The work of bureaucratic lawyers: An empirical investigation of lawyers working in the UK Government and the European Commission

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Thesis summary

While bureaucratic lawyers serve a crucial role in strengthening and upholding fundamental principles of modern government, a comprehensive insight into their work is generally neglected from the academic literature. More attention is usually paid to lawyers working in private practice or the courtroom. To help overcome this substantial gap in knowledge, this thesis adopts a multiple-case study which explores the work of UK Government and European Commission lawyers during the preparation of a legislative proposal. It draws on semi-structured interviews to achieve rich, detailed insights into the perceptions and experiences of these lawyers. The concept of work is defined using three fundamental questions: *what* functions do these lawyers perform, *when* do they perform them, and *how* do they perform them? The first two questions provide a nuanced and comprehensive understanding of the tasks, judgments, interactions, and chronologies that constitute lawyers' functions. The third question places a greater emphasis on the sociological aspects of their work. To address this question, the thesis develops a unique analytical framework which integrates insights from legal ethics, political science, and sociology. This framework is then applied to the empirical data to demonstrate how in-house socialisation processes, specifically interactions and experiences within the bureaucracy, shape how lawyers approach political-professional conflicts in their work. The second contribution of this framework is to reveal how these socialisation processes enable lawyers to acquire and develop the expertise needed to perform their work successfully.

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Dedication

This thesis is dedicated to my mum and yiayia who have never failed to amaze me with their love and support

And to Marina, this one's for you too

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Chapter One: Introduction

1.1. Thesis overview

There is a substantial empirical knowledge gap regarding the working practices of bureaucratic lawyers. This thesis contributes to closing the knowledge gap through an empirical examination of lawyers' work in the executive-bureaucratic branches of the United Kingdom and the European Union. The particular emphasis is on the work involved in preparing a legislative proposal for introduction to the legislature. This thesis draws on semi-structured interviews to achieve rich, detailed insights into the perceptions and experiences of these lawyers. The concept of work is broken down into the analysis of three questions: *what* are their functions, *when* do they perform these functions, and *how* do they perform these functions? Aside from some notable exceptions, the existing academic literature offers brief and incomplete statements about the work of UK Government and European Commission lawyers. Also, a considerable proportion of the literature consists of 'first order' accounts prepared by former lawyers which lack the broader range of perspectives commonly found in empirical research.[1] Furthermore, much of the existing academic literature leaves readers unaware as to the types of challenges and conflicts these lawyers face in their bureaucratic environments.

The third question of how these lawyers perform their work is notably absent from the existing academic literature. This *how* dimension places a greater emphasis on the sociological aspects of bureaucratic work, specifically how underlying factors and dynamics within the bureaucratic context can shape how lawyers perform their work. To address this knowledge gap, this thesis develops a unique analytical framework drawing on both neo-institutionalism and a realist theory of expertise. This framework allows me to provide a rich, nuanced picture of how socialisation processes within the bureaucratic context influence how lawyers behave in situations of political-

[1] Mirko Noordegraaf, 'Academic Accounts of Policy Experience' in Hal Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010).

professional conflict. Additionally, it sheds light on how socialisation processes enable lawyers to acquire the knowledge and skills needed to perform their work.

This chapter will now explain what is meant by the term 'bureaucratic lawyer' in the context of this thesis. It will then highlight the significance of bureaucratic lawyers in modern government and draw attention to the fact that their working practices have been largely underexplored, even despite the socio-legal movement. The chapter will then explain and justify the selection of UK Government and European Commission lawyers, largely focusing on differences arising from the national-supranational distinction. Following this, the chapter will contextualise insights provided in the remainder of this thesis by offering some background information on both the UK Government and European Commission, as well as their respective law-making processes. Finally, the chapter will summarise the structure of this thesis and outline the four research questions that guide this research.

1.2. Bureaucratic lawyers

The executive branch exists at different levels of government, including local, devolved, national, and supranational levels. The focus of this thesis is on both the national (UK Government) and supranational level (European Commission). Lawyers working for the bureaucracy of an executive branch of government are typically referred to as bureaucratic, civil servant, or government lawyers.[2] In this thesis, I have opted for the term 'bureaucratic lawyers' to align with the academic literature explored in chapter three, and because the term 'government lawyers' is often used for the national context only. Moreover, for the purposes of this thesis, bureaucratic lawyers include in-house counsel who are employed directly by the executive branch to provide legal services to government departments and ministries.[3] Given that this thesis only focuses on the stages of policy development and legislative drafting, it

[2] In this thesis, the terms 'bureaucracy' and 'bureaucratic organisation' refer to executive-bureaucratic organisations.
[3] This thesis does not focus on those lawyers who are political appointees (e.g., Law Officers in the UK Government).

does not consider in-house counsel responsible for litigation services on behalf of the executive branch of government.

Within the same bureaucracy, it is challenging to reduce the work of lawyers to a single model as there are distinct types of lawyers. While the key distinction presented in the academic literature is often between legal advisers who provide substantive advice (i.e., non-drafting advice) and legislative drafters who write the legislative text, this is largely representative of common law jurisdictions. It is possible that the predominant focus on this distinction is shaped by the fact that a considerable proportion of the literature on bureaucratic lawyers is located in the American and Canadian legal ethics scholarship, with both of these legal systems representing the common law tradition. In civil law jurisdictions, however, the key distinction is generally between legal advisers and legal revisers.[4] Legal revisers are not significantly involved in the initial drafting of the legislative text, if at all, as their role is to assess the drafting quality of the proposal once it has been composed. This particular distinction applies to the EU too as it largely adopts a civil law system, similar to many continental European countries.

While the precise roles and responsibilities of bureaucratic lawyers are likely to vary across jurisdictions, the academic literature recognises the crucial role they serve in upholding and strengthening certain features of modern government. Legal advisers are commonly associated with the duty of upholding the principle of legality which can bolster the stability and legitimacy of the bureaucracy.[5] Legislative drafters are frequently associated with strengthening the democratic principle by articulating 'the will of the people' through the accurate and coherent expression of the elected

[4] Mario Hernández Ramos and Volker Heydt, 'Legislative Language and Style' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017).
[5] Berry Tholen and Ellen Mastenbroek, 'Guardians of the Law or Loyal Administrators?: Toward a Refined Administrative Ethos for Legislative Drafters' (2013) 35(4) Administrative Theory & Praxis 487, 489; Ben Yong, 'Risk Management: Government Lawyers and the Provision of Legal Advice within Whitehall' (The Constitution Society 2013). See also Jean Paul Jacqué, 'The Role of Legal Services in the Elaboration of European Legislation' in Antoine Vauchez and Bruno Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing) 50–51.

politician's intentions.[6] These lawyers are also expected to fulfil a duty to the public by ensuring that legislation is accessible and comprehensible to those governed by it.[7] Furthermore, bureaucratic lawyers are sometimes associated with serving a constitutional role by evaluating the compliance of legislative proposals with values integral to the legal order, including equality and fairness.[8]

Bureaucratic lawyers have been described as 'double agents' on the premise that they are legal professionals who also serve a duty towards the bureaucratic organisations by which they are employed.[9] Being embedded in these organisations, and being subject to relevant internal hierarchies, can compromise their ability to maintain the independence needed to uphold foundational principles of modern government, including legality and constitutionality.[10] It is in fact not unusual for organisations that employ bureaucratic lawyers to hold a degree of scepticism about them, perceiving them as 'too conservative when it comes to taking risks' or regarding them 'as legal perfectionists (wanting to eliminate risk rather than manage or accept some tolerance for legal problems with proposed courses of action).'[11] In contrast, bureaucratic lawyers with an 'overly aggressive appetite for risk' may be perceived as creating problems for organisations that want to ensure that 'the administration of justice' is upheld.[12]

[6] Teri Cherkewich, 'By Sword and Shield: Legislative Counsel's Role in Advancing and Protecting Democracy One Word (and Client) at a Time' (2015) 36(3) Statute Law Review 253, 254. See also David A Marcello, 'The Ethics and Politics of Legislative Drafting' (1996) 70 Tulane Law Review 2437, 2453.
[7] VCRAC Crabbe, 'The Ethics of Legislative Drafting' (2010) 36(1) Commonwealth Law Bulletin 11, 16.
[8] Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999) 254. See also Keyes (2009) as cited in Cherkewich (n 6) 257.
[9] Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2014) 4. See also Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart Publishing 2019).
[10] Moorhead, Vaughan and Godinho (n 9) 60.
[11] ibid 61.
[12] ibid.

Despite the importance of bureaucratic lawyers in safeguarding fundamental principles of government, and the interest linked to their 'double agent' role, a comprehensive examination of their working practices has been largely neglected from the academic literature.[13] While the legal ethics scholarship covers the topic of bureaucratic lawyering, typically in relation to the United States and Canada, it rarely addresses the *actual* work of these lawyers.[14] Instead, it tends to make normative assumptions about their 'proper' behaviour based on existing rules of legal professional conduct or broader principles (e.g., public interest). Moreover, bureaucratic lawyers are still described as 'the orphans of legal ethics' as much more attention is placed on lawyers in private practice.[15] The tendency to overlook bureaucratic lawyers does in fact mirror broader trends in the legal scholarship as lawyers working in private practice or the courtroom receive considerably more attention.[16]

One might reasonably assume that research on the work of bureaucratic lawyers would have increased as a result of the socio-legal movement. Although traditional doctrinal legal scholarship meant that legal academics were mostly concerned with the analysis of legal rules, the socio-legal movement has encouraged an alternative approach to the study of law.[17] The practice of bureaucratic lawyering has nevertheless escaped the attention of most socio-legal scholars, possibly because much of the existing socio-legal scholarship is still rooted in the content of legal

[13] This is explicitly acknowledged in Dotan (n 9) 2.
[14] For legal advisers see Randolph D Moss, 'Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel' (2000) 52(4) Administrative Law Review 1303, 1306. For legislative drafters see Roger Purdy, 'Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems' (1987) 11(1) Seton Hall Legislative Journal 67; Cherkewich (n 6). Note that in the United States, legislative drafters often work for the legislature.
[15] Allan C Hutchinson, 'In the Public Interest: The Responsibilities and Rights of Government Lawyers' (2009) 10(6/7) German Law Journal 981, 981.
[16] Dotan (n 9) 2.
[17] Christopher McCrudden, 'Legal Research and the Social Sciences' 122(Oct) Law Quarterly Review 632; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell Publishing 2008) 29.

rules, albeit in the context of their relationship with society.[18] Moreover, real-life insights into the work of bureaucratic lawyers would need a foundation established in empirical methods rather than pure theory, but empirical methods are only used in a modest proportion of the socio-legal scholarship in the UK.[19]

Another strand of scholarship that would presumably be interested in the study of bureaucratic lawyering, especially given its focus on the policy framing dimensions of law-making, is the political science literature. However, this has also overlooked the involvement of bureaucratic lawyers despite their crucial role in clarifying and developing the underlying policies of legislative initiatives. Nevertheless, what the political science literature can provide is a crucial understanding of how bureaucrats define and understand their roles within a political system. This thesis will therefore draw insights from the political science scholarship, as well as the aforementioned legal ethics scholarship, to develop a unique analytical framework that establishes a set of expectations regarding the possible behavioural patterns of lawyers working within executive-bureaucratic organisations, including their level of independence from political interests and their willingness to maintain this independence.

1.3. Multiple-case study

This thesis adopts a multiple-case study design as it explores the working practices of UK Government and European Commission lawyers. For the purposes of this thesis, a multiple-case study provides a better understanding of the organisational structures able to shape the perceptions and behaviours of bureaucratic lawyers.[20] In multiple-case studies, researchers often select cases with the expectation that they

[18] Reza Banakar and Max Travers, 'Introduction' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 17, fn 26; Dermot Feenan, 'Exploring the "Socio" of Socio-Legal Studies' in Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013).
[19] Hazel Genn, Martin Partington and Sally Wheeler, 'Law in the Real World: Improving Our Understanding of How Law Works' (The Nuffield Foundation 2006) 26–27.
[20] Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50(1) Academy of Management Journal 25, 27.

will have different outcomes for foreseeable reasons.[21] There are numerous factors that influenced my selection of cases, extending beyond the fact that UK Government and European Commission lawyers are both under-researched. First, the national-supranational distinction is of particular interest as it is expected that the supranational legal order will assign roles and responsibilities to lawyers that are not applicable to those working at the national level, such as ensuring the legal and linguistic parallelism of translated proposals. The supranational order also imposes additional legal constraints which lawyers must navigate in their work, such as the principle of conferral which establishes that the EU can only take actions 'within the limits of the powers assigned to it' by the Member States.[22] As the principle of conferral is fundamental in safeguarding the division of powers between the EU and the Member States, bureaucratic lawyers serve a central role in preventing any breaches as this can (further) reduce trust and confidence in the EU. This is in stark contrast to the notion of Parliamentary Sovereignty which allows UK legislation to be amended or repealed without significant legal constraints.[23]

Another key distinction relates to the fact that the European Commission derives its democratic legitimacy indirectly.[24] Unlike UK Government ministers who are typically directly elected Members of Parliament, Commissioners are not directly elected although Members of the European Parliament, who are themselves directly elected, must vote on whether to approve them. Empirical research, outlined in chapter three of this thesis, will demonstrate that national bureaucrats often rationalise their deference to political objectives by relying on the elected status of political superiors, representing the classic Weberian distinction between bureaucrats and politicians.[25]

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[21] Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th edn, SAGE Publications 2018) 55.
[22] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 107. Consolidated Version of the Treaty on European Union 2016 (OJ C202/13), art 5(2).
[23] To understand how the application of Parliamentary Sovereignty has been limited over the years see UK Parliament, 'Parliament's Authority' (*UK Parliament*) <https://www.parliament.uk/about/how/role/sovereignty/> accessed 1 September 2023.
[24] Craig and de Búrca (n 22) 189–90.
[25] Tholen and Mastenbroek (n 5).

With this in mind, there is scope to explore how the contrasting nature of the European Commission might lead to different perspectives and behaviours among bureaucratic lawyers given that they do not work alongside elected officials.

As suggested already, another factor influencing the selection of cases is that the UK Government and European Commission adopt different law-making models, with the UK adopting a common law model and the EU being more closely aligned with a civil law model. While scholars tend to discuss this in terms of different drafting styles, this distinction also leads to differences in the law-making processes, as well as the contributions and timelines of the respective lawyers' working practices.[26] One of the major differences found in common and civil law jurisdictions is whether the drafting is centralised or not. Centralised systems are more typical in common law jurisdictions and rely on specialist drafting lawyers to produce the initial draft, on the basis of legal instructions prepared by policy officials and legal advisers.[27] Thus, lawyers make a substantial contribution even before the legislative proposal is drafted. Civil law jurisdictions, on the other hand, often adopt a decentralised system where the proposal is composed by policy officials who are specialists in the relevant subject area.[28] Once composed, the proposal is formally submitted to legal advisers who check its lawfulness and to legal revisers who check its drafting quality.[29]

[26] For a further discussion on the distinction of drafting styles see Ramos and Heydt (n 4) 140–42. See also Helen Xanthaki, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe' (2012) 6(2) Legisprudence 133; William Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (2014) 2(3) Theory and Practice of Legislation 249. This literature does in fact suggest that the drafting styles may no longer as dissimilar compared to previous years.
[27] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 263.
[28] ibid; Stefan Höfler, Markus Nussbaumer and Helen Xanthaki, 'Legislative Drafting' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017) 153–58.
[29] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 265–66; Höfler, Nussbaumer and Xanthaki (n 28) 154. However, the empirical analysis will reveal that these lawyers are likely to have informal involvement prior to this.

