map included a 3-page-questionnaire and a stamped addressed envelope. At the beginning of the symposium the participants were informed about the survey and the purpose of the study. During the subsequent three weeks after the symposium we received 42 responses, which is equivalent to a response rate between 28 per cent and 32.3 per cent. The descriptive statistics indicate some severe biases, e.g. 73.8 per cent of the respondents are male. We also asked respondents to name the type of organization they are working for. 51.3 per cent of the respondents come from academia (n=20), 25.6 per cent work for a law firm or a business consultancy (n=10), 10.3 per cent are working for the public administration (n=4), another 10.3 per cent for lobby organisations (n=4), and 2.6 per cent (n=1) represent political parties. Three respondents refused to name their affiliation.⁹

⁹ Due to the small number of respondents and their uneven distribution among types of organizations it is rather difficult to extract systematic differences between professional groups. However, if there are no systematic differences between the professional groups this could be a hint that the respondents answers are valid indicators of “reality” and would strengthen the empirical findings. If in contrast, respondents from academia, which represent the largest professional group, have very

The convenience sample forbids any conclusions on validated or falsified theoretical concepts. Yet, it can be used to inform the plausibility and applicability of such concepts. In particular, the convenience sample will be used to identify relevant political dimensions linked to the assumed causes and consequences of purchasing legal advice.

4.2 Interpellation from the Floor of the Bundestag

The second data source is an interpellation from the floor of the Bundestag which provides information about the frequency with which federal ministries purchased legal advice (Bundestags-Drucksache 16/14133 [2009]). We combine this ministry-specific information with minister-specific data on the party affiliation into a panel dataset that contains cross-sectional time series information on the number of passed laws and ordinances that involved legal advice for 15 federal ministries from 1990 to 2009.¹⁰

The interpellation provides very limited information on the contractors' remuneration. In fact, the Federal Ministry of Finance refused to provide information on the honorary for 2008 and 2009 and the Federal Ministry of Economics and Technology refused to provide such data for 2004 and 2008. It is argued that making this information public would violate the contractors' right to privacy especially with regard to their charging policies (Bundestags-Drucksache 16/14133 [2009]: 3). For these reasons the dependent variable counts passed laws and ordinances that

different views on the issue, we should be even more careful about interpreting the data as the results were highly influenced by the particular academic perspective. In order to evaluate this point we reproduced Figure 1 and 2 and Table 2 for two groups, namely respondents from academia and non-academia. We find no substantial differences between the two groups concerning the definition of purchasing legal advice (Figure 1) and the purchaser/provider of legal advice (Figure 2). Concerning the assumed consequences, the non-academic group seems to be less pessimistic towards the effect of purchasing legal advice on citizens' trust in politicians and the ministerial administration (Table 2). Full results are available upon request.

¹⁰ The abbreviations and the official names of the 15 ministries are summarised in Appendix Table 1.

involved purchasing legal advice. The interpellation includes information on all ‘private’ actors advising German ministries. Drafts that involved the purchase of advice but failed at any stage of the legislative process are not reported (e.g. the *Linklaters* draft bill did not pass the cabinet). Hence, the count-measure we have to rely on is likely to underestimate the real extent to which the ministries have purchased legal advice.

The explorative multivariate analysis accounts for the following independent variables: The personnel resources of the ministry are measured as the number of employees working in a specific ministry in a particular year. This variable includes employees with and without tenure measured as head counts (Bundestags-Drucksache 16/14133 [2009]: 10). Political ideology is captured with two alternative measures. First, considering political ideology as an individual feature of the minister we employ a left to right scale ranging from 1 (*Grüne*) to 6 (*CSU*). Secondly, as ministers generally have to defend draft laws within the cabinet, we operationalize political ideology with a set of government dummies (Kohl IV, Kohl V, Schröder I, Schröder II and Merkel I), whereas Kohl IV serves as the reference category. The information on the ministers’ political party affiliation is taken from various issues of Kürschners Volkshandbuch (Kürschners Volkshandbuch 2010). Thirdly, we include a lagged dependent variable and a time trend measure. The dependent variable is lagged by one year. This measure aims to account for potential self-reinforcing dynamics that stem from relying on external expertise. The trend measure is a simple continuous variable ranging from 1991 to 2009.¹¹

In order to estimate the relationship between the independent variables and the number of events we need to deal with three issues: overdispersion, excess of zeros, and the panel structure of our dataset. The Poisson distribution has been described as the benchmark model for count data analysis (Cameron and Trivedi 1998; Long 1997). It requires, however, that the mean and the standard deviation of the dependent variable are equal. Our

¹¹ The definition of variables and their descriptive statistics are presented in Appendix Table 2 and 3.

dependent variable has a mean of 0.20 and a standard deviation of 0.88. This feature, known as overdispersion (mean<std.), tells us that the Poisson distribution does not fit. The standard errors in the Poisson regression model would be biased downwards, resulting in spuriously high z-values. Following Long and Freese (2006), a negative binomial distribution is used. The parameters of the regression model are estimated using maximum likelihood with robust standard errors. A positive coefficient means a one-unit increase in the independent variable has the effect of increasing the predicted number of events. In order to compare the substantive effect, we calculate the impact of a one-unit increase in the independent variable on the incidence rate ratios in percentage points by $100*(e^{\beta}-1)$.¹²

A second specification issue concerns the “excess” of zeros in the dependent variable, meaning that the majority of ministries report zero purchasing-legal-advice events for most of the years. The econometric literature suggests no standard approach when the dependent variable suffers from both overdispersion and “excess” of zeros. We try to tackle this issue in a threefold manner. First, the dataset is restricted to contain only those ministries that utilized purchasing legal advice in at least one year during the observation period. Thus, strictly speaking we analyze which factors affect the frequency of purchased legal advice among those ministries that potentially use this kind of advice.¹³ Secondly, we make extensive use of descriptive robustness checks and thirdly, we explore the robustness of the negative binomial regressions by re-estimating each model with both OLS and Poisson regression.¹⁴

¹² The datasets and Stata command files are available for replication purposes.

