Formal regulation as a mean to solve conflicts in ministerial advisory domains – developments in ministerial advisers Public Service Bargains in Germany, UK and Denmark

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Abstract

The introduction and development of the positions of ministerial advisors or a changing role of ‘political’ staff units vis-à-vis the line bureaucracy are among the most far-reaching changes for traditional political-bureaucratic relationships. Under which rules office-holders on these positions or in units operate varies between countries. Apparently, the countries that initially relied on informal rules and pragmatic bargains such as the UK and Denmark struggle with increasingly developing formal rules to govern Special advisers (SpAds) whereas in ‘usual formalization-suspect’ such as Germany and Sweden the role of functionally equivalent staff units rather changed without any change in the formal regulation, but in an informal process hardly noticed outside federal government. Based upon a Public Service Bargain perspective, the paper aims to explain this ‘formalization paradox’ reflected in differences in the degree of formalization of the PSB of such SpAds and ‘political’ staff units in Denmark, Sweden, UK, Sweden and Germany.
1. Introduction

Civil servants throughout different types of politico-administrative systems are increasingly confronted with the demand for balancing responsible and responsive advice (Mulgan 2008) – that is balancing neutral competencies based upon expert knowledge with responsive competencies based upon knowledge on how politics works (Aberbach and Rockman 1994; Eichbaum and Shaw 2010). At the same time governments throughout the Western world have been confronted with intensified media coverage in the ‘24/7 media world’ (Hood, 2011: 114), often focusing on the activities and behavior of individual ministers. Many governments responded by strengthening advisory capacities to assist coping with this intensified media reality. In some countries, the position of the ‘special advisor’ has been established and the permanent bureaucracy has for the first time been confronted with a ‘third party’, whereas in others already established staff units were expanded. The advisory domain of civil servants and such advisors is typically functionally divided between the agents, reflecting mutual respect for the competencies each party contributes. However, advisory domains can become very contested, subject to conflicts between and shirking by the involved parties. Contrary to what could be expected, governments that initially relied on informal rules and pragmatic bargains such as in the UK and Denmark struggle with increasingly developing formal rules to govern special advisers (SpAds), whereas in ‘usual formalization-suspect’ Germany the role of functionally equivalent ministerial advisers organized in staff units (Leitungsstübe) rather changed without amending formal rules, but in an informal process hardly noticed outside federal government. This paper aims to explain this ‘formalization paradox’ by analyzing the development of these advisory capacities and the regulative responses to the introduction of such advisors from a Public Service Bargain perspective (Hood and Lodge, 2006). Whereas ‘culture and conversation’ are generally recognized as central mechanisms affecting the ministerial advisers’ relation to the minister and the permanent civil service (e.g. Lodge, 2009:57), there are at least two good reasons to consider the degree of formalization as well. Firstly, formal rules shape governments options to create and reform different types of political and media units and advisory functions, especially salient in ‘constitutional contexts resting substantially upon conventions’ (Eichbaum and Shaw, 2013). Secondly, formal rules can affect the ‘quality’ of the ‘ministerial ménages à trois’ (de Visscher and Salomonsen, 2013) as they can aim to solve conflicts and foster a more cooperative relationship. Hence existing research indicates that formal regulation appears to be an effective response to conflicts in advisory domains. There is a growing body of research on ministerial advisers (for an overview see Shaw and Eichbaum, 2012:3), but ministerial advisers’ relationship to both the political executive and the civil service is still rather under theorized (Eichbaum and Shaw, 2013). Although more a heuristic model than a full fledged theory, the Public Service Bargain (PSB) perspective (Hood and Lodge, 2006) offers a point of departure for comparative research to characterize and identify differences in relationships between ministers and their ‘agents’ and to begin explaining differences in the development of the character of the PSB, in this case in terms of the degree of formalization of the bargain. In the subsequent sections we present the PSB perspective and the research design and methods. Hereafter follows the empirical analysis, which begins with an analysis of the development of the ministerial advisers employed in the three countries, including how the regulation of such advisers has developed (or is absent). The paper concludes by a
comparative discussion of potential explanatory factors, which account for the ‘formalization paradox’.

2. Changing Public Service Bargains: Towards Formalization

Defined as any “…explicit or implicit agreements between public servants – the civil or uniformed service of the state – and those they serve. The other partner in such bargains consists of politicians, political parties, clients, and the public at large” (Hood and Lodge, 2006:6), PSBs serves as a heuristic device to conceptualise and empirically identify different types of bargains between actors involved in politico-administrative systems (for an overview of different types of bargains see Hood and Lodge, 2006:21). PSBs can be differentiated according to what the civil service is supposed to give to the minister (contribution), what it receives (rewards) and to whom it grants its loyalty (Hood 2001; Hood and Lodge 2006). Contributions refer to whether the civil service is expected to provide political or expert knowledge and advice. Rewards refer to the question whether the civil service enjoys a permanent status as impartial and neutral or whether it comes and goes with the minister, which is furthermore related to the question of whether the service is appointed on the basis of merit or for more personal and/or political reasons. Finally, it asks whether loyalty is granted to an ideal of a neutral bureaucracy, safeguarding the general interest, different types of interest in society, to successive ministers or a specific minister. Most generally, trustee and agency bargains are distinguished (Hood and Lodge 2006: 39). Whereas trustee bargains conceive the bureaucracy “to act as independent judges of the public good (i.e. interests of their beneficiaries) to some significant extent and not merely to take their orders from some political masters” (Hood and Lodge 2006:2 6), agency bargains do not grant any formal autonomy or discretionary power in relation to the minister to the civil service, but rather provides for a relationship with the minister characterized by trust and confidentiality (Hood and Lodge 2006: 116-120). Here, the civil service is expected to act on the “…bidding of the politicians for whom they work, and that even if they do not, politicians accept responsibility for their acts as if they had given specific directi ons. Public servants exchange day-to-day loyalty to the politicians for whom they work for access to the confidential counsels of those politicians and a measure of autonomy when it comes to public praise or blame” (Hood and Lodge 2006:53).