1.4. Background information

To contextualise insights provided throughout this thesis, it is necessary to identify and explain certain similarities and differences between the UK Government and the European Commission, including their law-making processes.[30] Although this thesis will explore the work of UK Government and European Commission lawyers during the preparation of legislative acts, these acts represent different *sources* of law in the respective organisations. In the case of the UK Government, this thesis considers the preparation of Acts of Parliament which represent the highest form of law in the UK, referred to as Bills before their approval by the House of Lords and the House of Commons.[31] The primary reason for focusing on Acts of Parliament, otherwise referred to as statutes, stems from the fact that their preparation necessitates the involvement of legal advisers and legislative drafters which are both of interest in this thesis, while secondary legislation is predominantly a matter for legal advisers only.

In the case of the EU, this thesis considers the preparation of binding legislative acts.[32] While the treaties are the highest form of law in this supranational legal order, they are significantly different in nature than Acts of Parliament and therefore cannot form an appropriate comparison.[33] While the EU Treaties are often compared to national constitutional texts, they are in fact examples of international agreements as they are negotiated and agreed by the Member States. They outline EU objectives, define decision-making procedures, and establish the relationship between the EU

[30] For more information on the UK law-making process see Michael Zander, *The Law Making Process* (7th edn, Hart Publishing 2015); Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press 2017). For the EU law-making process see Craig and de Búrca (n 22).
[31] UK Parliament, 'Acts of Parliament' <https://www.parliament.uk/site-information/glossary/acts-of-parliament/> accessed 25 May 2022.
[32] Consolidated Version of the Treaty on the Functioning of the European Union 2016 (OJ C202/47), art 289.
[33] For this national-supranational distinction see Kieran Bradley, 'Legislating in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 108–09.

and the Member States.[34] They also establish the rules and powers of the various EU institutions to produce binding legislative acts, namely: regulations, directives, and decisions.[35] Similar to Acts of Parliament, the preparation of these acts necessitates the involvement of two types of lawyers, specifically legal advisers and legal revisers.

Having identified the relevant types of law, this section will now provide some brief background information on the associated law-making processes within the UK Government and European Commission, highlighting the involvement of lawyers. In the UK Government, the process includes the preparation of a Public Bill prior to its introduction in the House of Lords and the House of Commons.[36] A Public Bill is a proposal for a new law that applies to the general population. The vast majority of Public Bills that are successfully passed into law are proposed by government ministers.[37] While some of these Bills emerge as a result of manifesto commitments, some of them may also be recommended from committees or independent advisory commissions.[38] The lead government department, specifically the minister-led department initiating the Bill, has several responsibilities including the need to consult interested government departments or agencies.[39] It also has the

[34] The last significant treaty reform was in 2009 when the Treaty of Lisbon entered into force. Treaties can also be amended 'from time to time' to allow for other countries to join and to make changes to the EU institutions, for example. See European Commission, 'Types of EU Law' <https://commission.europa.eu/law/law-making-process/types-eu-law_en> accessed 25 May 2022.
[35] Treaty on the Functioning of the European Union, art 288.
[36] A Public Bill is a proposal for a new law that applies to the general population. In the context of this thesis, the focus is on Public Bills proposed by government ministers. For a description of the different types of UK Bills see UK Parliament, 'What Is a Bill?' <https://www.parliament.uk/about/how/laws/bills/> accessed 5 July 2022.
[37] Public Bills can also be proposed by other MPs or Lords. These are called Private Members' Bills but are not the focus of this thesis. See UK Parliament, 'Private Members' Bills' <https://www.parliament.uk/about/how/laws/bills/private-members/> accessed 5 July 2022.
[38] Zander (n 30) 4.
[39] ibid 10.

responsibility of deciding ‘whether and, if so, to what extent persons or bodies outside the governmental machine should be consulted’.[40]

Lead departments must also bid for a slot in the legislative programme in order for the Bill to be introduced to Parliament.[41] To do so, a department must submit a bid template to the Parliamentary Business and Legislation (PBL) Committee which is made up of ministers who take collective decisions on matters regarding the legislative programme. The PBL Committee will assess bids on a number of factors, including the necessity of primary legislation, the political urgency of the proposal, and how much progress has been made on the proposal.[42] Following consultation with No. 10, business managers, and the Office of the Parliamentary Counsel (OPC), the PBL Committee presents the Cabinet with a provisional programme for agreement. At this stage, it also grants provisional drafting authority to lead departments. Around five to six months before the parliamentary session, the PBL Committee will review the programme and consider whether any changes should be made. Around one month prior to the beginning of the session, the programme is finalised and included in the King’s speech.

Once the department secures a slot in the legislative programme, it must appoint a Bill team and a Bill manager. The Bill manager’s role ‘is to maintain an eye on the parliamentary timetable and an objective overview of the entire bill, rather than getting caught up in the detail of the policies.’[43] The manager is accompanied by the rest of the Bill team, with three to four departmental officials often being enough.[44] The Bill manager will allocate specific responsibilities amongst these officials, such as stakeholder management or overseeing the delivery plan. Central to the preparation of a Bill is also a team of policy officials led by one or more policy leads. The policy team is primarily responsible for developing and shaping the substantive

[40] ibid.
[41] Cabinet Office, ‘The Guide to Making Legislation’ (2022) 11.
[42] ibid 29–30.
[43] ibid 33.
[44] A single legal representative from GLD may be appointed to the Bill team to oversee the work of the legal team (e.g., ensure timelines are met) and be a legal point of contact within the Bill team. This is especially important if the Bill is complex with multiple measures.

policy or policies contained in the Bill.[45] Other bureaucrats closely involved in the Bill's preparation are *legal advisers* from the Government Legal Department (GLD).[46] While just one legal adviser may be appointed, it could also be a small collection of legal advisers with one nominated to lead the rest. The Bill will also be assigned to two or three *Parliamentary Counsel* from OPC who are specialist drafting lawyers.

Once the policy has been worked out in sufficient detail between the policy team and legal advisers, legal instructions are submitted to Parliamentary Counsel who are responsible for drafting the Bill provisions. While their title suggests an organisational affiliation to the UK Parliament, Parliamentary Counsel are in fact employed by OPC which is part of the Cabinet Office. When the drafting of the Bill is completed, the latest draft must be submitted to the PBL Committee in addition to other relevant documents such as the covering memorandum, the impact assessment, the explanatory notes, and the legal issues memorandum which confirms that the Bill is compatible with the European Convention on Human Rights. The PBL Committee will then arrange a meeting with any ministers interested or concerned by the Bill, in addition to OPC and any departmental officials who need to assist their minister. If the PBL Committee decides that the Bill can be presented to Parliament, it must choose the date of presentation which partly depends on how much redrafting must be done to account for the Committee's deliberations.[47]

In the European Commission, the process includes the preparation of a legislative proposal for submission to the ordinary legislative procedure. This procedure is the 'standard procedure' for adopting EU legislative acts.[48] It places the European Parliament and Council on an equal footing as the adoption of a legislative act requires the agreement of both institutions. The Commission has responsibility over planning and proposing new legislative acts and thus has a similar role to the

[45] Cabinet Office (n 41) 34.
[46] There are some ministerial departments which still have their own lawyers, but these departments are in the minority.
[47] Zander (n 30) 16.
[48] Alina Kaczorowska, *European Union Law* (3rd edn, Routledge 2013) 149.

executive branch of a national government.[49] The Commission can choose to prepare legislation on its own initiative or can do so in response to invitations from the Council of the European Union, the Council, the Parliament, or EU citizens. The most important actions to be taken by the Commission in the year ahead are laid out in an annual work programme.[50] Legislative proposals are prepared and written by policy officers in the lead Directorate-General (DG), specifically the Commission policy department to which the proposal belongs.[51] DGs are led by one or more Commissioners and in this sense are similar to national ministries.[52]

Once a broad outline of an anticipated proposal is prepared, it is submitted to the appropriate Commissioner(s) for approval. It is then submitted to the College of Commissioners who must agree that it is 'worth pursuing and the timing is right'.[53] If agreement is reached, the lead DG must then begin the process of framing the proposal and drafting the legislative text accordingly.[54] This process requires that the proposal is subject to several considerations which include the preparation of an impact assessment and broad consultation with stakeholders, businesses, and citizens. The lead DG has discretion as to whether it informally consults other internal departments at this point, including horizontal services like the Commission Legal Service. This choice is dependent on various factors, including the 'working culture' of the DG and the 'political sensitivity' of the proposal.[55] This discretion is more constrained than it used to be as the internal consultation process is becoming increasingly formalised. This is demonstrated, for instance, by the Secretariat-

[49] Treaty on European Union, art 17(2); Treaty on the Functioning of the European Union, art 294(2).
[50] For a list of annual work programmes see European Commission, 'Commission Work Programme' <https://ec.europa.eu/info/publications/commission-work-programme_en> accessed 19 July 2022.
[51] Miriam Hartlapp, Julia Metz and Christian Rauh, 'Which Policy for Europe?: Power and Conflict Inside the European Commission' (2013) 35(4) Journal of European Integration 425, 429.
[52] John McCormick, *Understanding the European Union: A Concise Introduction* (8th edn, Bloomsbury Publishing 2021) 75.
[53] Kaczorowska (n 48) 154.
[54] Hartlapp, Metz and Rauh (n 51) 429.
[55] Andrew Jordan and Adriaan Schout, *The Coordination of the European Union Exploring the Capacities of Networked Governance* (Oxford University Press 2006) 219.

General advancing the formation of interservice groups which facilitate 'regular cross-DG exchange in particular issue areas'.[56]

Once the legislative text is prepared, the internal coordination procedure of the Interservice Consultation (ISC) is launched which requires the lead DG to formally request the opinion of other Commission departments interested in the contents of the draft legislative proposal, either by virtue of their responsibilities or the nature of the subject matter. The process is laid out in Article 21 of the Commission Rules of Procedure which establishes that the Commission Legal Service is one of the departments which must 'be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications.'[57] The Legal Service is the Commission's in-house legal counsel which is made up of *legal advisers* who offer advice on the legal substance of the proposal and *legal revisers* who are responsible for assessing drafting quality. From the moment the Legal Service is consulted in the ISC, it is given ten to fifteen working days to issue a Legal Service opinion, depending on whether the proposal is more or less than twenty pages long. While the contents and consequences of the legal opinion will be explored in depth in subsequent chapters, it is worth noting that there are three types of opinions that can be granted: positive, positive subject to amendments, and negative.

It is only once the ISC is completed that the political level becomes formally involved. The proposal is placed on the agenda of the College of Commissioners and two decision-making procedures are possible: the written procedure and the oral procedure. The written procedure can only take place if 'the Directorates-General directly involved are all in agreement and the proposal has been endorsed by the Legal Service' otherwise the proposal must be considered under oral procedure.[58] In the written procedure, all Commissioners will receive the proposal with a specified time limit within which they must express their reservations. If no reservations are expressed within the time limit, their assumption is implied. Proposals which do not

[56] Hartlapp, Metz and Rauh (n 51) 429.
[57] Rules of Procedure of the Commission 2000 (OJ L308/26), art 21.
[58] ibid, art 12.

receive any reservations are adopted by the Commission. If reservations are expressed, then the proposal will be considered under oral procedure during a meeting attended by all Commissioners. Under oral procedure, the proposal will be 'adopted if a majority of the number of Members specified in the Treaty vote in favour. This majority shall be required irrespective of the tenor and nature of the decision.'[59]

While this thesis does not explore the work of UK Government and European Commission lawyers once a legislative proposal has been submitted to the legislative branch, it is important to note that many of them are still involved in the later stages, with the exception of Commission legal revisers whose contribution is "pretty much exhausted" when the proposal is submitted to the European Parliament and Council.[60] It is also worth mentioning that the UK and EU legislatures employ their own lawyers. In the UK House of Commons, these lawyers are located in the Office of the Speaker's Counsel which is made up of around fifteen lawyers whose work falls into two key categories, specifically general legal advice and support for committees.[61] In the House of Lords, there is "a very small group of legal staff" who support parliamentary committees that have legal responsibilities.[62] The European Parliament and Council also employ lawyers, most of whom also work for a centralised Legal Service. The exception are Parliament lawyer linguists who are independent from the Parliament Legal Service.[63]

[59] ibid, art 8.
[60] Interview with CLR 3 (27 April 2017). Commission legal advisers are also relatively 'distanced' from the legislative process although the Commission representative in the trilogues will usually relay any legal queries back to the Legal Service internally.
[61] Interview with HC 24 (14 November 2019). The Office of the Speaker's Counsel has a greater involvement in the scrutiny of secondary legislation. Parliamentary clerks who are not lawyers, but are proceduralists, are closely involved in the parliamentary passage of primary legislation.
[62] Interview with HL 26 (11 December 2019). Similar to House of Commons lawyers, most of their work is focused on matters concerning secondary legislation although they have a comparatively greater role in primary legislation given their involvement with the Delegated Powers and Regulatory Reform Committee.
[63] The separation of lawyer linguists from the Parliament Legal Service was initiated around fifteen years ago when there was a reform of the administration. They are now situated in the Directorate for Legislative Acts.

1.5. Structure of the thesis

Chapter two comprises the literature review which is divided into two key sections, the first of which demonstrates the paucity of literature on the working practices of bureaucratic lawyers, especially from an empirical perspective. Accordingly, the section argues that there has been a missed opportunity in the socio-legal scholarship to explore the work performed by lawyers within a bureaucratic context. The second section of the literature review will discuss the academic literature which explores the work of UK Government and European Commission lawyers specifically. Although these studies contribute to our understanding of what these lawyers do, they frequently overlook various aspects that would offer a more comprehensive and nuanced understanding of what their work entails in practice, such as the everyday tasks, judgments, interactions, and time frames involved.

The central argument emerging from chapter two is that there is a notable gap in knowledge on the actual, real-life experiences of bureaucratic lawyers, including those working in the UK Government and European Commission. This observation emphasises the need to explore the work of UK Government and European Commission lawyers using a qualitative data collection method that could achieve rich, detailed insights into their experiences. Chapter three develops a unique analytical framework to guide the empirical analysis of this thesis. It begins by revisiting the existing literature in chapter two to outline *what* functions UK Government and European Commission lawyers are expected to perform in their work, and *when* in the process they are likely to do so. This framework will also be used to analyse the underlying sociological factors and dynamics that can influence *how* UK Government and European Commission lawyers perform their work within their bureaucratic contexts. This dimension of the framework is informed by various strands of literature, primarily drawn from legal ethics and political science, and is underpinned by two theories which emphasise the importance of in-house socialisation in influencing how lawyers perform their work, specifically in relation to their political-professional behaviour and expertise.