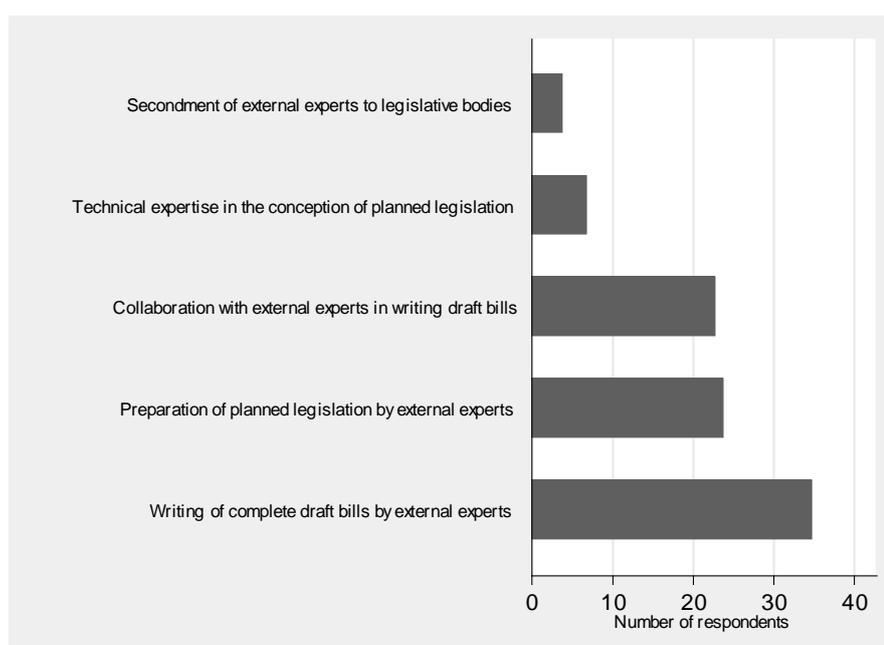
¹³ In order to explore the impact of this deliberately introduced selection bias we re-ran the analysis represented in Table 4 on the full sample including those ministries that did not purchase legal advice during the observation period. Estimation results obtained from the full sample are largely consistent with those obtained from the reduced sample. Full results are available upon request.

¹⁴ Estimation results are robust towards the use of alternative estimator such as Poisson and OLS. Full estimation results from Poisson and OLS regressions are available upon request.

The third issue concerns the panel structure of the dataset. The full sample covers 15 federal ministries from 1990 to 2009. If we expect that ministry-year observations are conditionally independent, the appropriate estimation approach would be a pooled model. In this case we assume that the decision to purchase legal advice is independent from a ministry's area of responsibility. However, if we assume that purchasing legal advice depends on the ministry's area of responsibility we need to estimate a negative binomial regression model with ministry-fixed effects.

The consequence of all these methodological issues is to scale down claims of causality. It is important to point out that the statistical models suggested below cannot be understood as causal models in any strict sense. The multivariate analysis will be used to explore the existence of statistical association and stylized facts derived from the conceptual framework on the potential causes of purchasing legal advice in law drafting. In order to contrast different model specification, we report McFadden's Pseudo R-squared, the Bayesian Information Criterion (BIC) and the Akaike Information Criterion (AIC).

Figure 1: Perceptions of "outsourcing" legislative responsibility



Question: What do you consider the "outsourcing" of legislative responsibility to be?

5 Explorative Empirical Evidence

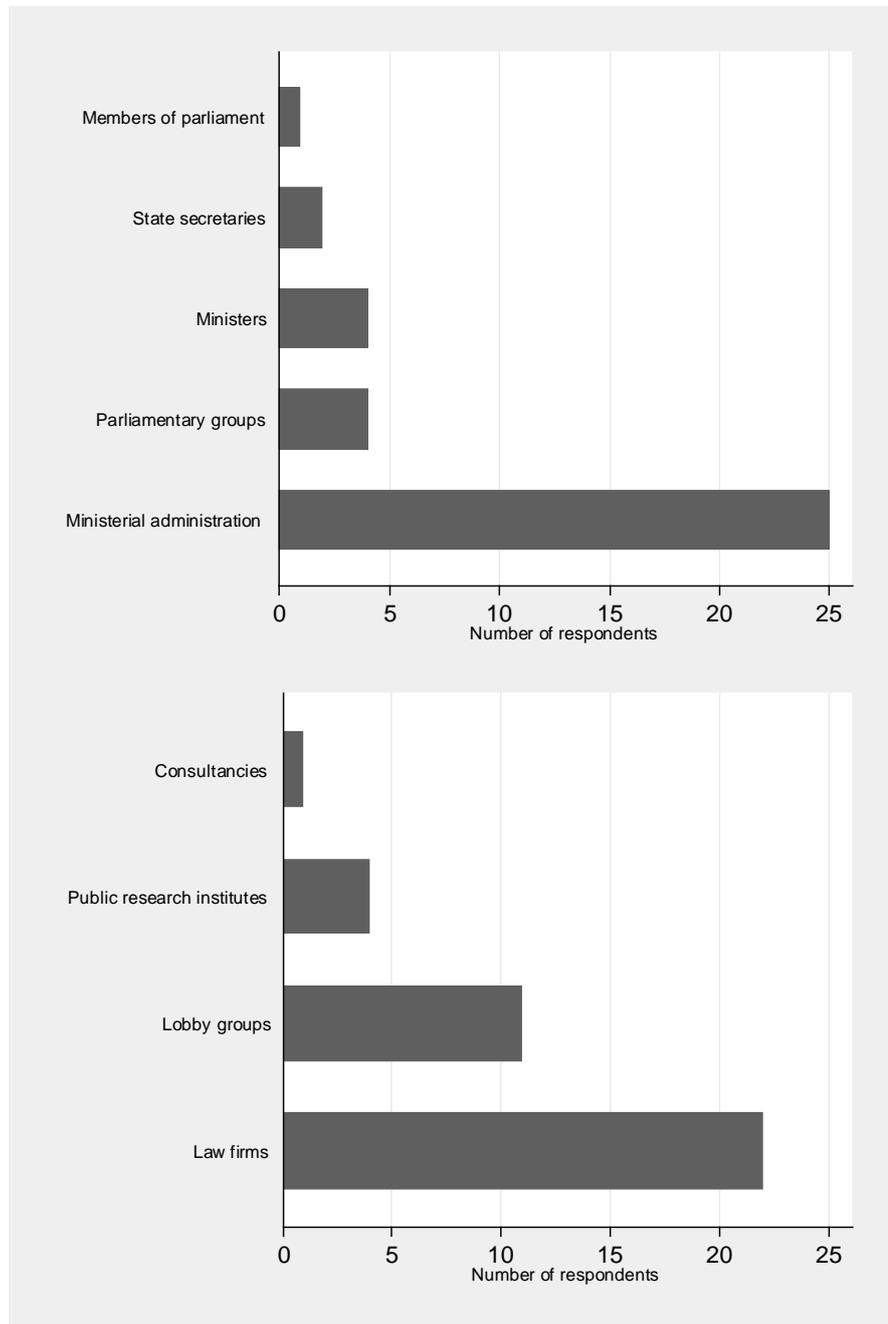
5.1 Perceptions on the Theoretical Conceptualization