Agency bargains are further differentiated according to how they conceptualise loyalty. If the civil service devotes its loyalty to successive ministers, this civil service loyalty is called “serial loyalist” (Schafferian bargain). If the civil service owes its loyalty to a specific minister, it acts as a “personal loyalist” (hybrid bargain) (Hood 2001: 16; Hood and Lodge 2006: 21).

However, bargains may also be differentiated according to degree of formalization and therefore to whether they are systemic and formally enacted in constitutions, laws, civil service statues, ethical codes etc. or pragmatic and therefore informally reflected in normative role expectations and implicit mutual understandings of what the different parties bring and receive in the bargain respectively (Hood, 2000:9-10; Hood and Lodge, 2006:9-10).

The question of what drives the change towards increasing formalization of the PSB of the ministerial advisers has not been addressed in the PSB literature. An increasing use of rules and the codifying of bargains is suggested as a mean to prevent cheating in PSBs (Hood and Lodge, 2006:167), but although - as will be evident in the subsequent analysis - ‘scandals’ have occurred, indicating elements of cheating, extensive cheating in the PSB is not a major factor driving the formalization.
However, the literature suggests a number of factors, which may explain the break down of bargains or which may drive changes from one type of bargain to another, e.g. sudden or long-term habitat changes in the environment, cheating, differences in the interpretations of PSB and politician’s choice (Hood, 2002:325; Hood and Lodge, 2006: chapter 8).

Changes in the environment may either be characterized as sudden or long-term habitat changes. Where the former may be caused by a radical or revolutionary change in the political system (Hood and Lodge, 2006: 154), as for example major reforms, etc. the latter may be caused by incremental changes in the way politics works, i.e. in the demands made on the politicians e.g. by the media (Hood and Lodge, 2006:156). In terms of cheating, such type of behaviour differs from bargain to bargain. In serial agency bargains, the civil service may act disloyally to the incumbent minister, e.g. by including party-political considerations or institutional self-interests in their advice or by ‘policy sabotage’ (Hood, 2001:19), that is leaking information to the press or even the opposition; or mobilizing interest groups and the like against the policy proposed by ministers. They may also be reluctant to obey ministers’ orders, e.g. reflected in a slow response. Ministers’ cheating behaviour may be party-political in nature for example, when recruitment and promotion decisions within a merit bureaucracy are based on party-political criteria. Special advisers in a personal agency bargain may also demonstrate disloyal behaviour towards the minister by leaking sensitive material to the media or others concerning both the minister’s policy and person (Hood, 2001:19; Hood and Lodge, 2006:165). The minister might cheat, either by blaming special advisers for their own failures (Hood and Lodge, 2006:165) or by failing to support their protégés (Hood, 2001:19), for example when they enter the ministerial bureaucracy.

Although politicians enjoy - at least formally - a superior role being the principal of the agents in the advisory bargains, all actors in the bargain contribute to changes and modifications of the bargain over time. As argued by Lodge: “Public bargains are not forever; they break down or at least become modified in the light of changing preferences and disappointment. In other words, they are endogenous part of ongoing renegotiations between interdependent actors.” (2010:112). Hence, not only politicians but also agents may cause changes in the bargains. Such changes may also come about if the actors involved in the bargain differ in their interpretation, i.e. have different understandings of “…what the basics of the agreement amount for; for instance over what are the competencies required of a non-party-political civil service or what political direction can be given to independent public officials?” (Hood 2002:325).

A central point of the PSB literature is that PSBs are contingent upon both the historical development of the bargain as well as the interest and strategic actions performed by the involved actors (Hood and Lodge, 2006:14). Although ‘history’ per se does not drive changes in the PSB, ‘legacies’ and existing bargains are assumed to interact and shape (and are being shaped by) new bargains (Lodge, 2010:108-109) for example when new actors as ministerial advisers enter the scene of the politico-administrative systems. The factors that are suggested by the PSB perspective to cause changes in bargains are summarized in figure 1.

*Figure 1: Factors causing changes in PSB*
In the subsequent analysis we investigate changes in bargains as increasing formalization. For the bargains between ministers and civil servants or special advisers respectively this involves formulation of codes of conducts, model contracts for employment contracts, as well as legislation. In the existing literature, the subject of the regulation varies. In the most general sense formalization is considered to prevent ‘hybridization’ of advice, i.e. a “…blurring of boundaries between the administrative and political realms” (Eichbaum and Shaw, 2013): “The advent of codes of conduct and model employment contracts for political staff in many (but not all) jurisdictions is perhaps an indication that, beyond a certain point, prime ministers will not entertain any blurring of the boundaries between different sources of advice.” (Eichbaum and Shaw, 2013). Regulating the position of ministerial advisors is often induced by issues of increasing politicization and accountability or in cases of conflicts between ministerial advisors and the civil service. Hence, rules often aim to limit formal politicization (e.g. rules on numbers), to clarify accountability structures in which ministerial advisors operate and/or to define appropriate functions for civil servants vis-à-vis special advisers, therefore seeking to prevent ‘administrative politicization’, i.e. special advisers preventing that advice from the civil service reaches the minister’s desk, questioning the competence of the civil service, or ‘colours’ the service’ advice with partisan aspects (Eichbaum and Shaw, 2008: 343-344; 2010: 135-136) and ‘funneling effects’ which screens out advice against the ministers party-political preferences and wishes (Shaw and Eichbaum, 2012:4).