Chapter three will also provide a logical structure for the empirical analysis by separating the law-making processes of the UK Government and European Commission into two distinct chronological phases, specifically: converting the policy problem into a legal solution *and* finalising the legal solution for introduction to the legislature. Chapter four will outline the methodological approach of this thesis, including the various steps taken to ensure research quality, and identify the four key research questions. For reference, these questions include:

1) What are the organisational positions of UK Government and European Commission lawyers in their respective bureaucracies?
2) What are the functions of these lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?
3) How do lawyers perceive their roles, and how does this influence their political-professional behaviour?
4) How do lawyers acquire the expertise needed to perform their work?

Chapters five, six, and seven will provide the empirical analysis of this thesis. In light of chapter three which emphasises the importance of in-house socialisation, chapter five will present empirical findings to uncover the organisational positions of UK Government and European Commission lawyers. This offers a more comprehensive and nuanced understanding of the institutional environments these lawyers are socialised into.[64] Chapters six and seven will examine the everyday work of UK Government and European Commission lawyers when preparing a legislative proposal for introduction to the legislature, with each of these chapters focusing on a particular chronological phase. The empirical findings will provide a detailed and up-to-date account of *what* functions the lawyers perform. This account will be presented chronologically, as told by participants, to acquire a comprehensive understanding of *when* they perform these functions. Chapters six and seven will

[64] While most emphasis in chapter five is on predicting the bureaucratic behaviour of lawyers, it does also provide valuable insights for better understanding the acquisition and development of their expertise.

also apply theoretical insights from chapter three to explore *how* lawyers perform their work, both in terms of their political-professional behaviour and expertise.

In brief, the political-professional behaviour of lawyers ultimately relates to how they navigate the political-professional conflict inherent in bureaucracies. This conflict has a strong heritage back to organisational sociology and Max Weber's writings on bureaucracy. The expertise of lawyers is based on a realist notion of expertise which emphasises the ongoing and dynamic learning process experienced by lawyers within their respective bureaucratic organisations. Chapter eight will then conclude this thesis and emphasise how the key research questions have been answered throughout this thesis. Chapter eight will also highlight the possible methodological limitations of this research and draw attention to opportunities for further research.

Chapter Two: Literature Review

2.1. Introduction

This literature review is divided into two key sections. The first section addresses the paucity of literature on bureaucratic lawyers, particularly from an empirical standpoint. While certain insights can be acquired from the broader field of legal scholarship on in-house lawyers, particularly in relation to the compromised independence of these lawyers, this chapter emphasises the need for additional research that specifically considers the unique nature of bureaucratic lawyers. The section will then introduce a well-defined and established body of literature on bureaucratic lawyers which is found in the Canadian and American legal ethics scholarship. It will emphasise the highly normative approach of this literature which lacks direct engagement with bureaucratic lawyers themselves. While the process of legislative drafting has also carved out its own place within the legal scholarship, this literature does not provide much insight into what the practice of being a bureaucratic lawyer entails. Accordingly, this section will argue that there has been a missed opportunity in the socio-legal scholarship to acquire a more comprehensive understanding of the work performed by lawyers in a bureaucratic context.

The second section of this chapter will specifically discuss the existing literature on the work of UK Government and European Commission lawyers in preparing a legislative proposal for submission to the legislature. The aim of this is twofold. In addition to emphasising the major knowledge gaps and methodological limitations of this literature, it also describes what is currently known about what UK Government and European Commission lawyers do as this enables readers to identify how much fresh insight is offered in this thesis. Providing an overview of what is currently known was not a straightforward task of copying information across from the literature. Aside from some notable exceptions, the existing literature tends to offer vague, brief, and incomplete statements about the work of these lawyers. Thus, it was not until I had closely examined a considerable amount of the literature that I was able to put the pieces together to acquire a better understanding of their work.

The concluding section of this chapter will emphasise the rationale of this thesis by advancing that the academic literature fails to address the three dimensions of UK Government and European Commission lawyers' work, specifically the what, when, and how dimensions introduced in chapter one. This section will also provide a brief introduction to the analytical framework in chapter three which is developed to help overcome the knowledge gap identified in this chapter and to make a contribution to the socio-legal scholarship on bureaucratic lawyers. Finally, the concluding section will also highlight some interesting and meaningful comparisons between the work of UK Government and European Commission lawyers as identified in the literature.

2.2. Bureaucratic lawyers

There is a shortage of academic literature on bureaucratic lawyers, particularly from an empirical standpoint. In 1981, Gavin Drewry described the topic of bureaucratic lawyering as a 'largely unexplored jungle'.[65] In 2021, Linda Mulcahy expressed that 'little has changed' since Drewry's statement.[66] The lack of attention given to bureaucratic lawyers is visible not just in academic scholarship but also in professional codes of conduct governing legal professionals.[67] In the case of the UK, the Solicitors Regulation Authority (SRA) recognises that in-house lawyers, including those working in government, may find it more challenging to maintain independence if their employers' interests do not align with their legal regulatory obligations.[68] Despite this recognition, neither the SRA Principles nor the SRA Code of Conduct provide specific provisions to address the possible challenges encountered by in-

[65] Gavin Drewry (1981) as cited in Philip SC Lewis and Linda Mulcahy, 'Government Lawyers: Technicians, Policy Shapers and Organisational Brakes' (2021) 28(1) International Journal of the Legal Profession 23, 23.
[66] ibid. In addition to exceptions mentioned below in relation to the UK context, one study that stands out as an exception to the paucity of empirical literature on bureaucratic lawyers focuses on the Australian Solicitor-General. See Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing 2016).
[67] For the Canadian context see Deborah Macnair, 'Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective' (2003) 24(2) Statute Law Review 125; Hutchinson (n 15).
[68] Solicitors Regulation Authority, 'In-House Solicitors Thematic Review' (2023).

house lawyers, including government lawyers.[69] This tension is not addressed in the Code of Conduct of the Bar of England and Wales either.[70]

2.2.1. In-house lawyers

In-house lawyers are defined as 'those lawyers who work for, and are employed by, corporations, public bodies, and/or the third sector, rather than working on their own account or in law firms.'[71] Thus, the challenges experienced by bureaucratic lawyers can, to some extent, be identified within the broader academic literature on in-house lawyers, although this literature also remains limited in scope.[72] This literature tends to focus on the extent to which in-house lawyers, usually those working in corporations, can maintain a sense of professional independence, particularly as they are reliant on their corporations for employment. Lawyers may 'need to pay a price' for asserting their independence, such as receiving negative performance reviews, being dismissed from their positions, or feeling compelled to resign.[73] These studies tend to engage with lawyers working in corporations, through interviews or surveys, to examine how they define and perceive their roles, with a focus on how much independence their roles exhibit from organisational interests. The overarching conclusions indicate that in-house lawyers adopt distinct occupational roles from 'conventional private practice lawyers' as they are inclined to align with

[69] 'SRA Principles' <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 1 September 2023; 'SRA Code of Conduct for Solicitors, RELs and RFLs' <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 1 September 2023.
[70] 'Bar Standards Board Handbook' <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 1 September 2023, part 2.
[71] Moorhead, Vaughan and Godinho (n 9) 2–3.
[72] Robert L Nelson and Laura Beth Nielsen, 'Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations' (2000) 34(2) Law & Society Review 457; Hugh P Gunz and Sally P Gunz, 'The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel' (2002) 39 American Business Law Journal 241; Pam Jenoff, 'Going Native: Incentive, Identity, and the Inherent Ethical Problem of In-House Counsel' (2012) 114 West Virginia Law Review 725; Tanina Rostain, 'General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions' (2008) 21(2) Georgetown Journal of Legal Ethics 465; Moorhead, Vaughan and Godinho (n 9).
[73] Moorhead, Vaughan and Godinho (n 9) 214.

organisational interests, or at the very least, consider them in their decision-making.[74]

A well-known article by Robert Nelson and Laura Nielsen is based on interviews with lawyers working in major US corporations to determine whether the ways in which they perceive their roles aligns with one of three ideal typical roles: 'cops (limiting their advice to legal mandates), counsel (combining legal and business advice), or entrepreneurs (giving priority to business objectives rather than legal analysis).'[75] The overall findings demonstrate that twice as many lawyers advance an entrepreneurial role compared to the role of a cop, with half the total number of lawyers falling within the counsel category.[76] The empirical findings also highlighted that in-house lawyers do not tend to fall neatly within one of these three roles as they 'play different roles in different circumstances'.[77] Furthermore, it was common for the in-house lawyers to adopt a 'repertoire' of roles where their responses incorporated elements of each role, albeit with varying degrees of emphasis.[78] While Nelson and Nielsen do not analyse the concept of a role perception in accordance with theoretical frameworks, chapter three of this thesis will highlight that role perceptions frequently result from a blend of various roles, with organisational factors often determining which is emphasised more prominently.

Richard Moorhead, Steven Vaughan, and Cristina Godinho carry out interviews and a survey with in-house lawyers in England and Wales, including those employed by corporations, the third sector, and government.[79] This research provides fresh and valuable understandings of in-house lawyering, although the vast majority of the participants' responses and subsequent analysis concentrates on commercial interests and pressures. As a result, the nuances of operating within a bureaucratic context and the influences of political pressures on lawyers are less frequently the

[74] ibid 9.
[75] Nelson and Nielsen (n 72) 457.
[76] To a certain degree, the numerical predominance of the counsel category is due to Nelson and Nielsen's coding scheme as this role represented the default category.
[77] Nelson and Nielsen (n 72) 463.
[78] ibid.
[79] Moorhead, Vaughan and Godinho (n 9).

focus and there is therefore scope and merit to delve deeper into this topic.[80] In fact, the research by Moorhead et al provides additional support for a dedicated study on the unique circumstances of bureaucratic lawyers as the empirical findings reveal that lawyers working in the public sector are inclined to rate the professional principles of 'independence and legality' more highly than those working in corporations.[81] Moreover, those working in the public sector identified 'significantly *higher* ratings of ethical pressure than those working in a business.'[82]

The knowledge gap on bureaucratic lawyers is crucial to address as a substantial proportion of executive legal work does not reach the courts. Accordingly, 'the advice of government lawyers can have far greater impact on what governments decide to do – or decide not to do - than anything the courts might decide.'[83] A well-defined and established body of academic research on bureaucratic lawyers is often found in the American and Canadian legal ethics scholarship.[84] However, even within this body of literature, significantly more thought and emphasis is placed on researching lawyers in private practice.[85] Moreover, a narrow litigation-oriented focus has also meant that bureaucratic lawyers who represent the executive branch in the courts have received comparatively more attention than those involved in the provision of

[80] This is also recognised in Lynn Mather, 'In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence by Richard Moorhead, Steven Vaughan, and Cristina Godinho' (2019) 46(4) Journal of Law and Society 691.
[81] Moorhead, Vaughan and Godinho (n 9) 178.
[82] ibid 67.
[83] Yong (n 5) 16.
[84] For example see Purdy (n 14); Moss (n 14); W Bradley Wendel, 'Professionalism as Interpretation' (2004) 99(3) Northwestern University Law Review 1167; Hutchinson (n 15); Patrick J Monahan, '"In the Public Interest": Understanding the Special Role of the Government Lawyer' (2013) 63(3) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 49; W Bradley Wendel, 'Government Lawyers in the Trump Administration' (2017) 69(1) Hastings Law Journal 275.
[85] Hutchinson (n 15) 981.

legal advice or legislative drafting.[86] The following discussion will examine how the topic of bureaucratic lawyers has been approached in the legal ethics scholarship.

2.2.2. The ethical conduct of bureaucratic lawyers

As a starting point, the legal ethics research often examines the codes and standards regulating the professional conduct of lawyers to argue that there is limited guidance for legal advisers and legislative drafters working in government. Typically, this research then provides a normative standpoint of how these lawyers *should* or *should not* behave, including their degree of independence from political preferences. With regard to legal advisers, the conclusions reached about the 'proper' ethical conduct of these lawyers are often based on distinctions between them and their counterparts in private practice, including whether they should be bound by the principle of partisanship which characterises the conduct of lawyers in private practice.[87] Some of these studies also rely on past executive decisions to evaluate the ethical conduct of bureaucratic legal advisers. A key example includes the advice provided by legal advisers serving the United States executive branch on the permissibility of 'enhanced interrogation techniques' on detainees following the September 11 attacks.[88]

The principle of partisanship is frequently used as an example to advance the argument that bureaucratic lawyers should behave differently from lawyers in private practice. More specifically, this principle is based on the idea of a zealous advocacy where private practice lawyers vigorously argue in favour of their client's position

[86] Fred C Zacharias, 'Structuring the Ethics of Professional Trial Practice: Can Prosecutors Do Justice?' (1991) 44(1) Vanderbilt Law Review 45; Steven K Berenson, 'Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?' (1999) 41(4) Boston College Law Review 789; William Josephson and Russell Pearce, 'To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?' (1986) 29(4) Howard Law Journal 539.
[87] Nelson Lund, 'Rational Choice at the Office of Legal Counsel' (1993) 15(1–2) Cardozo Law Review 449.
[88] Wendel, 'Government Lawyers in the Trump Administration' (n 84) 281. See also Dawn E Johnsen, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2007) 54(6) UCLA Law Review 1559.

within the bounds of the law.[89] One argument rejecting the applicability of partisanship to bureaucratic lawyers is based on the idea that they are in a different position to private practice lawyers as they have an ethical duty to 'hold the government to its responsibility under the Rule of Law… They should not be advising the political bosses that they are entitled to avoid the impact of legal constraint where it is ambiguous or unclear.'[90] Another argument rejecting the principle of partisanship in relation to bureaucratic lawyers is premised on the view that this principle fails to account for the practical difficulties these lawyers face with client identification. Roger Cramton argues that most professional codes and standards are drafted on the premise that a lawyer is either representing an individual client or an uncomplicated corporation.[91] Cramton nevertheless proposes five possible clients for a bureaucratic lawyer:

> (1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency.[92]

Empirical research has in fact shown that legal advisers working in the United States executive branch offered a wide range of responses in terms of who their client was including the State Department, the instructing department, and the Senate.[93] Another principle used to assess the ethical behaviour of bureaucratic lawyers is the notion of public interest. As the work of bureaucratic lawyers is more directly situated in the immediate domain of the public interest, one of the leading questions in the legal ethics scholarship is whether these lawyers have a greater ethical responsibility to represent the public interest than private practice lawyers. Some have argued that bureaucratic lawyers should be subject to higher ethical standards than private

[89] Wendel, 'Government Lawyers in the Trump Administration' (n 84) 298.
[90] Waldron (2010) as cited in Matthew Windsor, 'The Ethics of Government Legal Advisers' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing 2013) 121.
[91] Roger C Cramton, 'The Lawyer as Whistleblower: Confidentiality and the Government Lawyer' (1991) 5(2) The Georgetown Journal of Legal Ethics 291, 296.
[92] ibid.
[93] See Windsor (n 90) 129.