For a start, we asked the conference participants for their understanding of the term “legislative outsourcing”. There were five possible answers and it was possible to check more than one box. (1) Secondment of external experts to legislative bodies, (2) the provision of technical expertise in the conception of planned legislation, (3) collaboration of external experts in writing draft bills, (4) the preparation of planned legislation by external experts, (5) writing of complete draft bills by external experts. Figure 1 indicates that “outsourcing” of legislative responsibility is understood as an extreme form of third party involvement, its distinct characteristic being the writing of complete draft bills. Very few respondents consider the provision of technical expertise and the secondment of external experts to legislative bodies as the “outsourcing” of legislative responsibility. This evaluation supports the first part of the theoretical conceptualization which states that the exclusive purpose of purchasing legal advice is the formulation of a draft bill.

Our theoretical conceptualization assumes that purchasing legal advice requires a contractual relationship between the ministerial administration and private firms (law firms or consultancies). In order to explore this assumption the conference participants were asked to name who they think are the purchasers and suppliers of legal advice. Results for these two items are represented in Figure 2. First, with respect to purchasers, the picture is rather straightforward. The majority of respondents considered the ministerial administration, rather than politicians, as the main purchaser of legal advice. With large distance to the first place, parliamentary groups and individual ministers share the second place, followed by state secretaries and individual members of parliament (MPs). With respect to the suppliers of legal advice, the picture is less clear-cut. Law firms are considered to be the most important suppliers of legal advice, followed by lobby groups, public sector research institutes and consultancies. In contrast to the theoretical conceptualization,

consultancies seem to play a minor role in writing draft bills.

Figure 2: Perceptions of the demand and supply side of purchasing legal advice



Question: Who are the primary consumers of legislative “outsourcing”?
Who are the primary suppliers of legislative “outsourcing”?

The data provided in the minor interpellation is consistent with the evidence from the questionnaire (Bundestags-Drucksache 16/14133 [2009]: 7, 9). Drawing on this source of information we arrange the 20 biggest contractors of legal advice during the

grand coalition (2005-2009) by their branch of economic activity.¹⁵ Among the 20 contractors, 45 per cent are law firms, 20 per cent are consultancies and 35 per cent are public research institutes. The picture changes if we take into account the remuneration. The grand coalition spent in total approximately 6.9 million Euros on external legal advice. Up to 49 per cent of this sum went to law firms, 38.4 per cent was spent on consultancies and 12.6 per cent of the sum went to public research institutes.¹⁶

Evaluations obtained from the conference participants and the data provided by the Bundestag support the view that purchasing legal advice occurs between the ministerial administration and private sector law firms for the explicit purpose of preparing or writing draft bills. We also asked the participants whether they consider the purchasing of legal advice as a new phenomenon. Among the 41 respondents that answered this question, only 22 considered the purchase of legal advice as a new or rather new phenomenon. The expectation that purchasing legal advice is perceived as a radically new phenomenon thus needs to be questioned.

Table 2: Perceptions of the potential causes and consequences of “outsourcing” legislative responsibility

“Outsourcing” legislative responsibility is caused by...	Mean	Std.	Obs.	Support of the statement in per cent
... a lack of in-house expertise in the ministerial administration	3.5	1.4	41	48.8
... a lack of trust of the minister in the ministerial administration	3.0	1.3	41	34.2
... a factual constraint, resulting from the growing number of regulations and their increasing complexity	3.9	1.7	42	59.5
... increasing time pressure in legislative processes	4.0	1.6	42	69.1
... a ministers’ political ideology	3.1	1.6	42	45.2

¹⁵ Contractor-specific data for other legislative periods are not provided in the Bundestags-Drucksache 16/14133 (2009).

¹⁶ Since four law firms and one consultancy refused to reveal the remuneration we had to use linear approximations to impute these values.

“Outsourcing” legislative responsibility ...	Mean	Std.	Obs.	
... speeds up the legislative process	3.7	1.5	40	60.0
... decreases democratic legitimacy	3.9	1.6	42	59.5
... provides decision-making support	4.5	1.2	42	83.3
... serves the enforcement of particular interests	3.8	1.6	42	59.5
... causes unnecessary costs	3.2	1.5	42	40.5
... needs to be legally regulated	4.1	1.8	42	71.4
... is unnecessarily problematised in Germany	3.1	1.6	42	47.6
... decreases citizens’ trust in politicians	4.2	1.5	40	70.0
... decreases citizens’ trust in the ministerial administration	4.0	1.7	40	62.5

Note: Scale ranging from 1 (fully disagree with the statement) to 6 (fully agree with the statement), Support of the statement in per cent = Dummy variable equals 1 if response is larger than 3, otherwise 0.