3. Research design and method

The research design represents a comparative case-study of the regulation of advisers in four countries: Germany, Sweden, UK and Denmark. In the subsequent analysis Sweden is not included and we have not yet elaborated the analysis of the potential explanatory factors. The cases are chosen because in all four ministerial bureaucracies advisers have become appointed to assist the minister, among others in tackling the media and the ministers’ external communication in general, that is advisers with relatively functionally equivalent portfolios. All four countries have introduced such advisers in the period from around the 1970’-80’, and
in all four countries have the number of such advisers been increasing for longer periods of time.

The ambition of the article is to demonstrate the ‘formalization paradox’, that is why we selected four countries, which differ in the degree of formal regulation of the advisers’ function and behavior: In Denmark and UK we identify increasing formal regulation of advisers, in Germany and Sweden such regulation barely exists. The ambition of the article is further to give some tentative explanations of those differences, why we, after having presented the differences in the regulation (the dependent variable), discuss the possible explanatory factors as reflected in the theoretical model above in relation to the cases.

The empirical analysis is based on a documentary analysis of the formal regulation of the advisers. Table 1 provides an overview of the documents included in each case.
4. Empirical Analysis

In all cases, the analysis begins with a discussion of the bargain and its development regarding the permanent civil service and the advisers, followed by a comparative analysis of possible explanations of the ‘formalization paradox’.

4.1 The UK- Bargain – formalization and multiplication

The UK bargain between ministers and permanent civil servants reflects at least historically the example par excellence of a serial-loyal agency bargain. This type of bargain represents the original bargain-perspective on the relationship between ministers and civil servants as introduced by Barnard Schaffer (1973). The bargain described the relationship between ministers and civil servants in the later nineteenth century, in which “…civil servants gave up some political rights (such as the right to openly criticize the policy of the government of the day) in exchange for permanence in office. And for their part, elected politicians in their role as departmental ministers gave up their right to hire and fire civil servants at will in exchange for loyalty and competence (see Schaffer 1973: 252).” (Hood and Lodge 2006: 19). The merit principle originates from the Northcote Trevelyan Report of 1854 (Northcote et al., 1854). A Civil Service Commission was set up in 1855 to put an end to patronage. The Commission evaluated if actual recruitment to the civil service complied with the principles of merit and open recruitment. To ensure strict implementation of the merit principle, the independent Civil Service Commission issued a number of recruitment principles to be followed in recruitment practices and in the selection of senior civil servants (Civil Service Commission, 2012).

Contrary to Denmark and Germany, there is no constitution regulating the government in the United Kingdom. Originally, the UK-bargain was not enacted in any law, but had a highly informal, normative character, reflecting the behaviours of respectively ministers and civil servants. This original and highly informal Schafferian bargain reflects the Whitehall model of bureaucracy, in which the civil service is characterised by permanence, anonymity, neutrality and providers of expertise or fachkompetenz skills (Kavanagh et al 2006: 44). However, the norms, which developed from practice to regulate the relationship between ministers and civil servants, have been described, codified and later formalised in a number of codes resulting most recently in the Constitutional Reform and Governance Act from 2010. Hence what originated as a highly informal bargain has been increasingly formalised from the mid1990s onwards. As noted by Hood and Lodge the British Whitehall PSB’ has been subject to “…an increasing tendency to write down the formerly ‘tacit understandings’ between ministers and bureaucrats, traditionally operating mainly through socialization and ‘conversation’ (Foster 1998) into written codes and guidelines.” (2006:11).

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Table 1: Analyzed documents

<table>
<thead>
<tr>
<th>Case</th>
<th>Documents</th>
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<tbody>
<tr>
<td><strong>United Kingdom</strong></td>
<td>• Ministerial Code. Cabinet Office, May 2010</td>
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<tr>
<td></td>
<td>• Code of Conduct for Special Advisers. Cabinet Office, June 2010</td>
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<tr>
<td></td>
<td>• Civil Service Commissioners Recruitment Principles. April 2012</td>
</tr>
<tr>
<td></td>
<td>• Civil Service Code</td>
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<tr>
<td></td>
<td>• Constitutional Reform and Governance Act, 2010</td>
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<tr>
<td><strong>Denmark</strong></td>
<td>• Betænkning 1354 “Forholdet mellem Minister og Embedsmænd”, Ministry of Finance, May 1998</td>
</tr>
<tr>
<td></td>
<td>• Betænkning 1443 “Embedsmænds rådgivning og bistand”, Ministry of Finance, June 2004</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>• GGO</td>
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</tbody>
</table>
Firstly, the bargain between ministers and civil servants is now described in the Ministerial Code. The code was made public for the first time in 1992 (Guy 2012a), and since then it has become convention that a new Prime Minister issues his own code, most recently David Cameron (Cabinet Office 2010). The code states the important general principle of the political impartiality of the civil service, which ministers should respect as well as “…give fair consideration and due weight to informed and impartial advice from civil servants…” (Cabinet Office 2010a:11).

Secondly, the norms are nowadays described in the Civil Service Code. The Code was first published in 1996, which incorporated the Armstrong Memorandum from 1985 (Gay 2006:2), that stated “Civil Servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day…” (Armstrong 1985 cited in Hood and Lodge 2006:54). It is further suggested, that the civil servants should “…conduct themselves in such a way as to deserve and retain the confidence of Ministers, and as to be able to establish the same relationship with those whom they may be required to serve in some future Administration.” (ibid.). Hence the memorandum states the fact that the civil servants, although being impartial, are serving the crown as represented by the government of the day, which reflects an agency bargain in favour of a trustee type of bargain where the service serves an idea above the incumbent minister. Further it reflects that the agency bargain is of a serial-loyalty type because civil servants should act to be able to gain a confident relationship to successive ministers. These norms are reflected in the code which points that civil servants are appointed by the principle of merit and are expected to act according the core values of integrity, honesty, objectivity and impartiality (Civil Service Code 2010), representing the core idea of a civil service being able to ‘speak truth to power’ (Sausmann and Locke 2004:121). Most recently, the principle of merit as well as a civil service code was made statutory in the Constitutional Reform and Governance Act from 2010 (chapter 1).