lawyers as they 'exercise state power in everything they do'.[94] The mainstream position appears to be, however, that bureaucratic lawyers do not have an ethical obligation to the public interest which exceeds what is expected from private practice lawyers. When advancing this view, a frequent argument is that there are several competing notions of what constitutes the public interest:

> Despite its surface plausibility, the notion that government attorneys represent some transcendental "public interest" is, I believe, incoherent. It is commonplace that there are as many ideas of the "public interest" as there are people who think about the subject.[95]

It has also been argued that shifting power to lawyers to decide what constitutes the public interest falls contrary to a strictly democratic model of good governance. Allan Hutchinson expressed that prioritising lawyers' views on the public interest over the views of elected and accountable officials is undemocratic and 'perhaps even anti-democratic'.[96] This argument has clear parallels with the classic Weberian model of bureaucracy explored in chapter three which maintains that bureaucrats should refrain from exercising autonomous decision-making due to their unelected status.[97] Geoffrey Miller expanded on the point made by Hutchinson and stressed that, although the public interest as a reified concept might not be determinable, constitutional procedures such as elections and appointments are put in place to approximate this concept. With this in mind, Miller argued that 'nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.'[98]

A third principle which is used to assess the ethical behaviour of bureaucratic lawyers is that of legal indeterminacy. Some legal ethics scholars adopt a legal realist perspective to argue against a quasi-judicial role of bureaucratic lawyers

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[94] Dodek (2013) as cited in Monahan (n 84) 49.
[95] Geoffrey P Miller, 'Government Lawyers' Ethics in a System of Checks and Balances' (1987) 54(4) University of Chicago Law Review 1293, 1294–95.
[96] Hutchinson (n 15) 992.
[97] Tholen and Mastenbroek (n 5) 492–93.
[98] Miller (n 95) 1295.

where they are expected to carry out an objective and serious legal interpretation which advances the 'best view of the law'.[99] This is in contrast to proposing or encouraging merely plausible legal arguments that facilitate political preferences. The principle of legal indeterminacy questions how bureaucratic legal advisers can confidently locate the 'best view' of the law given that it is evolving, fluid, and subject to a number of reasonable interpretations.[100] The indeterminate, or at least underdetermined, nature of law is evidenced if one considers mainstream legal interpretations which were once regarded as frivolous (e.g., comparative negligence).[101] Others have adopted a rational choice standpoint to argue that the indeterminacy of law could allow lawyers to express legal opinions which promote their own interests.[102] In contrast to these views, Randolph Moss advances that the question of whether law is indeterminate is a theoretical one and the 'best view of the law' can in fact be determined by legal professionals:

> Lawyers, legislators, and judges operate on a daily basis on the understanding that there are right and wrong answers in the law, or, at least, answers that do and must govern relevant conduct… The law involves a vast array of principles and precedents. The best view of the law is that which provides the most coherent explanation of those principles and precedents.[103]

While the above arguments are proposed with legal advisers in mind, the legal ethics literature also discusses the ethical conduct of legislative drafters. These studies tend to focus on legislative drafters working in the United States and Canada too, but they are more fragmented than studies on legal advisers as they do not build upon each other's arguments to the same degree.[104] These studies typically evaluate whether, and if so to what extent, the ethical responsibilities of legislative drafters should go beyond the accurate translation of political preferences into legislative language. A key argument which supports the idea that this translation role should

[99] Moss (n 14) 1296. See also Johnsen (n 88) 1580.
[100] Wendel, 'Government Lawyers in the Trump Administration' (n 84) 334–45.
[101] ibid 334–35.
[102] Lund (n 87) 447–48.
[103] Moss (n 14) 1321–22.
[104] Purdy (n 14); Marcello (n 6); Macnair (n 67); Cherkewich (n 6).

constitute their primary ethical duty is based on the view that through the accurate translation of an elected official's objectives, legislative drafters discharge their duty to the democratic principle by communicating 'the will of the people'.[105]

Further arguments nevertheless advance that the professional role of legislative drafters to improve the form and content of legislation means that their ethical duties should extend beyond the interests of political superiors. This includes the public, with scholars relying on the principle of accountability under the rule of law to argue that legislative drafters should ensure that the legislative text is comprehensible, as far as possible, by those governed by it.[106] Esther Majambere explains, 'The rule of law demands that, as much as is possible, people know in advance what the law demands of them, what the law grants to them, and what sorts of behaviour they can expect from officials.'[107] An ethical duty to the public also requires legislative drafters to check that legislation upholds 'values associated with the entire legal system, such as fairness and equality'.[108] In addition to serving the public, some legal ethics scholars propose that legislative drafters have a central role in serving the legislature by drafting legislation that is self-explanatory, not misleading or deceptive, and organised in a way which allows for orderly debate.[109]

Teri Cherkewich argues that legislative drafters should also have an ethical responsibility to maintain and enhance the integrity of the statute book by 'ensuring the seamless integration of new laws and identifying inconsistencies or incoherence with existing laws'.[110] Ultimately, by discharging their broader ethical duties towards the public, the legislature, and the statute book, scholars acknowledge that legislative drafters are at risk of usurping the functions of elected officials.[111] While providing their advice and even suggesting alternative options to elected officials

[105] Cherkewich (n 6) 257.
[106] Crabbe (n 7).
[107] Esther Majambere, 'Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting' (2011) 37(3) Commonwealth Law Bulletin 417, 418.
[108] Keyes (2009) as cited in Cherkewich (n 6) 257 (emphasis removed).
[109] Crabbe (n 7) 16; Purdy (n 14) 83.
[110] Cherkewich (n 6) 261.
[111] Crabbe (n 7) 17.

and/or their administrators is generally considered to be appropriate in discharging their ethical duties, scholars warn that legislative drafters should do so with 'scrupulous objectivity' to avoid inadvertently shaping the form and content of legislation in light of their own personal preferences.[112]

While the legal ethics literature provides a valuable discussion on the ethical behaviour of bureaucratic lawyers, including in the context of political-professional conflicts, there is no clear consensus reached by scholars on what 'proper' ethical behaviour should actually entail. Moreover, especially in the case of legal advisers, scholars tend to provide more examples of how these lawyers should not behave rather than expressing how they should behave. I argue that a key limitation of this literature is that it is too far removed from the practical realities of bureaucratic lawyering as the claims made are more normative than real. The emphasis is on how bureaucratic lawyers *should* (or should not) act based on an adherence with established principles, rather than engaging with lawyers themselves to explore how they behave and perceive their roles in practice. While normative ideas are valuable in theory, empirical research that explores how bureaucratic lawyers navigate conflicts and dilemmas in their everyday work can help to bridge the gap between theory and practice. On this point, chapter three will utilise insights from the legal ethics scholarship as a foundation for undertaking qualitative research on UK Government and European Commission lawyers.

2.2.3. Legislative drafting quality

Another strand of legal scholarship which features bureaucratic lawyers, or at least has the potential to do so, is that which examines legislative drafting quality. The act of legislative drafting in government has to a certain extent formed its own academic discipline.[113] In one sense, this interest has been generated by academic and public

[112] Purdy (n 14) 100. See also Crabbe (n 7) 17.
[113] Reed Dickerson, *Legislative Drafting: A Challenge to the Legal Profession* (Little Brown and Co 1954); Geoffrey Bowman, 'The Art of Legislative Drafting' (2006) 7(1/2) European Journal of Law Reform 3; William Robinson, 'Manuals for Drafting European Union

criticisms on the drafting quality of legislation, particularly in relation to the EU.[114] Some legal scholars have in fact argued that the EU should draw encouragement from drafting initiatives in the UK Government, including the Good Law initiative which was created to manage and hopefully reduce the complexity of legislative drafting.[115] Another reason behind this interest stems from the view that legislative drafting is a unique function or 'craft' which requires a higher degree of specialism than many other bureaucratic roles.[116]

Although this literature presents an opportunity to provide an in-depth exploration of the participation of bureaucratic lawyers during the drafting process, the predominant emphasis is on the significance of drafting principles or the success of organisational measures aimed at enhancing drafting quality.[117] An additional limitation is that some of this literature adopts a narrow conception of legislative drafting which disregards the bureaucratic and political context, consequently advancing that this process 'is not fundamentally different from the production of other types of texts.'[118] Within this strand of literature, there are ultimately a small number of personal accounts by former lawyers which offer real-life examples of how bureaucratic lawyers contribute

Legislation' (2010) 4(2) Legisprudence 129; Xanthaki, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe' (n 26); Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26); Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017).

[114] Helen Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?' (2001) 38(3) Common Market Law Review 651; Helen Xanthaki, 'European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation' (2014) 35(1) Statute Law Review 66.

[115] Jean-Pierre Duprat and Helen Xanthaki, 'Legislative Drafting Techniques/Formal Legistics' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017) 109, 125. For a review that contributed to the Good Law initiative see Alison Bertlin, 'What Works Best for the Reader? A Study on Drafting and Presenting Legislation' (The Loophole 2014).

[116] Edward C Page, 'Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis' (2009) Oct Public Law 790, 791.

[117] Ramos and Heydt (n 4). For an academic discussion on how the EU has dealt with legislative drafting quality in its regulatory agenda see Helen Xanthaki, 'Emerging Trends in Legislation in Europe' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017).

[118] Höfler, Nussbaumer and Xanthaki (n 28) 146.

to improving legislative quality.[119] While these personal accounts will feature in the second half of this chapter, it is worth noting that there still remains a substantial need for empirical research which provides a wider range of viewpoints. Furthermore, such personal accounts do not benefit from theoretical insights which can facilitate a deeper understanding of why lawyers act and behave the way they do within bureaucratic environments.

2.2.4. A missed opportunity in the socio-legal scholarship

The socio-legal movement departs from the traditional emphasis on doctrinal legal research and embraces the study 'of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.'[120] In order to analyse the law as a social phenomenon, this movement proposes the use of epistemologies and methodologies associated with the social sciences.[121] Given the socio-legal movement, one might reasonably expect that the existing academic disciplines on bureaucratic lawyers, especially the legal ethics scholarship which is most closely associated with the study of these lawyers, would have made more attempts to employ empirical methods or theoretical frameworks used in the social sciences. Equally, one might expect that the socio-legal movement would have generated fresh interest in the study of bureaucratic lawyers but this topic has regrettably escaped the attention of most socio-legal scholars. This could be as a result of a broader limitation as much socio-legal research focuses on the

[119] Bowman (n 113); William Robinson, 'Drafting of EU Acts: A View from the European Commission' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008); Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26).
[120] David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005) 864.
[121] There is no single agreed definition of socio-legal studies. For various definitions see Feenan (n 18). For the concept of the 'legal' see David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016). For differences between socio-legal studies and the sociology of law see Banakar and Travers (n 18).

meaning and impact of legal rules on society with comparatively less emphasis on how policies and legislation are formulated.[122]

This thesis takes a step in overcoming the knowledge gap on bureaucratic lawyers in the socio-legal scholarship, incorporating methods and theories from the social sciences to study these lawyers in their bureaucratic contexts. It uses semi-structured interviews to provide a nuanced and detailed understanding of UK Government and European Commission lawyers' work during the preparation of a legislative proposal. It also integrates insights from the aforementioned legal ethics scholarship, as well as two theoretical lenses from the social sciences. These theoretical lenses advance that lawyers' socialisation experiences within their bureaucracies are foundational for how these lawyers behave when navigating political-professional conflicts in their work, and for how these lawyers develop the knowledge and skills needed to perform their work successfully. These theories will be explained in chapter three but this chapter will now review the academic literature on the work of UK Government and European Commission lawyers.

2.3. UK Government and European Commission lawyers

This chapter has so far explored the academic literature on bureaucratic lawyers, beyond the UK Government and European Commission. This illustrated an empirical knowledge gap on the working practices of bureaucratic lawyers, even in light of the socio-legal movement. The following section will shift its focus from the broader literature to delve into the existing research on the work of UK Government and European Commission lawyers during the preparation of a legislative proposal. As indicated above, providing an overview of what is currently understood about their work was not a straightforward task of copying information across from the existing academic literature. Aside from some notable exceptions, the literature on these lawyers often provides brief, vague, and incomplete statements about their work. I

[122] Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 17; Feenan (n 18).

therefore had to closely examine a considerable proportion of the literature before I was able to put the pieces together to acquire a better understanding of their work. First, the discussion will consider the academic literature on UK Government lawyers, with separate attention given to each type of lawyer. The discussion will then proceed to explore the literature on European Commission lawyers, also addressing each type of lawyer independently.

2.3.1. UK Government

In a study on UK Government lawyers, Ben Yong expresses, 'We know relatively little about when, why and how government lawyers are consulted; how legal advice is given, on what issues, and to what extent legal advice impacts upon the decisions of government'.[123] Ultimately, the limitations associated with the literature on UK Government lawyers' work are not simply as a result of the very few studies available, but also as a result of the type of studies available. Some of the most informative studies presented in this chapter are self-accounts prepared by former lawyers, specifically former Parliamentary Counsel.[124] While such 'first order' accounts offer valuable personal insights and experiences, they lack the range of perceptions gained from empirical studies involving more participants.[125] They also lack the various theoretical perspectives and capacities of an 'outsider' researcher who may see and explain things in ways which an 'insider' lawyer cannot.[126]

Aside from a small handful of empirical studies, the remaining literature is found in descriptive accounts of the UK law-making process, usually in legal textbooks.[127] While these studies outline the key functions of lawyers, their analysis remains brief and does not provide much insight, if any, into how these functions are performed in practice. The result is that readers are left unaware of the types of challenges and

[123] Yong (n 5) 17.
[124] For example see Daniel Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament* (2nd edn, Sweet & Maxwell 2011).
[125] For a discussion on first order accounts see Noordegraaf (n 1) 59.
[126] Tom Clark and others, *Bryman's Social Research Methods* (6th edn, Oxford University Press 2021) 133.
[127] For example see Zander (n 30).

tensions these lawyers encounter in their bureaucratic environments, including the political-professional conflicts discussed in the broader literature. These studies also overlook various 'hidden' features which constitute everyday work, such as shared understandings and practical judgments. Expanding on claims made in the previous section, there would be substantial value in adopting a socio-legal approach to the study of UK Government lawyers which incorporates both empirical and theoretical insights to enhance our understanding of what work these lawyers do and how they interact with their bureaucratic settings when doing so.

2.3.1.1. Legal advisers

There are very few academic studies exploring the work of legal advisers from the Government Legal Department (GLD). This might be attributed to the fact that the attention of most legal academics is drawn to how the courts scrutinise the legal action of the executive as opposed to how the executive regulates its own legal action.[128] It could also stem from a broader limitation as academic studies exploring the work of UK civil servants during the preparation of a Bill are few and far between.[129] Among the studies that do exist, policy officials and legal advisers are often discussed as a collective unit which leaves readers unaware as to the specific tasks and responsibilities of legal advisers, particularly in terms of their advisory work.[130]

The existing academic literature specifies that legal advisers provide legal advice to the lead department, that is the ministerial department sponsoring a Bill.[131] The literature does not tend to offer much more than brief statements expressing that these lawyers act as 'legal advisers' or that they 'provide' legal advice to lead departments.[132] An empirical study by Ben Yong has filled in considerable gaps but

[128] Yong (n 5) 15.
[129] Edward C Page, 'The Civil Servant as Legislator: Law Making in British Administration' (2003) 81(4) Public Administration 651, 652.
[130] For example see Zander (n 30) 8–10; Russell and Gover (n 30) 63.
[131] For the UK Government, references to 'departments' include ministerial departments unless the context makes a clear indication otherwise.
[132] Zander (n 30) 9.