5.2 Perceptions of the Assumed Causes for Purchasing Legal Advice

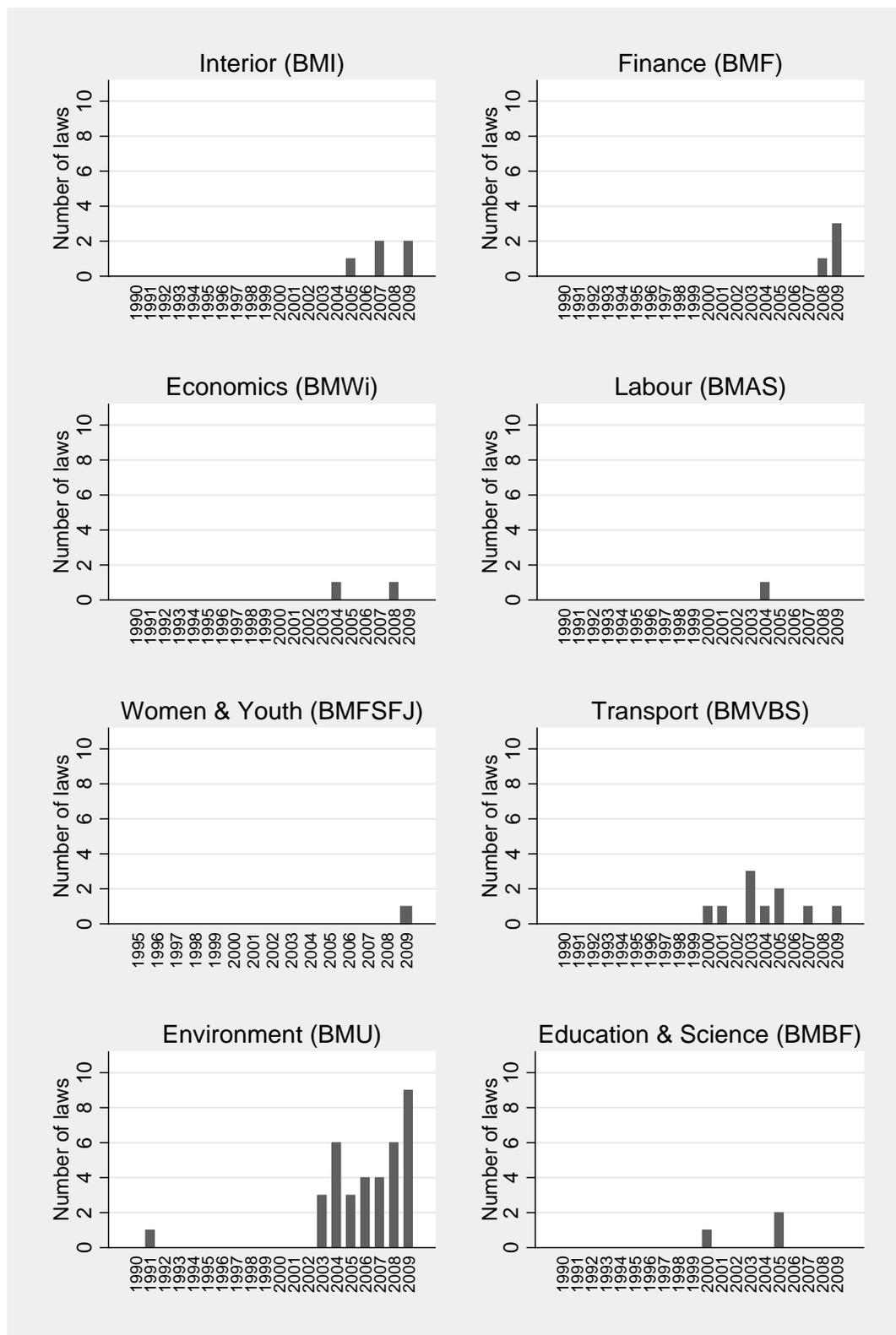
In order to explore the first political dimension which relates to the perception of the potential causes for purchasing legal advice, we confronted the conference participants with a list of statements suggesting different causes. These five potential causes are: Legislative outsourcing is (1) a consequence of the lack of in-house expertise, (2) a consequence of a minister’s lack of trust in the ministerial administration, (3) a factual constraint, resulting from the growing number of regulations and their increasing complexity, (4) a consequence of increasing time pressure in legislative processes and (5) a question of the political ideology of the minister. Respondents were asked to express to which degree they agree with these explanations on a 6 point scale ranging from fully disagree (1) to fully agree (6).

Table 2 reports the mean response to each of the five statements, the standard deviation and the number of respondents. Since each statement comes with a six-point scale a mean of 3.5 would indicate that on average the item is not considered to provide a useful explanation. Moreover, we dichotomised the response in order to get a percentage share of those who support the statement. The resulting dummy, represented in the last column of Table 1, equals 1 for responses above 3 and zero otherwise. When a mean of 3.5 serves as the benchmark we find a tendency that among the 42 respondents increasing time pressure (mean 4.0, 69.1 per cent) and the increasing complexity of legal issues (mean 3.9, 59.5 per cent)

seem to provide a potentially meaningful explanation for the purchase of legal advice. The item “lack of in-house expertise” is equal to the benchmark mean (48.8 per cent), whereas the items “lack of trust in the ministerial administration” (mean 3.0, 34.2 per cent) and “political ideology of the minister” (mean 3.1, 45.2 per cent) are slightly below the benchmark indicating that these two statements have been perceived to provide little explanatory power.

The assessment of the conference participants is consistent with the explanation of the economics ministry (BMWi) in the context of the 2008 financial crisis (Bundestags-Drucksache 16/14022 [2009]: 2). According to this document the ministry argues that it consulted a private law firm because urgent action was necessary and because sufficient human resources with practical knowledge and experience in the restructuring of banks were not available in-house.

Figure 3: Frequency of purchasing-legal-advice events by ministry (1990-2009)



Note: Ministries that have not purchased legal advice between 1990-2009: Foreign Affairs (AA), Chancellery (BK), Agriculture (BMELV), Health (BMG), Justice (BMJ), Defence (BMVg), Development (BMZ)

The potential causes of purchasing legal advice can be furthermore informed with data on the frequency with which the ministerial administration purchased legal advice during the last 20 years. Among the 15 ministries in our count-dataset only eight ministries have purchased external legal advice within the last 20 years for at least one time. Findings from Figure 3 can be condensed into three statements. First, only one ministry – the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) – purchased legal advice before the year 2000, i.e. the vast majority of events took place only since 2000. Secondly, two ministries are outstanding in purchasing legal advice, namely the BMU and the Federal Ministry of Transport, Building and Urban Development (BMVBS). In total there are 62 purchasing-legal-advice events reported (Bundestags-Drucksache 16/14133 [2009]: 6). Compared to the total amount of laws, purchasing legal advice is thus very rare. The BMU and the BMVBS account for 74 per cent of all events. Compared to the other 13 ministries one could argue that both ministries have to deal with issues that depend more than others on technical expertise. The health department, however, which could also be considered as technology-intensive, did not purchase legal advice. The sudden increase in purchasing legal advice is the third observation derived from Figure 3. Except for the BMVBS, all eight ministries that purchased legal advice for at least one time show a continuation or an increase in purchasing legal advice in the subsequent years. The period between the second Schröder government and the beginning of the grand coalition (first Merkel government) appears to be a critical juncture for the purchase of legal advice.