Although it has been rather common to use ‘non civil servants’ as ministerial policy advisers throughout the twentieth century, the current special advisers date back to March 1974, when the at the time Prime Minister Harold Wilson allowed ministers to appoint special advisers (SpAds) on ‘a regular basis’ (Guy 2000:8). Hence, the bargain structure of the politico-administrative system in UK reflects a multiple-bargain arrangement in which special advisers engages in a personal-loyal agency bargain with the minister.

The annual number of special advisers since 1994/1995 is reflected in table 2, which is based on data from Guy (2009; 2012b).

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1 Previous Questions of Procedures for Ministers.
Table 2: Number of Special Advisers per year in UK (1994/5-2012/13)

<table>
<thead>
<tr>
<th>Year (July)</th>
<th>Number of special advisers in total</th>
<th>Number of special advisers in Prime Ministers Office</th>
<th>Number of special advisers in the remaining ministries in total</th>
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<tbody>
<tr>
<td>1994/95</td>
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<td>28</td>
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<tr>
<td>1995/96</td>
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<td>2003/04</td>
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<td>2004/05</td>
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<td>2005/06</td>
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<td>2008/09</td>
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<td>49</td>
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<table>
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<tr>
<th>Parliamentary Session</th>
<th>Date in post</th>
<th>Number of special advisers in total</th>
<th>Number of special advisers in Prime Ministers Office *</th>
<th>Number of special advisers in the remaining ministries in total</th>
</tr>
</thead>
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<tr>
<td>2012/2012</td>
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<td></td>
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<td>09/12/11</td>
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<td></td>
<td>04/04/12</td>
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<td>36</td>
<td>48</td>
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<tr>
<td>2012/2013</td>
<td>17/07/2012</td>
<td>81</td>
<td>33</td>
<td>48</td>
</tr>
</tbody>
</table>

* The total number of advisers in Prime Ministers office includes those appointed by the Prime Minister and those appointed by the Deputy Prime Minister

The radical increase in the number of special advisers around 1997 reflects the armament in terms of strategic political communication in no. 10 when Blair came to office in 1997 (Ministry of Finance 2004:127).

The functions of SpAds in UK vary (Fawcett and Guy 2010:31). It appears as if before 1997 most advisers where primarily policy advisers, but since the radical increase in 1997 the portfolio of advisers was expanded to include media advice. Hence, today some are engaged as policy advisers - ‘policy wonks’ - and some for the purpose of giving media advice (Marsh, Richards and Smith 2000: 315), that is they are involved in the ministries’ policy-making activities and are occupied by “spinning” the governments messages. A recent review concludes, however, that many of the special advisers are deeply involved in policy development and design, and that “…communication occupied only marginally more of SpAds’ time than policy design.” (LSE GV214 Group, 2010:7).

Although special advisers are appointed as civil servants, their employment is tied to the minister’s term in office (Guy 2009: 3), hence they are appointed as temporary civil servants under Article 3 of the Civil Service Order in Council 1994 (Cabinet office 2010b:3). This is also reflected in the model contract for special advisers, first published in 1997 by the Blair government (replacing the previous letters of appointment) (Guy 2000:17) and most recently
revised in 2010 by the new coalition government (Cabinet Office 2010c). Hence their bargain with the minister is of a personal loyal type. Also this bargain has been increasingly formalised and regulated since the 1990’s onwards (Fawcett and Guy 2010:53). The formal regulation of SpAds is reflected in: the civil Civil Service Order in Council; the Code of Conduct for Special Advisers: the Model Contract for Special Advisers; the Civil Service Code; the Ministerial Codes as well as in the Constitutional Reform and Governance Act from 2010 (Guy 2012b:5-6).

Their appointment is not expected to follow the principle of merit and they do not have to behave in accordance with the values of impartiality and objectivity as the permanent civil service. They have however to behave in accordance with the remaining principles set in the Civil Service Code (Fawcett and Guy 2010:52-52). According to the Ministerial Code, “With the exception of the Prime Minister and the Deputy Prime Minister, Cabinet Ministers may each appoint up to two special advisers…” (Cabinet Office 2010a:6).

Much of the regulation has been driven by not only the government per se (the cabinet office), but especially by the House of Common Public Administration Select Committee (PASC2) and The Committee on Standards in Public Life (CSPL3) as governments responses to their recommendations are published in a number of reports based upon various types of investigations and inquiries. Although all reports generally recognise the value special advisers can bring to the government, they all raise a number of concerns. In 2000, the CSPL under Lord Neill published a report “Reinforcing Standards”, which recommended a code of conduct for special advisers. This was published for the first time by the Cabinet Office in July 2001 (Guy 1012b:7). The code was most recently revised in June 2010, where it was added that special advisers are “…appointed to serve the Government as a whole and not just their appointing Minister…” (Cabinet Office 2010:1, see also Guy 2012b:10). In 2001, the PASC published the report “Special Advisers: Boon or Bane?” which addressed more widely the relationship between such advisers ad the permanent civil service (PASC 2001; Fawcett and Guy 2010:53). This report did not cause any changes in the regulation and the government did not accept any of the recommended changes from the report. This was, however, the case after the publication of CSPL’s report (under sir Nigel Wicks) in 2003 “Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service”. This time the report was motivated by “…the controversy surrounding the roles of Jo Moore…”(Fawcett and Guy 2010:54), and the famous e-mail send on 9/11 as well as the two special advisers with ‘executive powers’ in the Prime Ministers Office, including Alastair Campbell as Director of Communication and Strategy (Guy 2012b:8). As a reaction to the report, the government accepted to clarify the relationship between the SpAds and civil service in the Code of Conduct for Special Advisers, revised the Ministerial code to clarify that all ministers are “…personally accountable to the Prime

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2 PASC was established in 1967 with the purpose of evaluating and monitor the quality and administrative standards in the ministries as well as matters related to the civil service per se. The members are members of Parliament appointed by the House of Commons. In spite of the governments having majority in the House of Commons the committee has developed into a critical watchdog in relation to the government and the civil service (Ministry of Finance 2004:133; www.parliament.uk).