Whitehall has since been subject to organisational changes which might have encouraged a change in the procedure and chronology of this function.[133] Nevertheless, Yong highlights that this advisory function has moved from a quasi-judgment to an assessment of legal risk.[134] Legal advisers are less likely to frame their advice in 'yes' or 'no' terms but instead will evaluate the likelihood of judicial challenge and success of various options.[135]

The nature of this advisory function means that legal advisers are more inclined to perceive themselves as 'risk managers' as opposed to 'guardians' of the law.[136] If in doubt about their legal risk assessment, legal advisers can consult the Law Officers who are government ministers sitting 'at the apex of the legal hierarchy.'[137] The academic literature does not provide much information about how legal advisers perform a risk assessment nor the variety of legal issues considered. It nevertheless acknowledges that these assessments adopt a strategic and complex approach to risk which takes into account the public sector context, specifically the use of state resources and the appropriateness of the state becoming a 'repeat player' in litigation.[138]

Legal advice tends to be delivered to policy officials in the lead department, although any legal decisions impacting the policy must be submitted to the relevant minister for clearance.[139] When legal advice is submitted to the minister it is often interwoven with various social, economic, and political considerations and it is ultimately up to

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[133] Yong (n 5). Central to these organisational changes is the replacement of the Treasury Solicitor's Department in 2015 which is discussed in chapter five.
[134] ibid. See also Daintith and Page (n 8) 248.
[135] Yong (n 5) 7, 53.
[136] ibid 94, 97.
[137] ibid 57. See pp 56-63 for additional information about Law Officers and the process of consulting them. For a brief description on why the role of Law Officers is contentious see Alex Nice and Catherine Haddon, 'Law Officers' (Institute for Government 2022) <https://www.instituteforgovernment.org.uk/explainers/law-officers> accessed 15 September 2022. See also Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law' (2022) 20(2) International Journal of Constitutional Law 664; Conor Casey and John Larkin, 'The Attorney General and Renewed Controversy over the Law/Politics Divide' (2022) 26(2) Edinburgh Law Review 228.
[138] Yong (n 5) 7.
[139] Page (n 129) 651.

the minister to weigh up all these considerations and determine which course of action to take.[140] Since the mid-1990s, legal advice has been offered from 'the very initial stages of policy formation.'[141] This is in contrast to former practices where legal advisers would generally get involved once ministerial departments had developed and clarified their policies in sufficient detail.[142] The policy could therefore be finalised without any consideration of whether it was deliverable in legal terms, causing possible problems or delays during later stages.[143]

Various reasons have been provided for the earlier involvement of legal advisers, including 'the increasing number of ways in which law impacts upon, and is inextricably bound up with, policy'.[144] Other reasons include technological developments, especially in the form of emails and shared intranets, the increase of informality in Whitehall, and the physical location of lawyers within ministerial departments.[145] There is also a greater emphasis on teamwork between policy officials and legal advisers, encouraging a more proactive approach where legal advisers no longer wait to be asked for legal advice.[146] A combination of these factors has meant that legal advice is no longer predominantly in writing but is now provided informally during meetings, phone calls, and emails too.[147]

The existing literature also indicates that legal advisers instruct Parliamentary Counsel (or Counsel) to draft the Bill clauses. This is often presented as their main function and has therefore received more academic attention than their advisory role.[148] Although the general idea conveyed is that legal advisers translate policy instructions from the lead department into legal instructions for Counsel, former Counsel explained that legal advisers are not simply 'go-betweens' who turn policy

[140] Yong (n 5) 54.
[141] ibid 7, 48–50. See also Lewis and Mulcahy (n 65) 36.
[142] The Hansard Society, *Making the Law: The Report of The Hansard Society Commission on the Legislative Process* (The Hansard Society 1993) 22.
[143] ibid 340.
[144] Yong (n 5) 48–49.
[145] For more reasons see ibid 48–52.
[146] Daintith and Page (n 8) 248; Yong (n 5) 50.
[147] Yong (n 5) 53.
[148] Greenberg (n 124) 35.

ideas into legal instructions.[149] A similar sentiment was shared by Edward Page who conducted interviews with UK civil servants and found that legal advisers serve a 'crucial' and 'intellectually stretching' role with policy officials to flesh out the policy details.[150] While this insight adds to an understanding of legal advisers' work, it still leaves unexplained the details of how they develop policy and how their precise contribution differs from that of policy officials.

The literature also provides some insight into the contents of legal instructions, with the key objective being to communicate clearly to Counsel what the lead department wants to achieve through the proposed legislation.[151] For this reason, legal advisers should not include words or draft provisions as this can make it harder for Counsel to uncover the intended meaning.[152] Rather, legal advisers should use the instructions to impart their own knowledge in the area of law. This demarcation of expertise was summarised by Daniel Greenberg, former Counsel, who expressed that legal advisers are 'experts in the area of law on which they advise' while 'Counsel are experts in how legislation works and is applied'.[153] Despite legal advisers being experts in the area of law, it is challenging to locate information regarding the specific legal matters they raise in the instructions. Additionally, more details on how developed the policy must be prior to instructing, and how legal advisers' instructing role overlaps with their provision of legal advice, would offer a more comprehensive understanding of the nature and chronology of their work.

In summary, the knowledge gap left by the literature relates in part to the involvement of legal advisers during policy clarification and development. An in-depth exploration of this could also enhance our understanding of the relationship between policy officials and legal advisers, and the different types of knowledge they each offer the process. There is also scope to further explore the advisory role of

[149] ibid.
[150] Page (n 129) 661–62. See also Zander (n 30) 9; Russell and Gover (n 30) 58.
[151] David R Miers and Alan C Page, *Legislation* (2nd edn, Sweet & Maxwell 1990) 58; Greenberg (n 124) 23.
[152] Miers and Page (n 151) 58–59; Greenberg (n 124) 40; Zander (n 30) 20.
[153] Greenberg (n 124) 23.

legal advisers, including the judgments made when carrying out a legal risk assessment, how risk-averse they are in their analysis, and the various types of legal issues taken into account. Furthermore, there is considerable room to investigate the legal issues presented in the legal instructions and the extent of legal advisers' involvement after the instructions have been delivered to Parliamentary Counsel.

2.3.1.2. Parliamentary Counsel

In comparison to legal advisers, there are more studies exploring the work of Counsel from the Office of the Parliamentary Counsel (OPC) during Bill preparation. This could be because Counsel are regarded as a 'rare example of a specialist' within the generalist culture of the UK Civil Service.[154] As a result, Counsel are explored as their own distinct group rather than interchangeably with other UK civil servants. In spite of this, there is not a considerable amount of research examining the work of Counsel.[155] According to Brian Jones, a Westlaw journal search on 'Parliamentary Counsel' in 2018 produced a very small number of results.[156] This Westlaw search was repeated in August 2023 and twenty-two results were produced, with only a handful addressing working practices.[157] The remaining results typically focused on legislative language, including issues like gender-neutral language and the clarity of provisions. Similar to legal advisers, a greater focus on Counsel would reflect a 'radical change' from the current legal scholarship which is typically drawn to judicial activity and litigation lawyering.[158]

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[154] Page (n 116) 791.
[155] ibid 790.
[156] Brian Christopher Jones, 'Our Forgotten Constitutional Guardians: Preserving Respect for the Law' (2021) 42(1) Statute Law Review 1, 3.
[157] Four of the results related to Parliamentary Counsel in other jurisdictions, including Australia and New Zealand.
[158] Ann Seidman and Robert B Seidman, 'Between Policy and Implementation: Legislation Drafting for Development' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 318–19. Such a change would align with the central premise of legisprudence which advances that the *creation* of law deserves the same degree of academic attention. For more on legisprudence see Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005). See also Ulrich Karpen, 'Introduction' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017).

The existing literature tends to suggest that Counsel only really become involved upon receiving legal instructions from the lead ministerial department, with numerous statements such as 'once the instructions are ready, [Counsel] can begin their work.'[159] However, an empirical study in 2009 revealed that communication between Counsel and the lead department occasionally takes place prior to this.[160] At the time of the study, the early involvement had yet to be routinised although there was an expectation that it would become more regular in the future. While the study acknowledged that Counsel's early contribution can be 'critical' in influencing the legislation, it did not delve into the specifics of this contribution or precisely how early it takes place.[161]

Drawing on insights from other studies helped to fill in some gaps about this early involvement, with a couple of studies suggesting that Counsel advise the lead department on the feasibility of Bill projects. In a discussion on the 1998 Human Rights Act, Constantin Stefanou expressed that Counsel's advice on the feasibility of the proposal played a central role in the UK Government's political choice to proceed.[162] The feasibility of the proposal was not only assessed 'in terms of a draft text but with reference to whether or not such an Act can become an organic part of the existing system.'[163] Counsel also advise the Parliamentary Business and Legislation (PBL) Committee during the bidding process.[164] As mentioned in chapter one, this committee is responsible for assessing bids made by ministerial departments for a slot in the legislative programme. By Counsel advising on the feasibility of proposals in light of drafting resources, the committee is in a better position to establish a provisional list of Bills for the next parliamentary session.[165]

[159] Russell and Gover (n 30) 58. See also Miers and Page (n 151) 60; Höfler, Nussbaumer and Xanthaki (n 28) 156–57.
[160] Page (n 116) 798–99.
[161] ibid 799.
[162] Constantin Stefanou, 'Drafters, Drafting and the Policy Process' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 325.
[163] Stefanou (n 162).
[164] ibid 323–24. For more information about the PBL Committee see Cabinet Office (n 41).
[165] Granville Ram (1951) as cited in Zander (n 30) 14–15.

During the pre-drafting stages, the lead department may also request Counsel's advice on the passage of the Bill in Parliament.[166] While this enables the lead department to forward-plan, taking into account the various procedural requirements that must be satisfied, this procedural advice is ongoing and not exclusive to these stages.[167] Moreover, Counsel's involvement is likely to extend beyond giving advice as they are responsible for interacting with parliamentary clerks to ensure the smooth passage of the Bill.[168] Stephen Laws, former First Parliamentary Counsel, revealed that the provision of procedural advice and assistance is made possible as Counsel have an 'unmatched experience' of working on Bill projects compared to other Whitehall officials.[169]

The drafting work of Counsel has received more academic attention than their early advisory role. Former Counsel have emphasised that the process of legislative drafting is not simply the translation of legal instructions into legislative language.[170] The 'most valuable function' of Counsel is to subject policy ideas to an intellectual analysis to ensure they stand up to scrutiny in Parliament, and by the judiciary and practitioners once enacted.[171] The capacity for Counsel to influence policy through such analysis has featured in many academic discussions as it challenges the purist view that legislative drafting should be confined to the wording of legislation.[172] While most scholars agree that Counsel should propose solutions if they uncover policy omissions, they do not believe that Counsel should make or decide the policy.[173] According to Geoffrey Bowman, former First Parliamentary Counsel, 'a great deal of experience is needed' for Counsel to strike this balance appropriately.[174]

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[166] Stephen Laws, 'Drawing the Line' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 20; Daintith and Page (n 8) 255.
[167] Greenberg (n 124) 19. See also Daintith and Page (n 8) 221, 250.
[168] Greenberg (n 124) ch 9.
[169] Laws (n 166) 20. See also Jones (n 156) 13.
[170] Laws (n 166); Greenberg (n 124) 32–33.
[171] Geoffrey Bowman, 'Why Is There a Parliamentary Counsel Office?' (2005) 26(2) Statute Law Review 69, 70. This was confirmed in Page (n 116) 797.
[172] The Hansard Society (n 142) 46; Bowman (n 113) 5; Stefanou (n 162); Page (n 116) 790.
[173] Bowman (n 171) 73; Bowman (n 113) 5; Page (n 116) 798.
[174] Bowman (n 113) 5.

When Counsel have determined which ideas stand up to scrutiny, the writing element of drafting can begin.[175] The literature often provides a technical account of linguistic specificities including the appropriateness of certain words, grammatical choices, and the structure of statutes.[176] Other scholars offer a less technical perspective to consider the broader drafting principles which inform drafting choices.[177] The overriding view is that the Bill should accurately communicate the legislative intention while its intelligibility, namely how simply and quickly it can be understood, should be a secondary concern.[178] This is based on the view that a Bill is ineffective if it fails to communicate the intended meaning when interpreted by the court of ultimate appeal.[179] Laws emphasised that 'long experience is the only guide' to ensure an appropriate balance between these principles.[180] In fact, Laws stated that numerous aspects of Counsel's work require the exercise of 'subtle judgements' which rely on knowledge and skills gained through experience of drafting Bills.[181]

The academic literature does provide certain insights into the pressures arising from the bureaucratic context as it highlights that ministerial wishes on the language or structure of a Bill may override Counsel's drafting choices.[182] While Counsel can escalate disputes to the Law Officers, this mechanism is not used lightly and some have indicated a change of culture over the years where Counsel are less inclined to 'question and push back' against ministerial demands.[183] Although this is attributed to a shift in Counsel's perception of their role, with an increased emphasis on considering ministers as their clients, further insight is needed to understand whether and if so how this change is reflected in practice. For example, are there certain matters which Counsel are still inclined to challenge and if so, what is the justification

[175] ibid 6; Daintith and Page (n 8) 252.
[176] GC Thornton, *Legislative Drafting* (3rd edn, Butterworths 1987); VCRAC Crabbe, *Legislative Drafting* (Cavendish Publishing 1993).
[177] Laws (n 166) 23.
[178] Miers and Page (n 151) 51, 201; Laws (n 166) 24; Greenberg (n 124) 222.
[179] Laws (n 166) 24.
[180] ibid 34.
[181] ibid 20.
[182] Miers and Page (n 151) 52; The Hansard Society (n 142) 47; Page (n 116) 804.
[183] Daintith and Page (n 8) 255; Jones (n 156) 16. See also Daniel Greenberg, 'Dangerous Trends in Modern Legislation' (2015) (Jan) Public Law 96.

for this? Also, are there any informal means to resolve conflicts prior to escalating a proposal to the Law Officers?