Table 3: Bivariate analysis of the relationship between purchasing-legal-advice events and explanatory variables (eight Ministries 1990-2009)

	Average events	Correlation	p-Value
<i>Number of purchasing-legal-advice events</i>	0.39		
<i>Ministry's area of responsibility</i>			
BMI	0.25	-0.05	0.55
BMF	0.20	-0.06	0.43
BMWi	0.10	-0.10	0.24
BMAS	0.05	-0.11	0.17
BMFSFJ	0.07	-0.09	0.26
BMVBS	0.50	0.03	0.69
BMU	1.80	0.45	0.00
BMBF	0.15	-0.08	0.23
<i>Ministry's personnel resources</i>			
Low number of employees	0.95		
High number of employees	0.13		
Number of employees		-0.17	0.04
<i>Political ideology</i>			
Grüne (7)	1.71	0.24	0.00
SPD (61)	0.70	0.21	0.01
parteilos (4)	0.00	-0.05	0.51
FDP (9)	0.00	-0.08	0.32
CDU (65)	0.09	-0.21	0.01
CSU (14)	0.07	-0.08	0.30

Note: $N \times T = 8 \times 20 = 160$ ministry-year observations, Low refers to the lowest 0-25 per cent of the distribution. High refers to the highest 75-100 per cent of the distribution. Number in parentheses refers to the frequency of ministry-year observations (e.g. there are 30 ministry-year observations in which there is a female minister)

Table 3 reports the bivariate relationship between the number of laws that involved the purchase of legal advice and our three explanatory concepts. Among the eight ministries we find a positive and statistically significant correlation only for the BMU. With respect to the ministries' personnel resources we find a negative correlation ($p=0.04$). Finally, we explore the bivariate relationship between the minister's party affiliation and purchasing legal advice. Table 3 reports a positive relationship between purchasing legal advice and ministers that belong to the social democratic (*SPD*) or green party (*Grüne*) and a negative relationship for ministers who are affiliated with the conservative (*CDU*) party. The positive correlation between Green ministers

and the number of purchasing legal advice events refers to the fact that the majority of purchasing legal advice events in the BMU took place when Jürgen Trittin (*Grüne*) was in charge of the ecology department in the second Schröder government (2003-2005). In order to take into account temporal and within-ministry dynamics in purchasing legal advice, we now turn to the multivariate analyses.

*Table 4: Determinants of purchasing legal advice
(Pooled Negative Binomial Regression)*

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	Dependent Variable: Number of Laws					
Number of Laws (t-1)	0.505*** [0.11]	0.0315 [0.08]	0.593*** [0.09]	0.429*** [0.12]	0.499*** [0.10]	0.0653 [0.07]
Number of Employees (ln)	-0.008 [0.04]	0.120 [0.20]			0.000 [0.04]	0.231 [0.32]
Year	0.199*** [0.04]	0.274*** [0.05]				
Left-Right Scale			-0.423** [0.17]	-0.40*** [0.14]		
Kohl V					-15.6*** [1.02]	-15.2*** [1.12]
Schroeder I					0.922 [1.16]	1.520 [1.47]
Schroeder II					2.77*** [1.07]	3.79*** [1.43]
Merkel I					2.53** [1.06]	3.95*** [1.47]
BMU		3.70*** [1.22]		2.17** [1.06]		3.79*** [1.20]
BMBF		1.146 [1.28]		1.263 [1.18]		1.182 [1.20]
BMF		0.0811 [2.53]		1.382 [1.16]		-1.194 [4.08]
BMFSFJ		0.624 [1.75]		0.464 [1.42]		1.155 [2.09]
BMI		1.022 [1.38]		1.913* [1.14]		0.457 [1.82]
BMVBS		1.691 [1.40]		2.013* [1.03]		1.102 [1.79]
BMWi		-0.107 [1.56]		0.971 [1.17]		-0.978 [2.56]
Observations	147	147	147	147	147	147
Pseudo R-squared	0.213	0.328	0.167	0.207	0.262	0.379
AIC	183.8	172.5	192.1	197.1	178.9	167.1
BIC	198.8	208.4	204.0	230.0	202.8	211.9

Note: Constant included but not reported, robust standard errors in brackets, * p<0.10, ** p<0.05, *** p<0.01

Table 4 presents estimation results obtained from negative

binomial regressions for eight ministries from 1991 to 2009. Concerning the arguments on the temporal dynamics in purchasing legal advice, both coefficients – the lagged dependent variable and the time trend – are positive and statistically significant. In substantive terms a one unit increase in the lagged number of events increases the risk or incidence of purchasing legal advice by $100*(e^{0.505}-1) = 66$ percentage points in Model 1. However, the effect size of the lagged dependent variable is not robust towards changes in the model specification. Apart from Model 4, none of the ministry-fixed effects models shows a statistically significant and positive estimation coefficient for the lagged dependent variable. Only in the reduced Model 4 the lagged number of laws that involved legal advice increased the predicted number of events by $100*(e^{0.429}-1) = 54$ percentage points. Hence we find limited support for the notion that purchasing legal advice follows a deterministic logic of self-reinforcement.

The substantive effect of the time trend remains rather stable in both specifications ($100*(e^{0.199}-1) = 22$ percentage points in Model 1). Similar to the pooled model specification, the ministry-fixed effects specification confirms a positive and highly significant time trend in purchasing legal advice. The result is consistent with the descriptive and bivariate analysis and points out that purchasing legal advice has just recently become an increasingly popular tool. In this respect, findings from the minor interpellation contradict the evaluation of those respondents in the convenience sample who did not consider purchasing legal advice as a novelty in executive law drafting (Bundestags-Drucksache 16/14133 [2009]: 6).

Concerning the ministries' personnel resources, Model 1 and 2 indicate that the number of civil servants has hardly any effect on the number of purchasing-legal-advice events. Hence, the regression analysis does not confirm findings from the bivariate analysis. However, this observation needs to be interpreted carefully as it concerns the relationship between the overall size of staff in a ministry and the number of events. If the preparation of draft bills depends on a specific combination of specialists' and generalists' expertise, the composition of a ministry's

workforce might be more important than its mere size.