3 CSPL was established in 1994 by the John Major to promote high standards of behaviour on the basis of seven principles (selflessness, integrity, objectivity, accountability, openness, honesty and leadership). The government appoints its members, but in practice the committee acts as an independent body. A central concern for the committee is to maintain the neutral civil service (Ministry of Finance 2004:133; www.public-standards.gov.uk)
Minister and to Parliament for the management and discipline of their special advisers and for investigating alleged breaches of the Code of Conduct for Special Advisers” (Guy 2012b:9).

In the Constitutional Reform and Governance act from 2010 it is made statutory that the government must report to the Parliament on the number and costs of the special advisers on an annual basis (section 16). Regarding their functions and relation to the permanent civil service it is suggested that not only must ministers publish a code of conduct for special advisers, but the code “…must provide, that a special adviser may not exercise any power in relation to the management of any part of the civil service of the State.” (section 8), as had previously been the case4. The Code of Conduct for Special Advisers further mentions that special advisers should “…act in a way which upholds the political impartiality of civil servants…” (Cabinet Office 2010b:3), or “…suppress or supplant the advice being prepared for Ministers by permanent civil servants although they may comment on such advice.” (Cabinet Office 2010b:4). In addition, it lists a number of functions appropriate for special advisers to perform, including both the preparation of policy papers, the relation to the ministers party and presenting the minister’s views to the media (Cabinet Office 2010b:2-3). The code was most recently revised by the new coalition government in 2010. In the revised code it is suggested, that advisers serve the government as a whole, and not just the appointing minister and it states, that “…dissemination of inappropriate material or personal attacks has no part to play in the job of being a special adviser…” (Cabinet Office 2010b, see also Guy 2012b:10). In addition the new government revised the Ministerial Code and imposed “…a general limit of two paid special advisers per Cabinet Minister (although ministers with additional responsibilities were entitled to seek permission to appoint additional advisers.” (PASC 2012:6).

The most recent development in the investigations of special advisers is the PASC’s inquiry with an Issues and Questions paper, resulting in the publication of the report “Special Advisers in the thick of it” in October 2012 (PASC 2012). The background is according the report the wish to explore special advisers under the new circumstances of being advisers to a coalition government (PASC 2012:6). Again the conclusion is, that special advisers “…have legitimate and valuable functions, including protecting the impartiality of the Civil Service…” (PASC 2012:10). Further, the report concludes that to ensure the legitimacy and functioning of special advisers in the contemporary ministerial bureaucracy not more regulation is needed, but more transparency and clarity regarding their role and the expectations towards advisers’ behaviour as well as trust in the bargain between the minister and the civil service and the advisers respectively (PASC 2012:31). As noted by the chair of the Committee Bernard Jenkin (MP), “The positive effect of special advisers is heavily dependent on a high degree of trust between them, their Ministers and their Permanent Secretaries, so there must be clarity of expectations about tasks and boundaries. Positive induction and support will be so much more effective than negative rules and enforcement.” (quoted at www.parliament.uk, 15. October 2012 in “SpAds need better training and support and clearer lines of accountability”). The report further states that it is important that ministers are aware of both being accountable and responsible for how special advisers conduct (PASC 2012:35), as also stated in the Ministerial Code. Moreover, it is stated that “…it is imperative for permanent secretaries to be ready to give advice and support on matters of propriety to special advisers and ministers, particularly at the start of a new administration.” (PASC 2012:36). In addition it is suggested that permanent secretaries are responsible for being “…aware what the special advisers are doing in the name of the minister.” (PASC 2012:36).

4 This was also included in the revised version of the Code of Conduct for Special Advisers from 2010.
Summing up, the British regulation of special advisers has developed from codes of conduct to actual legislation. However, it appears that the limits of introducing more rules are recognized. It is rather the responsibilities of the minister and the permanent secretaries that are considered crucial to prevent misbehaviour of advisers. Much of the regulation relates to the special advisers appointment, transparency of the numbers of SpAds, their functions as well as their relation with the permanent civil service. However, also ministers’ responsibility for the management and discipline of their special advisers is subject for regulation. Hence, the regulation aims both at preventing radical formal politicisation, but even more to clarify the bargain of special advisers in terms of who is accountable and responsible for their behaviour, as well as to prevent administrative politicisation by pointing to the importance and responsibility of the permanent secretary as a guardian of the bargain between the minister and the special adviser and skip the possibility that advisers get managerial responsibilities for the permanent civil service.