The academic literature also indicates that Counsel adopt a constitutional guardianship role in which they must maintain the integrity of the statute book.[184] Statutes are the highest law by which the UK Parliament is bound and this function has therefore been regarded as being as close as the UK has traditionally come to ensuring the 'constitutionality' of its legislation.[185] This role is twofold, with one aspect requiring Counsel to act as guardians of values that are considered 'integral to the legal order such as those of non-retrospection and proper use of delegation'.[186] The second aspect relates to the quality of language as badly drafted legislation can lead to the courts misinterpreting the intended meaning of the law. In turn, this can 'pollute' the constitutional settlement between the executive and legislative branches on the one hand, and the judicial branch on the other.[187]

In summary, while the academic literature offers comparatively more information about Counsel than legal advisers, primarily because there are a handful of personal accounts that illustrate the experiences and perspectives of former Counsel, there are still knowledge gaps remaining. There is scope to further explore the early participation of Counsel, especially in terms of their level of engagement with the underlying policy when contrasted with legal advisers. Moreover, an examination of their interactions with legal advisers and policy officials upon receiving the legal instructions would facilitate a more comprehensive understanding of their distinct roles and contributions during the drafting process. There is also considerable room to further investigate academic claims that a change of culture has resulted in Counsel displaying more deference to ministerial demands than previous years.

[184] Laws (n 166) 32; Jones (n 156) 10.
[185] Daintith and Page (n 8) 254.
[186] ibid 254–56.
[187] Laws (n 166) 32–33.

2.3.2. European Commission

European Commission lawyers, both legal advisers and legal revisers, are situated in a Commission department called the Legal Service. These lawyers constitute the core of legal expertise within the Commission, however, this does not mean that legal expertise is not present elsewhere in the Commission. The policy departments of the Commission, known as Directorates-General (DGs), also employ legal officers although these bureaucrats are in fact policy officers, albeit with more legal responsibilities.[188] The biggest limitation associated with the academic literature on Commission lawyers' work is that there is not much available, with even fewer studies compared to UK research. While the functions of UK Government lawyers are covered in legal textbooks, albeit briefly, this is not the case for Commission lawyers as many EU law textbooks simply make a brief reference to the three Legal Services, if they are mentioned at all.[189] Most of the relevant literature is prepared by former lawyers, with these first order accounts being subject to the same limitations identified earlier for UK research. Moreover, there is a tendency in the literature to discuss the Commission Legal Service as a centralised department without clarifying whether the responsibilities belong to legal advisers or legal revisers.[190] It was therefore essential to examine the entire body of literature first to make informed assumptions about which of the responsibilities belonged to which of the lawyers.

[188] The EU Careers website emphasises this distinction as the 'Law' domain refers to the profile of Legal Service lawyers while the 'Public Administration' domain refers to the profile of policy officers, including those employed as legal officers. See European Personnel Selection Office, 'EU Career Profiles' <https://epso.europa.eu/en/eu_career_profiles> accessed 16 September 2022.
[189] If the Legal Services of the EU institutions are mentioned, this is often a brief reference to the Council Legal Service and its legal opinion on the primacy of EU law in 2007. See Monica Claes, 'The Primacy of EU Law in European and National Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (2015).
[190] For example see Miriam Hartlapp, Julia Metz and Christian Rauh, *Which Policy for Europe?: Power and Conflict Inside the European Commission* (Oxford University Press 2014).

2.3.2.1. Legal advisers

While there is no defined body of literature on legal advisers in the Commission Legal Service, a small handful of studies have dedicated specific attention to these lawyers. These tend to be first order accounts, including a notable example by Jean Paul Jacqué, a former Director of the Council Legal Service.[191] While this provides a useful indication of the main functions of legal advisers across the three Legal Services, it focuses more on their professional conduct and lacks the depth needed to provide rich, comprehensive insights into their actual working practices.[192] It is also written from the perspective of a Council lawyer and therefore most attention is directed towards that institution. In contrast to first order accounts, Päivi Leino-Sandberg provides a broader range of perspectives by conducting interviews with EU legal advisers.[193] This research situates lawyers' narratives within the broader bureaucratic context, particularly the increased political orientation during Jean-Claude Juncker's presidency. However, as the key objective of this research is descriptive, it lacks theoretical insights which could explain the ways in which lawyers interact with their institutional surroundings.[194] Moreover, as this study is not exclusively focused on the work of Commission legal advisers, there is scope to provide further clarifications and insights into their work specifically.[195]

Among the handful of studies available, only one function clearly stands out, specifically the provision of advice on the legal 'substance' of a proposal which is typically used to indicate non-drafting advice.[196] This advice is offered to the DG to which the proposal belongs, the lead DG, and includes an assessment of legality, requiring legal advisers to consult the EU Treaties and check for non-compliance.[197]

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[191] Jacqué (n 5).
[192] This includes the Legal Services of the European Commission, Parliament, and Council.
[193] Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021) xv.
[194] ibid 18.
[195] For an overview of the participants included in the study see ibid.
[196] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 258.
[197] Jacqué (n 5) 50.

Central to this lies an assessment of whether the legal basis of the proposal is correct and whether the general principles of subsidiarity and proportionality are upheld.[198] An additional aspect of legal advice relates to whether the proposal 'is consistent with other measures in the sector and elsewhere.'[199] While these insights are useful, more research is needed to contribute to a deeper understanding of what this work entails and how it is performed in practice. For instance, how exactly do legal advisers assess compliance with the EU Treaties? Is their advice presented in the form of a legal risk assessment?

The existing literature has paid some attention to when this advice is provided, highlighting that it is generally offered prior to the formal coordination procedure of the Interservice Consultation (ISC). Such early involvement allows legal advisers to listen to what the lead DG wants to achieve and provide an initial assessment of whether the policy initiative is 'legally sound'.[200] While legal advice is offered early on, it is only formally required once the legislative text has been drafted and submitted to the ISC. This reinforces the idea presented in chapter one that within civil law models, lawyers tend to formally enter the process at a relatively later stage, especially in comparison to common law models. Upon receiving the proposal in the ISC, legal advice is submitted to the lead DG in the form of a written legal opinion which takes one of three forms: (1) 'positive opinion' (2) 'positive opinion with comments' or (3) 'negative opinion'.[201] If a negative opinion is issued, this operates as a veto as the proposal cannot be adopted by written procedure but instead must go to oral procedure which requires a debate between the Commissioners.[202]

[198] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 258–59. See Treaty on the Functioning of the European Union, art 5.
[199] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 249, 259. See also Hartlapp, Metz and Rauh (n 190) 19.
[200] Leino-Sandberg (n 193) 164.
[201] ibid 166.
[202] ibid 167–68. For differences between the written and oral procedure see European Commission, 'How Decisions Are Made' <https://commission.europa.eu/strategy-and-policy/decision-making-process/how-decisions-are-made_en> accessed 2 September 2023.

Based on statistics, Leino-Sandberg argues that the issuing of a negative opinion is 'rare' in practice.[203] It was argued that the political orientation during the Juncker presidency contributed to the infrequent issuing of a negative opinion as it created pressure among legal advisers to produce legal opinions that facilitated the political will.[204] According to Leino-Sandberg, legal advisers experienced more pressure to discover legal arguments that aligned with political desires, even if these arguments did not necessarily comply with their own professional legal views.[205] At times, these pressures were encouraged by more senior members of the Commission Legal Service who could request that a legal adviser working on a proposal adapts their opinion.[206] This stands in stark contrast to a view presented by Jacqué which emphasises that legal advisers must uphold an independent professional identify and 'resist any pressures coming from those holding the political power'.[207]

Situating the work of legal advisers within the bureaucratic context holds considerable value as it illustrates the types of challenges these lawyers might encounter compared to lawyers working in private practice. Additional research can contribute to a more comprehensive and nuanced understanding of how legal advisers actually navigate these pressures in practice, encompassing an assessment of potential legal limits that legal advisers may be unwilling to depart from irrespective of the political will. Furthermore, in accordance with theoretical and empirical perspectives provided in the following chapter, it would be helpful to direct more attention towards the interdependent relationship between legal advisers and

[203] Leino-Sandberg (n 193) 183. For 2018 statistics on the Legal Service opinion see European Commission, 'The Legal Service of the European Commission' (July 2020) <https://ec.europa.eu/dgs/legal_service/pdf/sj_en.pdf> accessed 10 May 2023. These statistics reveal the following distribution of the types of opinions issued in 2018: positive opinion (4,224), positive with amendments (4,064), and negative opinion (14). However, these statistics include opinions provided for a broad range of legal initiatives, including any documents which may have legal implications.
[204] Leino-Sandberg (n 193) 190. Leino-Sandberg nevertheless draws attention to a potential change of culture since Ursula von der Leyen, the Commission President since December 2019, who insisted on defending the rule of law.
[205] ibid 184.
[206] Respondent 55 in ibid 170.
[207] Jacqué (n 5) 47.

their ‘own’ institutional context within the broader Commission to better understand the variety of factors that might shape how they approach and navigate political pressures in their work.

In summary, despite the academic literature explored above, knowledge gaps still remain in relation to the work of Commission legal advisers. For example, although the literature recognises legal advisers’ role in interpreting the EU Treaties to identify possibilities of non-compliance, there is scope to explore this further. For instance, how do legal advisers reach a reliable interpretation? Among legal advisers, is there a preference for a cautious interpretation to reduce instances of non-compliance that could ultimately strain relationships with the Member States, a risk already identified in chapter one? Furthermore, in contrast to legal advisers working in the UK Government, the academic literature does not indicate that Commission legal advisers adopt a considerable role in policy clarification. Additional research could illustrate whether this role is largely absent in practice and if so, how the resulting gap in legal knowledge is compensated for within the Commission.

2.3.2.2. Legal revisers

There is no defined body of literature on legal revisers working in the Commission Legal Service. However, given their contribution to improving the drafting quality of Commission proposals, some references about their formal responsibilities can be located within the literature on legislative drafting quality.[208] However, as the principal focus of those studies is often on the evaluation of drafting quality standards, or possible improvements to drafting quality, the daily working practices of legal revisers is only briefly discussed. Most of the insights provided in this section are gained from first order accounts by William Robinson, a former Commission legal reviser.[209] While the main emphasis of these accounts remains on the topic of

[208] For example see Höfler, Nussbaumer and Xanthaki (n 28) 160; Marta Tavares Almaeida and Chris Moll, ‘Legislative Drafting’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008).
[209] Robinson, ‘Drafting EU Legislation in the European Commission: A Collaborative Process’ (n 26). William Robinson was also a coordinator in the Quality of Legislation team of the Commission Legal Service.

legislative drafting quality, as opposed to an in-depth exploration of these lawyers' work, Robinson still provides some insight into the ways in which legal revisers can help to improve the drafting quality of Commission proposals.

Legal revisers are ultimately responsible for ensuring that a legislative proposal prepared in the lead DG is 'well drafted, clear and precise and in accordance with the various drafting rules.'[210] They initially acquire the skills to do this by 'working in collaboration with the more experienced revisers.'[211] Legislative proposals are drafted by policy officers working in the lead DG who have expertise in the particular subject area, sometimes referred to as 'technical experts'.[212] As technical experts rarely have specialist knowledge in legislative drafting, the draft proposals are often of poor quality, especially as DG officers are likely to have drafted in a foreign language too.[213] Legal officers in the lead DG may assist technical experts with the legislative drafting, with more information about legal officers provided below.[214] Technical experts are also able to rely on the Drafter's Assistance Package (DAP) launched by the Commission Legal Service which enables them to access drafting rules and guidance while they prepare legislative proposals.[215]

Legal revisers are formally expected to assess a draft proposal once it is submitted to the ISC by the lead DG.[216] The proposal is 'almost always' received in English and legal revisers must check that it is capable of translation into the remaining official

[210] ibid 259.
[211] Almaeida and Moll (n 208) 263.
[212] DG 6 (15 December 2017) explained that the distinction between policy officers and technical experts can be misleading. Often, administrators with a background in a scientific domain are referred to as 'technical experts' while those with a legal background are referred to as 'policy officers' or 'legal officers'.
[213] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 265.
[214] ibid 255.
[215] ibid.
[216] The publicly available drafting rules are European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (Publications Office of the European Union 2015); European Union, 'Interinstitutional Style Guide' (Publications Office of the European Union 2022). For further considerations of EU drafting rules and guidance see Robinson, 'Manuals for Drafting European Union Legislation' (n 113).

EU languages.[217] Comments made by the legal revisers will generally be added into the aforementioned legal opinion of the Legal Service but it is 'only exceptionally' that a negative opinion would be issued on their drafting comments alone.[218] In addition to this written opinion, legal revisers and DG officers may also engage in 'constructive dialogue' about a legislative proposal where legal revisers could be asked to review the draft provisions.[219] This dialogue may include legal advisers if there is a need for them to all 'work together'.[220] While this illustrates the significance of interactions, further research would be helpful to explore the various dynamics at play, including the distinct priorities and authorities of legal advisers, legal revisers, and DG officers.

Once the ISC is completed, the proposal is translated into all the official EU languages by the Commission's Translation DG. These translators rarely have legal qualifications but acquire legal expertise over time.[221] It is only in 'exceptional' circumstances that legal revisers will evaluate the drafting quality and linguistic parallelism of translated texts.[222] While they used to examine translated texts to a greater extent in previous years, EU law-making initiatives shifted the focus towards earlier quality control.[223] This was perceived to be more effective as there was greater scope to amend the text before it had undergone extensive consultations, been translated, and was shortly due for adoption.[224] Moreover, early quality control was intended to act as a precautionary measure as it was expected to reduce the number of misunderstandings arising upon translation.[225]

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[217] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 259.
[218] Robinson, 'Drafting of EU Acts: A View from the European Commission' (n 119) 180.
[219] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 259.
[220] Robinson, 'Drafting of EU Acts: A View from the European Commission' (n 119) 180.
[221] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 261–62.
[222] ibid 261.
[223] Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation 1999 (OJ C73/1).
[224] Robinson, 'Drafting of EU Acts: A View from the European Commission' (n 119) 180.
[225] ibid.

In summary, the existing academic literature lacks substantial information about the work of legal revisers. While the literature identifies that legal revisers are responsible for checking the drafting quality of proposals, further research can explore whether they informally assist during the drafting process within the lead DG too. If not, it would be interesting to uncover the types of issues that arise when drafting is not performed by specialist drafting lawyers as is the case in the UK Government. Moreover, the existing literature fails to examine the collaboration between legal revisers and legal advisers despite the fact that both lawyers must work together to submit the opinion of the Legal Service during the ISC. Additional research on their collaboration would help to illustrate their individual responsibilities but also reveal any areas of overlap or shared priorities.

2.3.2.3. Legal officers

This chapter has already identified that sector DGs employ legal officers.[226] However, it should be noted that these officers are in fact recruited as policy officers with additional legal responsibilities.[227] Given that these officers are not employed as in-house counsel, as well as chapter five emphasising that their titles might actually overstate their distinction from policy officers in DGs, they do not satisfy the definition of 'bureaucratic lawyers' provided in chapter one and therefore do not form a central focus in this thesis.[228] However, reviewing what the academic literature states about their work still remains valuable as it illustrates how their legal responsibilities might differ from lawyers working in the Commission Legal Service. It also helps to contextualise the empirical analysis in chapters six and seven as insights into legal

[226] In this thesis, the term 'sector DG' is sometimes used (as opposed to simply 'DG') as the DGs included in this thesis are those responsible for a particular policy sector. These terms will be used interchangeably in this thesis.
[227] The EU Careers website emphasises this distinction as the 'Law' domain refers to the profile of Legal Service lawyers while the 'Public Administration' domain refers to the profile of policy officers, including those employed as legal officers. See European Personnel Selection Office (n 188).
[228] Interview with DG 6 (15 December 2017).

officers' work and their interactions with the Commission Legal Service will still be made at times, especially when exploring the legislative drafting process.