Concerning the ministers' political orientation, we employ two different operationalizations, namely an individual left-right scale based on the ministers' party membership (Model 3 and 4) and the ministers' membership to a specific government (Model 5 and 6). In all models we excluded the time-trend measure since this measure is collinear with the type of government. Model 3 and 4 indicate a negative relationship between more right leaning ministers and the number of purchasing-legal-advice events. A one unit increase in the left right scale decreases the expected number of events by $100*(e^{0.396}-1) = 49$ percentage points (Model 4). Even if we exclude the ecology department, which accounts for the largest share of events, this relationship remains stable.¹⁷ Aggregating the ministers' political orientation by government shows that the latest Kohl government has a strong negative effect on the number of events (Model 5 and 6). Among the 62 observed events, 35 took place during the first Merkel government, 23 during the second Schröder government and 3 during the first Schröder government. Only one event took place during the fourth Kohl government. This pattern is represented by the dummies accounting for ministers' affiliation to governments.

5.3 Perception of the Assumed Consequences of Purchasing Legal Advice

The final step in the explorative analysis is to identify the second political dimension related to the perception of potential consequences of purchasing legal advice. To do so, we presented survey participants a set of nine statements on the potential consequences of purchasing legal advice. The nine statements seek to cover three outcome dimensions. The first dimension aims to capture how purchasing legal advice affects the legitimacy of the legislative process. The corresponding three statements are: purchasing legal advice (1) decreases citizens'

¹⁷ The left-right scale is still negative but fails to exert a statistically significant impact on the number of purchasing legal advice events if the dataset is restricted to the period 2000 to 2009.

trust in politicians, (2) decreases citizens' trust in the ministerial administration and (3) decreases democratic legitimacy. The second dimension refers to the instrumental character of purchasing legal advices. The corresponding three statements are: purchasing legal advice (1) speeds up the legislative process, (2) provides decision making support and (3) causes unnecessary costs. The third dimension of potential consequences of purchasing legal advice refers to political responsibility. The corresponding three statements are: purchasing legal advice (1) serves the enforcement of particular interests, (2) needs to be legally regulated and (3) is unnecessarily problematized in Germany.

The lower panel of Table 2 reports the mean response to each of the nine statements, the standard deviation, the number of respondents and the dichotomised response in percentage points. Since each statement comes with a six-point scale, a mean of 3.5 would indicate that on average the item is not considered to provide a useful explanation. First, we see that the mean of all three statements referring to the dimension on democratic legitimacy are above the benchmark of 3.5. Among these three statements support for the statement "decreases citizens' trust in politicians" (mean 4.2, 70.0 per cent) and "decrease in citizens' trust in the ministerial administration" (mean 4.0, 62.5 per cent) is particularly strong. Secondly, with respect to the instrumental character of purchasing legal advice, the statement "provides decision-making support" has a mean of 4.5 (83.3 per cent). This is the highest values among the nine items. Finally among the three statements referring to policy response and procedural legitimacy, the statement "needs to be legally regulated" exceeds the benchmark mean (mean 4.1, 71.4 per cent).

Not surprisingly, there is more heterogeneity in the perception of the potential consequences and causes of purchasing legal advice than in the perception of the actors and purpose of such contracts. On the one hand there are hints that purchasing legal advice is perceived to provide valuable information to the decision making process. On the other hand the amplitudes on the statements referring to trust and procedural legitimacy indicate that worries about citizens being dissatisfied with the

current procedure of purchasing legal advice are also considered as relevant. This suspicion is supported by the evaluation of the statement on legal regulation, which indicates that many respondents (71.4 per cent) see a need to establish legally binding rules for the use of external legal advice.

6 Discussion

The formulation of draft bills is a core function of Germany's ministerial administration. Mandating private law firms to provide such bills have received much political and media attention but as yet little academic interest. In relating the purchase of legal advice to outsourcing and policy advice we presented a conceptualization in which the purchase of legal advice is considered as a highly specific (preparation of a draft bill) and formalized (contractual relationship) form of policy advice that takes place between the ministerial bureaucracy and a private law firm.

To inform and consolidate these theoretical considerations with available empirical evidence and to identify the political dimensions related to the assumed causes and consequences of purchasing legal advice, the study relied on an unconventional mixture of explorative techniques. First, we conducted a survey among participants of a symposium on "Outsourcing" legislative responsibility held during the German Legal Association's Annual Meeting, 2010. Secondly, we compiled a panel dataset containing count data on the number of laws and ordinances that involved external legal advice for 15 federal ministries from 1990 to 2009. First, there is more heterogeneity in the perception of the assumed consequences of purchasing legal advice than in its contractual manifestation which is largely in line with the suggested theoretical conceptualization. Secondly, functional explanations referring to the growing complexity of legal issues and time pressure on executive law drafting seem to be important push factors for purchasing legal advice. More actor-centred perspectives such as the ministers' partisan orientation and the decline in administrative staff do not seem to be central for the

decision to purchase legal advice.

The empirical analysis presented in this study certainly suffers from the availability of reliable data and is limited due to its explorative character. As it stands, it may serve as a starting point for further research on purchasing legal advice in the German law drafting process. Such studies might be able to control for the scope of laws and ordinances that were drafted on the basis of external legal advice. The comparative scholarly debate on agenda-setting as well as the compliance debate (with regard to transposing EU legislation into national law) provides ample evidence that the nominal number of laws is not necessarily a good indicator for the ‘intensity’ and impact of legislation. In this respect, further research might aim to generate attitudinal information about the causes and consequences of purchasing legal advice by running a survey among the purchasers and providers of legal advice or seek to uncover the decision making process relying on in-depth case study methodology.

References

- Argote, L. (1999). *Organisational learning: creating, retaining and transferring knowledge*. New York: Kluwer Academic Publishers.
- Battis, U. (2009). Outsourcing von Gesetzentwürfen? *Zeitschrift für Rechtspolitik*, 42(7), 201-202.
- Boston, J. (1994). Purchasing Policy Advice: The Limits to Contracting Out. *Governance: An International Journal of Policy and Administration*, 7(1), 1-30.
- Bryman, A. (2008). *Social Research Methods*. Oxford: Oxford University Press.
- Bundestags-Drucksache 16/14022 [2009]. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Axel Troost, Dr. Barbara Höll, Roland Claus, weiterer Abgeordneter und der Fraktion DIE LINKE. Entwurf für ein „Gesetz zur Ergänzung des Kreditwesengesetzes“.