4.2 The Danish Bargain – formalization and multiplication

The Danish PSB between the ministers and the permanent civil service is an agency bargain of the serial-loyalist type combined with a rather strongly institutionalised norm of preserving the civil service’ neutrality and impartiality (Salomonsen and Knudsen 2011). The regulations of the Danish ministerial bureaucracy date back to a ministerial reform in 1848, when absolutism was replaced by constitutional liberalism. The system of ministerial governance was formally institutionalised in the constitution from 1849. It is, however, only the role and organization of the politicians in government, and not the civil service, which is formally institutionalised in the constitution. This means that the role and functioning of Danish civil servants remained highly informal until the end of the last century. With the ministerial reform, ministers got the authority to appoint civil servants. At the time ministers were recruited from the civil service, the exclusively conservative governments expected and received party-political loyalty from the civil service and mixed careers were not unusual. However, that changed in 1901 when a liberal government came to power for the first time. At that time, the civil service changed from being political responsive to a minister with whom they shared party-political affiliation to a neutral and merit-based bureaucracy providing expert knowledge, with no mixed careers between ministers and civil servants.

Danish ministers are formally able to select and recruit the civil servants of their ministries including the formal right to dismiss permanent secretaries on discretionary grounds. Hence, both a lack of trust, bad chemistry, as well as problems with cooperation are legal reasons for which ministers can dismiss permanent secretaries (Christensen 2004:24). However, the strong merit tradition has so far meant that politically motivated appointments in the permanent civil service have been extremely rare (Ministry of Finance 1998:130). Furthermore in the literature on administrative law it is considered unfair to take party-political affiliation into consideration when recruiting to positions within the public administration (Ministry of Finance 1998:223).

Although there is no legislation regulating the bargain between the permanent civil service and the minister, there are some norms prescribed in Whitepapers, published by committees on special adviser (see below). These norms means that the advice given by the permanent civil service should be in line with professional standards, be of a party-politically neutral nature, ensure legality as well as reflect a general obligation to speak the truth (Ministry of Finance 2004:141-143). Hence the Danish bargain between the minister and the permanent civil service resembles the UK bargain.
Special advisers were officially recognized in the Danish central administration in 1998. The annual number of special advisers since 1998 is reflected in table 3 which is based on data from a report made by the National Audit Office apart from 2010 and 2013 which is based on information from the website of the Prime Minister’s Office (www.stm.dk, visited January 11, 2010; February 3, 2012, March 5, 2013).

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<tr>
<td>Number of special advisers</td>
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<td>7</td>
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<td>17</td>
<td>30</td>
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Sources: The National Audit Office 2009:19. The number for 2009 is based on the first half year, and the website of the Prime Ministers Office.

The table reflects the total number of special advisers employed each year in total, why the actual number of special advisers employed at the same time may be a bit less than reflected in table 3. For example did the White paper no. 1443 report that 14 out of the 18 ministers had employed a special adviser (Ministry of Finance 2004:270). In 2010, 17 out of 20 ministers have a special adviser. Table 3 does not reflect any significant change in the degree of formal politicisation in terms of the number of special advisers in the period from 2001 onwards. The increase reflected from 2000 to 2001 may be caused not by a substantial, but a more formal change as it was first in 2001 that it became mandatory for ministers to use a special employment contract which allows for a formal recognition of special advisers in the departmental hierarchies (The National Audit Office 2009:19).

The increase from 2012 onwards reflects a shift in government in October 2011, when a coalition government headed by Social democrats replaced a coalition government headed by the liberal party caused a rather radical increase in the number of special advisers. However, contrary to the UK case, the increase does not reflect a concentration of advisers in the Prime Ministers office in Denmark, but rather reflects that some ministers, including the Prime Minister, employed two special advisers. According to the Prime Minister, the increase is based upon the fact that she had allowed those ministers, that are members of the central co-ordinating government committees (The Coordination and The Economic Committee) (Jensen 2011:220), to employ two special advisers due to their ministers’ co-ordination needs (the Prime Ministers response to the parliamentary interpellation debate December 14 2011, www.ft.dk).

In terms of their functions special advisers primarily provide media and party-political advice (Hustedt and Salomonsen, forthcoming). Hence they generally bring competencies to the bargain which differs from the permanent civil service, where especially the permanent secretary acts as the prime also political adviser to the minister.

The background for the increasing regulation of the special advisers began in the 1990’s when the opposition occasionally accused the government at the time to make patronage appointments when recruiting civil servants to the Prime Minister’s office (Salomonsen 2003:38-39). This led the parliament to form an expert committee in May 1997. The committee explored the development in political appointments in the civil service. In 1998, the committee published White paper no.1354/1998 on “The relationship between ministers and civil servants” (Ministry of Finance 1998), which, as a central conclusion, makes it explicitly legitimate for ministers to employ a special adviser if their appointment is tied to

5 All committees include members appointed and representing interest organisations, civil servants from central ministries as well as experts from the universities.
the ministers’ term in office (Ministry of Finance 1998:221-223). Further the White paper states that there are no legal constraints as to the criteria according to which ministers can appoint special advisers including strict party-political criteria (Ministry of Finance 1998:223-225). Although, as noted by Christensen, the White paper does not lead to any legislation or formal regulation (2006:1003), the government accepted and institutionalised the guiding principles suggested by the white paper (Salomonsen 2003:39-42).

In 2003, a second expert committee was set up by the parliament, “The Expert Committee on Civil Service Advice and Assistance to the Government and its Ministers” (Ministry of Finance 2004). This time the reason was not discussions of political appointments in the permanent civil service, but discussions of the advice and behaviour of special advisers in relation to the permanent civil service and the media. In 2004, the committee published White paper no. 1443/2004 “Civil servants advice and assistance” stressing that special advisers are employed as civil servants on special conditions, why the existing demands and constraints on the permanent civil service advice also applies for the advice provided by the special adviser. That is “…special advisers are subject to the same requirements as legality, obligation to speak the truth and professional standards…” (Ministry of Finance 2004:283-284). However, contrary to the permanent civil service, special advisers are not limited in terms of providing political advice in relation to the ministers role as party politician (Ministry of Finance 2004:287). Both of the White Papers emphasize the importance of the formal rules prescribing that the special adviser is subordinate to the permanent secretary, although the adviser should be given some latitude by the permanent secretary when providing advice to the minister (Ministry of Finance, 2004: 187). Moreover, the White Paper explains that special advisers may not provide instructions regarding the substantial (professional) content of notes, speeches and so forth produced by the permanent civil service for the minister. The White Paper also stresses the importance of keeping the permanent civil service as primary political advisers to the ministers (Ministry of Finance, 2004: 284).