Leino-Sandberg defines legal officers working in DGs as 'desk officers with legal training'.[229] Depending on the DG, and the nature of the policy areas covered, the internal split between legal officers and other administrators can vary considerably. For instance, the majority of officers working on legislative proposals in consumer or criminal matters are likely to be legal officers whereas it is 'closer to an equal split' between legal officers and economists ('technical experts') on proposals concerning merger issues.[230] For the preparation of legislative proposals, legal officers will assist technical experts by analysing the legal rules applicable to the proposal.[231] As indicated already, they will also assist technical experts with the drafting of a proposal, including guidance on how to define the scope.[232]

The academic literature also highlights certain differences between legal officers and legal advisers in the Commission Legal Service, with the former expected to be more creative in their legal advice as they adopt greater responsibilities to serve the operational needs of their particular DGs.[233] More specifically, legal officers are more inclined than legal advisers to focus on 'political realities' and a search for legal requirements that will help to facilitate the political will.[234] In spite of this, legal officers still recognise the value of engaging with Commission legal advisers to ensure that the legislative proposal is respecting the legal 'basics'.[235] Ultimately, most of this information was acquired from the literature already presented in this chapter.[236] While more information about legal officers' work may be available in the

[229] Leino-Sandberg (n 193) 159. There are also lawyers employed by the cabinets of Commissioners and the President but they operate as political advisers and therefore fall outside the scope of this thesis. For more on lawyers in the cabinets see ibid 161–63.
[230] Leino-Sandberg (n 193) 159.
[231] ibid.
[232] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 249, 255.
[233] Leino-Sandberg (n 193) 160.
[234] ibid.
[235] ibid 161.
[236] For further insight see ibid 157–61.

broader literature on EU law-making, or EU legislative drafting, their formal position as policy officers makes it challenging to locate statements that are specific to them.

2.4. Conclusion

The first half of this chapter addressed the paucity of literature on bureaucratic lawyers, especially in terms of empirical studies that could provide comprehensive insights into their lived experiences. The broader literature on in-house lawyers suggests that the behaviours of bureaucratic lawyers may set them apart from other types of in-house lawyers, providing additional support for dedicated research on these actors.[237] While the normative ideas specific to bureaucratic lawyers in the legal ethics scholarship are valuable in theory, empirical research can help to bridge the gap between theory and practice by engaging with the lawyers themselves to determine what they actually do and how they navigate conflicts and dilemmas in their everyday work. The first half of this chapter concluded by emphasising a missed opportunity in the socio-legal scholarship to explore the topic of bureaucratic lawyering using methods and epistemologies used in the social sciences.

The second half of this chapter explored the existing academic literature on the work of UK Government and European Commission lawyers specifically. This literature places most emphasis on the descriptive question of what these bureaucratic lawyers do. However, given the limited number of studies available, coupled with the fact that many of these studies only provide a few short statements about their work, there are still many aspects related to the various tasks, judgments, interactions, and chronologies of this work which would benefit from further research. There is also scope to further consider the context of the bureaucratic environment and how this shapes the ways in which lawyers perform their work. A further limitation stems from the fact that many of the existing insights are provided in first order accounts and therefore represent the experiences and perspectives of just a few ‘insider’ lawyers.

[237] Moorhead, Vaughan and Godinho (n 9) 67, 178.

Based on the above, there is a clear need for a systematic assessment of what these bureaucratic lawyers do. To facilitate this, my analytical framework in chapter three will formulate a set of functions for each of these lawyers, addressing both *what* they entail and *when* they operate. The analytical framework will also rely on two theoretical lenses to provide a nuanced understanding of the underlying sociological factors that influence *how* lawyers might perform their work within their bureaucracies. These theoretical lenses emphasise the importance of in-house socialisation processes in influencing how these lawyers behave towards political-professional conflicts and in shaping the knowledge and skills they acquire and develop over time. The development and application of this framework will ultimately contribute to overcoming the knowledge gap identified in socio-legal research by studying these lawyers and drawing on established theories and methods from the social sciences when doing so.

Before proceeding to chapter three, it is important to highlight some interesting comparisons between UK Government and European Commission lawyers, as identified in the literature. One of these relates to the suggestion that UK Government legal advisers adopt a key role in policy clarification while Parliamentary Counsel then subject the policy intention to a thorough intellectual analysis. The existing literature does not indicate that European Commission lawyers adopt a crucial role in the clarification or stress-testing of underlying policies, with their formal roles only commencing once the legislative proposal is drafted and submitted to the ISC. While it is expected that legal advisers and legal revisers will have earlier informal involvement while the proposal is being drafted, their formal role allocation suggests that their predominant concern is likely to be with the legislative text rather than the formulation and development of the policy to which this text is intended to bring into effect.

Another key distinction relates to the legislative drafting process. In line with a common law tradition, legislative acts in the UK Government are composed by specialist drafting lawyers once these lawyers receive a set of legal instructions from the policy department, specifically from legal advisers located there. In contrast, the

process in the European Commission is more closely aligned with a civil law tradition where the legislative text is composed by specialists in the subject area from within the policy department. Moreover, in line with national-supranational distinctions raised in chapter one, legal advisers working in the Commission appear to be subject to more legal limitations as they have a central role in ensuring that the Commission respects the division of competences between the EU and the Member States, as defined in the treaties. This is in stark contrast to the notion of Parliamentary Sovereignty which is a principle of the UK constitution which enables Acts of Parliament to be amended or overturned with significantly fewer legal constraints.

Chapter Three: Analytical Framework

3.1. Introduction

Chapter two revealed that the work of UK Government and European Commission lawyers would benefit from further empirical research. The central focus of this chapter is to develop a unique analytical framework that will serve as a foundation for the empirical analysis in chapters five, six and seven. As a starting point, the chapter will emphasise that there is a notable gap in understanding the various nuances and complexities of bureaucrats' work, such as the daily judgments, experiences, interactions, and time frames involved. This knowledge gap is not limited to the legal scholarship as it is also evident in policy-making research found in other academic disciplines too, including public administration. Following this, the chapter will begin to develop the unique analytical framework by providing a more systematic assessment of what UK Government and European Commission lawyers do than what is currently available in the academic literature. It does this by evaluating the existing body of literature outlined in chapter two to formulate a set of functions, including *what* these functions entail and *when* they are performed.

The framework will then identify two distinct chronological phases within the law-making processes of the UK Government and European Commission which will serve as a logical structure for the empirical analysis provided in chapters six and seven. Moreover, in addition to guiding an analysis of the *what* and *when* dimensions of their work, the analytical framework developed in this chapter will also establish the groundwork for an empirical investigation of *how* UK Government and European Commission lawyers perform their work within their own bureaucracies. This relies on two theoretical lenses that emphasise the significance of in-house socialisation processes, that is to say the interactions and experiences occurring within the respective bureaucratic organisations, in shaping how the lawyers approach political-professional conflicts in their work and also how they acquire the expertise needed to perform their work. These two lines of analysis associated with the 'how' dimension will be explained in more depth below.

3.2. The ‘what’ and ‘when’ dimensions

Chapter two argued that there has been a missed opportunity in the socio-legal scholarship to conduct empirical research which explores the work performed by bureaucratic lawyers. The previous chapter also described what is currently known about the work of UK Government and European Commission lawyers during the preparation of a legislative proposal and highlighted several questions that remain unanswered, either because of the limited number of studies available or the methodological limitations of the studies that do exist. The following discussion will reveal that empirical research on bureaucratic work, specifically research that focuses on uncovering the activities, perspectives, and experiences of those involved, is lacking in a broader context and not just in relation to bureaucratic lawyers. The discussion will also emphasise the need to find an appropriate balance between description and theory in qualitative research on bureaucratic work, especially as this is a generally understudied area which would still benefit from a ‘thick description’ of what these bureaucrats do.

3.2.1. Understanding bureaucratic work

Around the beginning of the 2000s, scholars began to acknowledge that the actual work of policy workers, including bureaucrats, was ‘much richer and more complex’ than what was portrayed in academic research.[238] According to Hendrik Wagenaar, this limitation predominantly arose because textbooks of public policy and public administration often ignored the sociology of bureaucratic work, namely the ‘day-to-day activities’ and ‘lived experiences’ of bureaucrats.[239] Chapter two identified that

[238] Arnošt Veselý, ‘Policy Advice as Policy Work: A Conceptual Framework for Multi-Level Analysis’ (2017) 50(1) Policy Sciences 139, 141. See also Cosmo Howard, ‘The Policy Cycle: A Model of Post-Machiavellian Policy Making?’ (2005) 64(3) Australian Journal of Public Administration 3. The definition of a policy worker is not restricted to bureaucrats as it is broad enough to include other individuals whose work contributes to policy-making, such as professional experts and interest group representatives. On this point see Hal Colebatch, Robert Hoppe and Mirko Noordegraaf, ‘Understanding Policy Work’ in Hal K Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010) 11.

[239] Hendrik Wagenaar, ‘“Knowing” the Rules: Administrative Work as Practice’ (2004) 64(6) Public Administration Review 643, 643.

this limitation applies to legal textbooks too, at least in the context of bureaucratic lawyering, as many studies lack the depth needed to provide rich, comprehensive insights into the actual working practices and lived experiences of these actors. While the legal ethics scholarship has carved a path in the study of bureaucratic lawyers, it adopts a normative standpoint on what these bureaucrats *should* do. Direct engagement with bureaucrats not only provides a rich description and understanding of their various work activities, but it also reveals several 'hidden' features that form an integral part of their everyday work:

> … the almost unthinking actions, tacit knowledge, fleeting interactions, practical judgments, self-evident understandings and background knowledge, embodied standards and warrants, shared meanings, personal feelings, and small rituals that constitute the core of administrative work.[240]

Empirical research, particularly within the disciplines of political science and public administration, has responded to the limitations recognised in the early 2000s. Although not a clearly distinct body of literature yet, these academic studies rely on various methodologies, including interviews and observations, to provide sophisticated insights into the daily activities of bureaucratic work.[241] An empirical investigation by Edward Page and Bill Jenkins is often cited as a notable example of the growing body of research.[242] This study draws on interviews with around 120 middle-ranking policy officials in the UK Government to illustrate in detail the range

[240] ibid 644.
[241] For a distinction on the two disciplines see B Guy Peters and others, 'Bringing Political Science Back into Public Administration Research' (2022) 35(4) Governance 961. For empirical research on bureaucratic work see Edward C Page and Bill Jenkins, *Policy Bureaucracy: Government with a Cast of Thousands* (Oxford University Press 2005); Annick de Vries, Willem Halffman and Rob Hoppe, 'Policy Workers Tinkering with Uncertainty: Dutch Econometric Policy Advice in Action' in Hal K Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010); Karin Guijen and Paul 't Hart, 'Flying Blind in Brussels: How National Officals Do European Business Without Political Steering' in Hal Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010); Lydia Sterrenberg, 'Managing the Problematic in Policy Work' in Hal K Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010).
[242] Page and Jenkins (n 241).

of tasks performed when maintaining and developing policies.[243] Page and Jenkins also introduce the notions of 'improvised expertise' and 'invited authority'. The former relates to the generalist expertise of UK bureaucrats where most emphasis is placed on transferrable skills applying across different policy areas, such as the ability to consult effectively.[244] The second notion of invited authority relates to the finding that the UK Government is not an overly hierarchical place to work, with bureaucrats often seeking out a steer from ministers rather than waiting for strict instructions or decisions to come 'down' from them.[245]

Page and Jenkins' empirical investigation has been defined as 'inductive research at its best'.[246] The authors consciously selected an inductive approach as they sought to provide an 'understandable picture' of what these middle-ranking bureaucrats do in practice, including their experiences and perceptions.[247] More specifically, there was a concern that 'too much theoretical clutter and jargon would stand in the way of a clear portrayal of sets of activities that can be described and understood in fairly straightforward terms.'[248] Furthermore, as the work of UK middle-ranking bureaucrats had received limited exploration, there was a worry that a theoretical focus could inadvertently 'shut out' several important findings about what these individuals actually do.[249] While the inductive, largely atheoretical approach adopted by Page and Jenkins is generally praised for making a clear and convincing contribution to the study of bureaucratic work in the UK Government, Paul 't Hart has argued that this 'overly cautious' approach makes the research 'better on description than analysis'.[250]

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[243] ibid ch 3.
[244] ibid 5.
[245] ibid 109.
[246] Jean-Claude Thoenig, 'Edward C. Page and Bill Jenkins, Policy Bureaucracy. Government with a Cast of Thousands' (2006) 26(2) Journal of Public Policy 191. See also Alan Trench, 'Edward C. Page and Bill Jenkins, Policy Bureaucracy. Government with a Cast of Thousands' (2007) 70(5) Modern Law Review 872.
[247] Page and Jenkins (n 241) ix.
[248] ibid.
[249] ibid.
[250] Paul 't Hart, 'Policy Bureaucracy: Government with a Cast of Thousands' (2006) 84(3) Public Administration 783, 785.

Related to this point, Arnošt Veselý has asserted that empirical research on the activities of policy workers, including bureaucrats, would benefit from broader and deeper theorisations.[251] This view is premised on the idea that research should utilise theoretical explanations on the relationship between bureaucratic actors and their institutional contexts. In the absence of this, scholars are at risk of reaching 'simplistic' conclusions which fail to consider how bureaucrats' behaviours are shaped by various factors, including the norms, values, and expectations surrounding them.[252] Veselý draws on principles associated with institutional theory to emphasise an interdependent relationship between bureaucrats and their surroundings, a theory which will be explored further in the second half of this chapter.[253] This interdependent relationship is based on the view that 'institutional rules must be "enacted" by actors, but institutions themselves are produced and reproduced through these actions.'[254] According to Veselý, atheoretical research on bureaucratic work can be especially problematic in comparative research where scholars reach conclusions on the variation of behaviours in different jurisdictions while only exploring a single level of analysis.[255]

I argue that theoretical explanations of bureaucratic work do not have to be at the expense of descriptive accounts guided by a 'spirit of curiosity' where scholars simply adopt the methodology of speaking to bureaucrats about their everyday work.[256] Furthermore, such narrative accounts of bureaucratic work should not impulsively be portrayed as incomplete or 'overly cautious' research providing 'just the facts'.[257] These accounts are valuable in their own right as they enhance our understanding of an understudied topic but they also serve as a robust foundation for

[251] Veselý (n 238).
[252] ibid 151, 147.
[253] For more on this relationship see Gregory Jackson, 'Actors and Institutions' in Glenn Morgan and others (eds), *The Oxford Handbook of Comparative Institutional Analysis* (Oxford University Press 2010) 64. See also William Roberts Clark, 'Agents and Structures: Two Views of Preferences, Two Views of Institutions' (1998) 42(2) International Studies Quarterly 245.
[254] Jackson (n 253) 65.
[255] Veselý (n 238).
[256] Page and Jenkins (n 241) vii.
[257] 't Hart (n 250) 785; Page (n 129) 652.

future research on bureaucratic work. This thesis is in fact also led by a primary sense of curiosity given the limited academic information available on the work of bureaucratic lawyers, including those in the UK Government and European Commission. While it does rely on two theoretical lenses to explain how the behaviours and expertise of these lawyers can be shaped by their particular bureaucratic contexts, this does not compromise the presentation of a clear and detailed picture of their work during the preparation of a legislative proposal.