- Bundestags-Drucksache 16/14133 [2009]. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sabine Zimmermann, Dr. Barbara Höll, weiterer Abgeordneter und der Fraktion DIE LINKE. Mitarbeit von Privaten an Gesetzentwürfen und Arbeitsfähigkeit der Bundesministerien.
- Busse, V. (2010). Regierungsinternes Gesetzgebungsvorbereitungsverfahren. In K. H. Schrenk, M. Soldner (Eds.): Analyse demokratischer Regierungssysteme. Festschrift für Wolfgang Ismayr zum 65. Geburtstag. Wiesbaden: VS Verlag für Sozialwissenschaften, 221-236.
- Cameron, A.C., Trivedi, P.K. (1998). Regression Analysis of Count Data. New York: Cambridge University Press.
- Christensen, T., Laegreid P. (Eds.) (2003). New Public Management. The Transformation of Ideas and Practice. Aldershot: Ashgate.
- Derlien, H.-U. (2003). Mandarins or Managers? The Bureaucratic Elite in Bonn, 1970 to 1987 and Beyond. *Governance: An International Journal of Policy and Administration*, 16(3), 401-428.
- Deutscher Bundestag (2010). Statistik der Gesetzgebung - Überblick 16. Wahlperiode. Retrieved May 29, 2012, from http://www.bundestag.de/dokumente/parlamentsdokumentation/gesetzgebung_wp16.pdf
- Döhler, M. (2010). Gesetzgebung auf Honorarbasis - Politik, Ministerialverwaltung und das Problem externer Beteiligung an Rechtsetzungsprozessen. Paper presented at the DVPW-Sektionstagung "Ministerialverwaltung im politischen Prozess", Universität Potsdam, November 05/06 2010.
- Eavey, C.L., Miller, G.J. (1984). Bureaucratic Agenda Control: Imposition or Bargaining? *American Political Science Review*, 78(3), 719-733.
- Eichhorst, W., Wintermann, O. (2006). Generating Legitimacy for Labor Market and Welfare State Reform - The Role of Policy Advice in Germany, the Netherlands, and Sweden.

German Policy Studies, 3(2), 268-309.

- Falk, S., et al. (2006). Einführung: Politikberatung - Themen, Fragestellungen, Begriffsdimensionen, Konzepte, Akteure, Institutionen und Politikfelder. In S. Falk et al. (Eds.): *Handbuch Politikberatung*. Wiesbaden: VS Verlag für Sozialwissenschaften, 11-19.
- Federal Court of Auditors (Bundesrechnungshof) (2008). Bericht an den Haushaltsausschuss des Deutschen Bundestages nach § 88 Abs. 2 BHO über die Mitarbeit von Beschäftigten aus Verbänden und Unternehmen in obersten Bundesbehörden. Berlin.
- Franzese, R.J. (2002). Electoral and Partisan Cycles in Economic Policies and Outcomes. *Annual Review of Political Science*, 5, 369-421.
- Gilardi, F., Braun, D. (2002). Delegation aus Sicht der Prinzipal-Agenten-Theorie. *Politische Vierteljahresschrift*, 43(1), 147-161.
- Halligan, J. (1995). Policy Advice and the Public Service. In B. G. Peters, D. J. Savoie (Eds.): *Governance in a Changing Environment*. Montreal et al.: McGill-Queen's University Press, 138-172.
- Ismayr, W. (2000). Der Deutsche Bundestag im politischen System der Bundesrepublik Deutschland. Opladen: Leske+Budrich.
- Ismayr, W. (2008). Gesetzgebung im politischen System Deutschlands. In W. Ismayr (Ed.): *Gesetzgebung in Westeuropa: EU-Staaten und Europäische Union*. Wiesbaden: VS Verlag für Sozialwissenschaften, 383-429.
- Kelman, S.J. (2002). Contracting. In L. M. Salamon (Ed.): *The Tools of Government: A Guide to the New Governance*. Oxford: Oxford University Press, 282-318.
- Krevert, P. (1993). Funktionswandel der wissenschaftlichen Politikberatung in der Bundesrepublik Deutschland. Entwicklungslinien, Probleme und Perspektiven im

Kooperationsfeld von Politik, Wissenschaft und Öffentlichkeit. Münster/Hamburg: Schriften des Instituts für Politikwissenschaft der Westfälischen Wilhelms-Universität Münster.

Krüper, J. (2010). Lawfirm - legibus solutus? Legitimität und Rationalität des inneren Gesetzgebungsverfahrens und das 'Outsourcing' von Gesetzentwürfen. *Juristenzeitung*, 65(13), 655-662.

Kürschners Volkshandbuch (2010). Deutscher Bundestag 17. Wahlperiode / 2009-2013. Bad Honnef: NDV.

Kusche, I. (2008). Politikberatung und die Herstellung von Entscheidungssicherheit im politischen System. Wiesbaden: VS Verlag für Sozialwissenschaften.

Lane, J.-E. (2005). Public Administration and Public Management: The Principal-Agent Perspective. London: Routledge.

Long, J.S. (1997). Regression Models for Categorical and Limited Dependent Variables. Thousand Oaks, CA: Sage Publications.

Lösche, P. (2006). Lobbyismus als spezifische Form der Politikberatung. In S. Falk et al. (Eds.): Handbuch Politikberatung. Wiesbaden: VS Verlag für Sozialwissenschaften, 334-342.

Machura, S. (2003). Ministerialbürokratie. In Andersen, U., Woyke, W. (Eds.): Handwörterbuch des politischen Systems der Bundesrepublik Deutschland. Opladen: Leske+Budrich.

Mayntz, R. (1985). Soziologie der öffentlichen Verwaltung. Heidelberg: C.F. Müller Juristischer Verlag.

Miller, G.J. (2005). The political evolution of principal-agent models. *Annual Review of Political Science*, 8, 203-225.