This most recent White paper further points to the importance of ensuring openness and transparency in the appointments of special advisers. Hence it recommends that the government inform the general public on who is employed in which ministries as special advisers on the web side of the Prime Ministers Office (Ministry of Finance 2004:291). As reflected in table 3, there has been a rather dramatic increase in the number of special advisers in relation to the latest shift in government. This is however still in line with the recommendations put forward by the most recent White paper, which point to the fact that although there are “…important arguments in favour of keeping a limited number of special advisers per minister…” (Ministry of Finance 2004:284), ministers with central co-ordinating functions etc. may employ more than one, but not more that two or three (Ministry of Finance 2004:185).

Summing up the increasing formalisation of the special advisers has primarily dealt with their relation with the permanent civil service, their organizational position within the ministerial bureaucracy, the limits to their functions as well as how to ensure transparency and openness of their appointment. The regulation takes the form of White papers issued by committees decided upon by the parliament due to the opposition criticising the government of the day for patronage or the conduct of the special advisers in relation to the permanent civil service and the media. As is the British case, much of the regulation relates to the special advisers appointment, transparency of the numbers of SpAds, their functions as well as their relation with the permanent civil service. The purpose of the regulation is both to regulate the degree of formal politicisation as well as prevent administrative politicisation by explicating special advisers as being subordinated the permanent secretaries.
In 2011, the parliament set up a third committee to investigate special advisers (Ministry of Finance 2012). This time the background was a number of incidents, on which there has been public debate and legal investigations in (among others) questions of whether special advisers had leaked sensitive material to the press and had interfered inappropriately in the ministry’s processing of the tax reports of the husband to the at the time opposition leader. The mandate of the committee asks for an evaluation of the existing rules and if there is a need for further clarification of these rules (Ministry of Finance 2012). So far, members of the committee made clear that they do not expect to introduce new rules, but rather conceive it as their job to repeat the importance of the rules, which already exits.

4.3 The German Bargain: Multiple bargains with emergent informal changes

The German case represents a trustee bargain supplemented by elements of an agency bargain dating back to the years of 1848/9 when Prussia became a constitutional monarchy (Hood and Lodge 2006: 39). Bureaucrats are considered legal experts that perform their functions as “technocratic trustees” (Hood and Lodge 2006: 39) on behalf of society. Their expertise is considered to justify some administrative autonomy (Hood and Lodge 2006: 39). This expertise-based autonomy is constrained by the formal politicisation rules applicable to the senior civil service in the ministerial bureaucracy, i.e. the formal right to send civil servants of the two top hierarchical ladders (Beamtete Staatssekretäre and Ministerialdirektoren) to temporary retirement at any point in time. Historically, temporary dismissal of high-ranking civil servants was established as an instrument to get rid of liberalism that was quite prominent among high-ranking bureaucrats in Prussia of the time (Echtler 1973: 43-46). This rule represents the elements of the agency bargain in the German case, which developed alongside the trustee-type. Hence, loyalty is conceptualised two-fold: Whereas the “political civil servants” are considered personal loyalists, the (larger) merit part of the bureaucracy directs their loyalty in a more abstract manner to the state and the law, as invoked by the constitutional protection of the “Berufsbeamten” (Art. 33 GG) (Hood and Lodge 2006: 112-113). All in all, the German public service bargain is historically born as a multiple bargain with different types of actors.

As in most other countries, the constitution rather parsimoniously provides specifications as to the structure and organization of federal government (Böckenförde 1964: 192 ff.). Firstly, the constitution implies the “chancellor principle” providing the Federal Chancellor with the right to decide upon the general outline of all government policies (Richtlinienkompetenz). Secondly, the so-called departmental principle is established by the constitution, according to which each minister is solely responsible for all decisions taken within the realm of his ministerial portfolio. Thirdly, the constitution requires the cabinet principle; hence government decisions are taken by the cabinet (Chancellor plus all ministers) as a collegiate body. According to common legal interpretation of these constitutional prerequisites, the three principles are strongly interlinked and to be balanced by every-day life in government (Oldiges 1983: 19-22). Empirically, however, the departmental principle turns out to be the most important principle affecting decision-making within government (Mayntz, 1987: 4). Hence, the constitution paves the way for strong single ministerial departments resulting in considerable departmental egoism (Döhler, Fleischer and Hustedt 2007: 14). Whereas the constitution in general imposes its requirements in a very strong manner on all government actors, the Joint Rules of Procedures of the Federal Ministries (GGO) is formally an internal executive regulation which serves as a departmental rule-book but is not litigable. However, the GGO provides precise rules for formal procedures in federal government, most importantly, the instrument of the “lead ministry” and the correct hierarchically structured
ladder (*Dienstweg*) always to be followed in internal communication. Even though those formal rules are not explicitly referred to on an every-day basis they unfold their effectiveness in a rather general view that “form is not empty nonsense” (Page 2012: 68), describing the general procedural orientation based on law-based thinking and reasoning characteristic for the German federal government. Some observers understand this procedural legal orientation as the essential idea of the *Rechtsstaat* (Sturm and Müller 2003: 193).