Murswieck, A. (1993). Policy Advice and Decision-making in the German Federal Bureaucracy. In B. G. Peters, A. Barker (Eds.): Advising West European Governments. Inquiries, Expertise and Public Policy. Edinburgh: Edinburgh

- University Press, 87-97.
- Murswieck, A. (Ed.) (1994). *Regieren und Politikberatung*. Opladen: Leske+Budrich.
- Pollitt, C., Bouckaert, G. (2004). *Public Management Reform: A Comparative Analysis*. Oxford: Oxford University Press.
- Pollitt, C., van Thiel, S., Homburg, C. (2007). *New Public Management in Europe. Adaptions and Alternatives*. Basingstoke: Palgrave Macmillan.
- Schwanke, K., Ebinger F. (2006). Politisierung und Rollenverständnis der deutschen Administrativen Elite 1970 bis 2005. *Politische Vierteljahresschrift Sonderheft, 37: Politik und Verwaltung*, 228-249.
- Siefken, S.T. (2010). Ist denn alles Politikberatung? Anmerkungen zum Begriff und der Diagnose institutionalisierter Kooperation. *Politische Vierteljahresschrift*, 51(1), 127-136.
- Süddeutsche Zeitung (2009a) Gesetz-Outsourcing - der nächste Fall. Retrieved May 29, 2012, from <http://www.sueddeutsche.de/wirtschaft/guttenberg-gesetz-outsourcing-der-naechste-fall-1.171088>
- Süddeutsche Zeitung (2009b) "Jetzt rächt sich eine Sünde der Vergangenheit", Interview mit Peter Heesen, Chef des Beamtenbundes. Retrieved May 29, 2012, from <http://www.sueddeutsche.de/wirtschaft/gesetz-outsourcing-jetzt-raecht-sich-eine-suende-der-vergangenheit-1.153451>
- Tufte, E.R. (1978). *Political Control of the Economy*. Princeton: Princeton University Press.
- von Beyme, K. (1997). *Der Gesetzgeber: Der Bundestag als Entscheidungszentrum*. Opladen: Westdeutscher Verlag.
- Wehrmann, I. (2007). Lobbying in Deutschland - Begriffe und Trends. In R. Kleinfeld, A. Zimmer, U. Willems (Eds.): *Lobbying: Strukturen. Akteure. Strategien*, Wiesbaden: VS Verlag für Sozialwissenschaften, 36-64.

Appendix Table 1: Abbreviations and official names of federal ministries

Ministry	Name of the Ministry	Contracting	Official name of Ministry
AA	Federal Foreign Office	No	Auswärtiges Amt
BK	German Chancellery	No	Bundeskanzleramt
BMAS	Federal Ministry of Labour and Social Affairs	Yes	Bundesministerium für Arbeit und Sozialordnung (until 2002) > Auflösung: Arbeit zu BMWi und Soziales zu BMG (until 2005) > Bundesministerium für Arbeit und Soziales
BMBF	Federal Ministry of Education and Research	Yes	Bundesministerium für Bildung und Wissenschaft + Bundesministerium für Forschung und Technologie (until 1994) > Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie (until 1998) > Bundesministerium für Bildung und Forschung
BMELV	Federal Ministry of Food, Agriculture and Consumer Protection	No	Bundesministerium für Ernährung, Landwirtschaft und Forsten (until 2001) > Bundesministerium für Verbraucherschutz, Ernährung und Landwirtschaft (until 2005) > Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz
BMF	Federal Ministry of Finance	Yes	Bundesministerium der Finanzen
BMFSFJ	Federal Ministry of Family Affairs, Senior Citizens, Women and Youth	Yes	Bundesministerium für Jugend, Familie, Frauen und Gesundheit (until 1991) > Bundesministerium für Familie und Senioren + Bundesministerium für Frauen und Jugend (until 1994) > Bundesministerium für Familie, Senioren, Frauen und Jugend
BMG	Federal Ministry of Health	No	Bundesministerium für Jugend, Familie, Frauen und Gesundheit (until 1991) > Bundesministerium Gesundheit (until 2002) > Bundesministerium für Gesundheit und Soziale Sicherung (until 2005) > Bundesministerium für Gesundheit
BMI	Federal Ministry of the Interior	Yes	Bundesministerium des Innern
BMJ	Federal Ministry of Justice	No	Bundesministerium der Justiz
BMU	Federal Ministry for the Environment, Nature Conservation and Nuclear Safety	Yes	Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit
BMVBS	Federal Ministry of Transport, Building and Urban Development	Yes	Bundesministerium für Raumordnung, Bauwesen und Städtebau + Bundesministerium für Verkehr (until 1998) > Bundesministerium für Verkehr, Bau- und Wohnungswesen (until 2005) > Bundesministerium für Verkehr, Bau und Stadtentwicklung
BMVg	Federal Ministry of Defence	No	Bundesministerium der Verteidigung
BMWi	Federal Ministry of Economics and Technology	Yes	Bundesministerium für Wirtschaft (until 1998) > Bundesministerium für Wirtschaft und Technologie (until 2002) > Bundesministerium für Wirtschaft und Arbeit (until 2005) > Bundesministerium für Wirtschaft und Technologie
BMZ	Federal Ministry for Economic Cooperation and Development	No	Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung

Appendix Table 2: Definition and source of variables used in the regression analysis

Variable	Definition	Source
Number of laws	Number of laws and ordinances, which includes purchasing legal advice at one point of time within the legislation process.	Bundestags-Drucksache 16/14133 (2009)
Number of Employees	Number of civil servants and public employees (logarithm of head count)	Bundestags-Drucksache 16/14133 (2009)
Left-Right Scale	1 = Grüne, 2 = SPD, 3 = non-party member, 4 = FDP, 5 = CDU, 6 = CSU	Kürschners Volkshandbuch (various issues)
Government	Kohl IV = 1991-1994, Kohl V = 1995-1998, Schroeder I = 1999-2002, Schroeder II = 2003-2005, Merkel I = 2006-2009	Kürschners Volkshandbuch (various issues)
Year	Time trend ranging from 1991-2009	

Appendix Table 3: Descriptive Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
Number of Laws	147	0.42	1.24	0	9
Number of Employees (ln)	147	12.71	5.18	3.94	22.29
Left-Right Scale	147	3.54	1.62	1	6
Year	147	2000	5.42	1991	2009
Kohl V	147	0.21	0.41	0	1
Schroeder I	147	0.22	0.41	0	1
Schroeder II	147	0.16	0.37	0	1
Merkel I	147	0.22	0.41	0	1