In contrast to the position of the special adviser in Denmark and the United Kingdom, ministerial staffers have neither been established by any deliberate policy action nor did they simply emerge over the last decade. At least since the 1980s, ministerial staffers have been increasingly appointed by German ministries (Hustedt 2012) and are nowadays typically organized in staff units (*Leitungsstäbe*) with direct access to the minister. Staff units normally include the personal office to the minister, a unit responsible for parliamentary and cabinet affairs, a press unit, a planning unit and occasionally a unit for special tasks (Hustedt 2012: 165-181). Although there is a lack of systematic data concerning the recruitment and background of the ministerial staffers, most of them are supposed to be recruited from the line bureaucracy; however, it is widely acknowledged that the minister recruits his personal secretary and the head of the minister’s office and his press speaker from outside the ministry. Whereas it was common earlier to also recruit press speakers from within the ministry, today they typically have a journalistic background. This changed recruitment practice indicates the increasing relevance of media expert knowledge in the ministries (Hustedt 2012: 182-188). Moreover, no special employment conditions and rules apply to ministerial staffers.

Formal rules particularly applied to staff units do not exist. As mentioned, they are not appointed under special rule. The above mentioned GGO also prescribes the formal organizational structure of a federal ministry that consists of divisions, sub-divisions and sections. In an early version of the GGO established in 1958, personal secretaries to the ministers were allowed, but it was not before 2000 that staff units were explicitly included in the GGO: “Organisational units with staff functions may be set up for certain duties, especially with regard to the management of the Federal Ministry” (§ 10 (1) GGO). This rule, introduced within a more general overhaul of the GGO, however, cannot be considered a brand-new prescription, but rather a formal codification of a pre-existing organizational practice (Hustedt 2012: 142). However, this paragraph represents the only general formal rule applying to staff units. It is up to the single ministries or ministers to establish internal rules, e.g. to fix the position of the staff units in formal internal communication procedures. In that respect, the staff units relevance becomes visible as their heads (*Leiter Leitungsstab*) is typically the last organizational position checking all files before they enter the minister’s desk (Hustedt 2012: 247).

5. Discussion and conclusion

Comparing original bargains, their development and the regulation of the ministerial advisors can be summarized as follows (see table 4). Whereas in both the UK and Denmark, the original serial-loyal agency bargain was complemented by the formal introduction of the special advisor that owe personal loyalty to the minister, the German bargain already originally represents a multiple bargain, with a diverse loyalty nexus between the minister, political civil servants and other civil servants and remained rather stable over time – at least formally. Again, in both the British and the Danish case formalization of the newly established position of the special advisor increased over time, while in the German case no new rules for the staff units, which increased in size and relevance, were launched.
Table 4: Comparing PSBs and formalization

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<th>UK</th>
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<th>Germany</th>
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<tr>
<td>PSB</td>
<td>Serial-loyal agency bargain, bargain</td>
<td>Serial-loyal agency bargain, bargain</td>
<td>Trustee-type, multiple actors</td>
</tr>
<tr>
<td></td>
<td>multiplication over time</td>
<td>multiplication over time</td>
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<tr>
<td>Formalization</td>
<td>Yes, codes and legislation</td>
<td>Yes, white papers, no legislation</td>
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Comparing the British and Danish cases, at least two more similarities become apparent. Firstly, in both cases the civil service is originally established as a formally neutral bureaucracy based on the merit principle. Studying the regulation on the special advisors in the British and Danish cases reveals that similar issues are subject to regulation. In both cases regulation intends to prevent increasing formal and administrative politicization and to clarify accountability and responsibility concerns regarding the tasks and behavior of special advisors. Hence, formalization is intended to solve or mitigate concerns prompted by the impression that basic bureaucratic norms and values are violated: Neutrality, expertise and hierarchy. Secondly, in both cases, regulation was induced by public and political debate on the position of the special advisor. Quite in contrast, the German ministerial bureaucracy was formally politicized from the very beginning and there are hardly any political and public debates on what goes on at the top of ministerial departments is low. All in all, formalization appears to be driven by the original normative appreciation of bureaucratic neutrality deeply anchored in the British and Danish serial-loyal agency bargains. This deeply entrenched norm of neutrality causes high public and political scrutiny if it appears violated or at least tackled by changed practices at the top of British and Danish ministries.

It remains difficult to assess, whether this formalization really causes or at least reflects changes in the original bargain, however, it appears reasonable to conclude that the multiplication of the bargains and the clarification of the position of the new actors affects the interaction between all three involved actors regarding (1) competencies contributed by any of them, (2) how loyalty relationships are perceived and (3) how rewards are distributed among the parties. However, if increasing formalization actually fulfills its goals and mitigates the concerns on politicization and accountability remains to be awaited, but some skepticism seems to be appropriate for at least two reasons. Firstly, in both cases upcoming ‘scandals’ or conflicts have – so far – always led to new regulation indicating that the former was not considered adequate to solve the problem at hand. Secondly, the debates keep on centering on very similar issues, hence the regulation was not considered appropriate. To conclude, increasing formalization of the bargain – or at least of the position of the special advisors has so far not led to in fact entirely ‘solve’ problems. Hence, it appears reasonable to expect that increasing formalization will not result in fully harmonizing the position of the special advisor or the working relationships in the advisory domain of the ministries. That will only succeed if all parties becomes fully aware of the responsibilities of protecting and safeguarding ‘appropriate’ bureaucratic values and bureaucratic integrity and for SpAds to become more aware to behave according to the rules already introduced. The latter seems not only a responsibility of the SpAds, but of all parties involved.

Regarding discussions on the future of bargains (Hood and Lodge 2006: chapter 10), we might add that the most effective way to ensure future regulation of multiple bargains at the apex of the politico-administrative systems, in which SpAds have been introduced, does not appear to be more detailed regulation, but rather recurrent public and political debates of the development of their role and occasional ‘revisits’ of the existing rules.
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