Overall, while there has been a gradual increase of empirical research aimed at uncovering the work of bureaucrats, the studies are limited in number and the topic of bureaucratic lawyering has yet to leave a notable impact among these studies.[258] There is therefore still much to learn about what work these lawyers do and their lived experiences when performing this work. To accomplish this, this chapter will establish a framework to guide the empirical analysis of this thesis. As a starting point, I will rely on the relevant literature outlined in chapter two describing what UK Government and European Commission lawyers do to formulate a set of functions, encompassing both *what* the functions entail and *when* they operate. This systematic approach provides a more structured and accessible framework compared to what is currently available in the literature. The framework will then separate the law-making process into two distinct chronological phases which, in turn, will make it easier to empirically analyse the sequence of lawyers' work and to ascertain key moments where they become particularly influential. As this thesis adopts a multiple-case study design, framing the empirical analysis according to chronological phases will also make it easier to compare directly the different stages in which UK Government and European Commission lawyers contribute to their respective processes.

3.2.2. Comparative table of functions

The information presented in tables 1 and 2 represents a more systematic approach to the work of UK Government and European Commission lawyers than what is

[258] Chapter two nevertheless acknowledged qualitative research such as Page (n 129); Page (n 116).

currently available in the existing academic literature. While this approach has its own merits, there remains a significant need for in-depth qualitative research to provide a more nuanced and comprehensive understanding of these functions in practice. By speaking directly with UK Government and European Commission lawyers, this thesis will uncover several aspects related to the functions identified in the following tables, including the various tasks, interactions, judgments, and chronologies that constitute these functions.

UK Government	What?	When?
Legal advisers	Legal advice to the lead ministerial department, presented as a legal risk assessment that considers the public sector context.	Legal advice is increasingly provided from the initial stages of policy formulation.
	Clarification and development of policy details.	Introduced as a prerequisite for instructing Counsel, and likely to be done alongside legal advice.
	Instructing Parliamentary Counsel, including the preparation and delivery of legal instructions to Counsel.	Once the policy ideas and legislative solution have been clarified in sufficient detail.
Parliamentary Counsel	Feasibility advice based on drafting considerations, provided to the lead department and the PBL Committee.	This advice is provided before receiving legal instructions when the policy is still being developed.
	Procedural advice and assistance to the lead department, both on Bill procedures in government and parliament.	While this advice may be provided before receiving legal instructions when the policy is still being developed, it continues throughout the law-making process.
	Legislative drafting, including the intellectual analysis of policy	Once legal instructions are received from legal advisers.

	ideas and the writing of Bill provisions.	
	Constitutional guardianship, including safeguarding values integral to the legal order and maintaining the constitutional settlement between the three branches.	Likely to operate throughout the process as there is no suggestion that this function is mapped onto a specific stage of the law-making process.

Table 1: Work of UK Government lawyers**.**

European Commission	What?	When?
DG legal officers	Legal assistance to the DG, including the legal analysis of rules and a legal risk assessment.	No mention of a specific stage but much of this assistance will have to be offered prior to the ISC when the proposal is being prepared and drafted.
	Drafting assistance to technical experts in the DG.	Prior to the proposal being submitted to the ISC for the Legal Service and other Commission actors.
Legal Service: Legal advisers	Legal advice to the lead DG, including an assessment of legality and consistency.	While this function formally takes place during the ISC once the legislative proposal has been drafted, informal legal advice can also be provided at an earlier stage.
Legal Service: Legal revisers	Assessment of drafting quality for the lead DG by ensuring compliance with EU drafting rules and guidance.	During the ISC once the legislative proposal has been drafted, although there is mention of informal dialogue with the lead DG too. While it is uncommon nowadays, technical drafting quality can also be checked after translation.

	Ensuring linguistic parallelism between the language versions.	After translation by the Commission's Translation DG.

Table 2: Work of European Commission lawyers, and DG legal officers.

3.2.3. Formulating chronological phases

While tables 1 and 2 identify a set of functions belonging to UK Government and European Commission lawyers, it would be challenging to frame the empirical analysis around these identified functions as not all of them apply to UK Government and European Commission lawyers alike. For instance, the function of linguistic parallelism has no application in the national context. Similarly, the function of legal revision does not align with the common law system of the UK Government where the initial draft is composed by drafting specialists. The empirical analysis in chapters six and seven will therefore be framed around two chronological phases which encapsulate all the identified functions, specifically: (1) converting the policy problem into a legal solution and (2) finalising the legal solution. In formulating and articulating these two phases, some insights were drawn from existing studies in chapter two which established clear links between the work of UK Government and European Commission lawyers and the specific stages of the law-making process.

Nevertheless, a considerable proportion of the existing research did not make clear references to the chronologies of lawyers' work. This omission might be as a consequence of the nature of law-making which is a highly recursive process, with the possibility of the various stages being returned to and repeated several times.[259] Given this omission, inspiration was also drawn from David Howarth's original lawyer-engineer analogy which encourages a more systematic way of thinking about what lawyers do, including those working in government or other public sector bodies.[260] The development of Howarth's analogy was informed by a variety of

[259] Paul A Sabatier, 'The Need for Better Theories' in Paul A Sabatier (ed), *Theories of the Policy Process* (Westview Press 1999) 4.
[260] David Howarth, *Law as Engineering: Thinking About What Lawyers Do* (Edward Elgar Publishing 2013).

sources, including existing academic research, data published by legal professional regulators, and conversations with engineers and lawyers. While most of the evidence comes from the UK, Howarth also relies on additional sources to offer perspectives on lawyers working in other jurisdictions, particularly the United States.

Howarth encourages legal scholars to view law as a form of engineering to gain a more comprehensive understanding of the kind of work lawyers are engaged in.[261] The author argues that similar to engineers, lawyers are involved in a problem-solving design process where they provide legal solutions to policy problems, measure respective legal risks, and embody the chosen solution into a legal document. Rooted firmly in engineering principles, Howarth provides a more detailed description of these legal design tasks and the various actions they are likely to entail. The following discussion will outline these tasks and organise them into two distinct chronological phases. The aim of the discussion is to reveal how each phase will apply to the work of UK Government and European Commission lawyers in order to justify the use of this analogy as a template for structuring the empirical analysis. To contextualise this discussion, brief references will also be made to some of the empirical findings presented in chapters six and seven.

3.2.3.1. Converting the policy problem into a legal solution

In line with Howarth's analogy, this phase commences with the process of clarifying and understanding what the client wants to achieve.[262] To achieve this, lawyers must typically engage in 'an extended interaction' with the client.[263] Similar to engineers, lawyers may adopt a forward-looking approach and identify issues or constraints that could cause problems for clients at a later stage, including the application of legal rules that contradict the client's intentions.[264] Once lawyers understand what the client wants to achieve, they must identify and analyse the 'policy problem' that is preventing the client's objectives from being achieved. Similar to engineers, lawyers

[261] ibid 3.
[262] ibid 74.
[263] ibid.
[264] ibid 58, 74.

may adopt a backwards approach where they ask themselves 'what conditions would have to be fulfilled for the problem to count as solved and then asking what conditions would have to be fulfilled before those conditions were in their turn fulfilled and so on.'[265]

As Howarth does not explain the concept of a policy problem in much detail, it was necessary to engage with the broader policy-making literature which defines this as a 'disconnection' between the existing state of affairs and the desired government objectives.[266] Thus, in the context of law, one might expect lawyers to consider how the existing legal framework prevents the implementation of the client's objectives, which, in turn, can justify the need to legislate. Closely related to this is the next task of generating options to solve the policy problem.[267] Such options could include the proposal of an entirely new legal structure or changes to existing legal provisions. Howarth suggests that tensions may arise at this stage if the client does not agree with the options proposed by lawyers, or it is impossible to find a satisfactory solution to the problem.[268] One of the key considerations is how much creativity lawyers use when interpreting the law to generate these options.

When one of the legal options is chosen as a solution to the policy problem, this needs to be clearly specified and firmed up into a tangible form to be assessed by lawyers.[269] This tangible form often includes 'a description of a set of parts and instructions for putting them together.'[270] Although chapter two revealed that legal instructions are developed in the UK Government and are sent to Parliamentary Counsel for assessment, this differs from the situation in the European Commission which follows a civil law approach where legal instructions are not prepared. As such, the draft proposal itself serves as the document used for assessment by lawyers from the Legal Service. In the context of this thesis, the point at which the

[265] ibid 76.
[266] John A. Hoornbeek and B. Guy Peters, 'Understanding Policy Problems: A Refinement of Past Work' (2017) 36(3) Policy and Society 365, 369.
[267] Howarth (n 260) 61, 77.
[268] ibid 61.
[269] ibid 62.
[270] ibid.

legal solution is expressed as a written document for assessment by lawyers, either in a set of instructions or a draft proposal, marks the end of this analytical phase. The work of UK Government and European Commission lawyers during this phase will be explored in chapter six, but the discussion below provides some brief insights to help the reader better understand how this will unfold.

In the case of the UK Government, the academic literature specifies that legal advisers assist the lead ministerial department to flesh out the policy details and also provide advice on legal issues that could cause problems at a later stage.[271] While the literature lacks an in-depth examination of how legal advisers actually help to develop the policy details, empirical findings in chapter six will demonstrate that legal advisers collaborate with policy officials to tease out from them what the minister truly wants to achieve. The findings will also reveal that legal advisers help to identify the 'policy problem' through an assessment of the legislative landscape, which, in turn, enables them to uncover the legal changes required to 'solve' the policy problem. Legal advisers also provide a legal risk assessment for each policy option, with the selected legal solution written into a set of legal instructions for assessment by Parliamentary Counsel. While academic insights confirm that Counsel may also be involved during this initial phase for the provision of forward-looking drafting and procedural advice, empirical findings demonstrate the need for Counsel to retain a degree of separation from initial policy discussions to ensure the effectiveness of their work in the second analytical phase. Figure 1 illustrates this first phase:

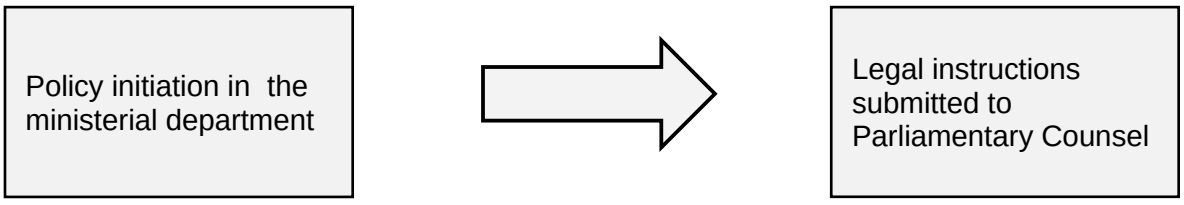

Figure 1: UK Government: Converting the policy problem into a legal solution.

[271] Yong (n 5) 7, 48-50.

The literature does not provide much insight into the involvement of European Commission lawyers during this phase, especially with regard to legal revisers. It nevertheless indicates that legal advisers will provide an initial assessment of whether the policy initiative is 'legally sound'.[272] Empirical findings will provide a more nuanced understanding of how this early legal advice tends to influence the selection of the legal solution by the lead DG, and the reasons behind this influence. Attention will also be drawn to legal advisers' notable separation from policy development, especially in contrast to their counterparts in the UK Government. While legal revisers may also be involved during this phase to help ensure the drafting quality of the legislative text before the formal coordination procedure of the ISC commences, their involvement is much more limited compared to legal advisers. Ultimately, after the engagement of both legal advisers and legal revisers, the lead DG is in an improved position to submit the legislative proposal to the ISC for a formal assessment by the lawyers. Figure 2 illustrates this first phase:

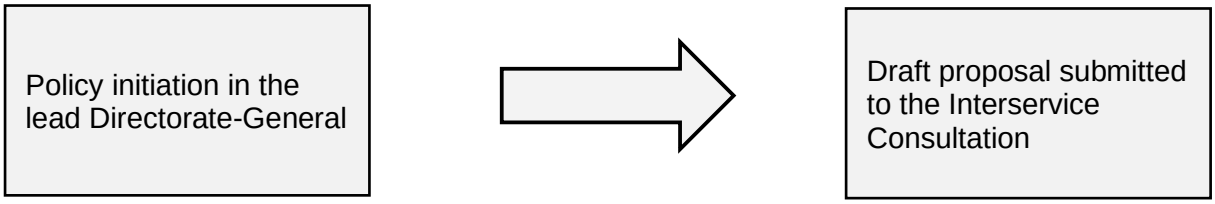

Figure 2: European Commission: Converting the policy problem into a legal solution.

3.2.3.2. Finalising the legal solution for introduction to the legislature

The second analytical phase begins once the proposed legal solution reaches lawyers for assessment, in the form of a written document. The overall purpose of assessment is to ensure that the legal solution can achieve the client's intended objectives in a legally robust manner. Howarth explains that this process requires lawyers to think 'through the possible consequences' of the legal solution, although not much insight is provided into what these consequences may entail in practice.[273]

[272] Leino-Sandberg (n 193) 164.
[273] Howarth (n 260) 80.

Given the division of labour and expertise in law-making, different types of lawyers are likely to be responsible for assessing different types of consequences.[274] Ultimately, this process of assessment ends when the solution has been refined up until the point where it is considered 'good enough' for introduction to the legislature.[275] Howarth indicates that lawyers might struggle to identify when this is the case as there is 'no clear stopping rule' in comparison to engineering:

> In engineering terms, what is happening here is that lawyers are engaging in a recognisable process of refining options in the course of assessing them, but they have developed no clear stopping rule for that process. Since they are usually working on a single option and then varying it, they are involved in a process looking for marginal improvements rather than testing systematic variations.[276]

Chapter seven will explore the work of UK Government and European Commission lawyers during this second phase. In the case of the UK Government, the literature reveals that upon receiving the legal instructions, Parliamentary Counsel will analyse the proposed solution to ensure it will stand up to scrutiny in Parliament, and by the judiciary and practitioners once enacted.[277] Empirical findings will provide a more nuanced understanding of Counsel's analytical role which is central to uncovering the policy intention and ensuring the effectiveness of legislation. Attention will also be drawn to their role in drafting the legislative provisions, including the need to strike an appropriate balance between various drafting principles and political considerations. Emphasis will also be placed on the crucial role which legal advisers serve during this phase to ensure the robustness of the Bill as this is an aspect of their work which is largely absent from the literature. Figure 3 identifies that the second analytical phase ends when the process of drafting the Bill is completed for submission to the UK Parliament:

[274] ibid 81.
[275] ibid 83.
[276] ibid.
[277] Bowman (n 171) 70.

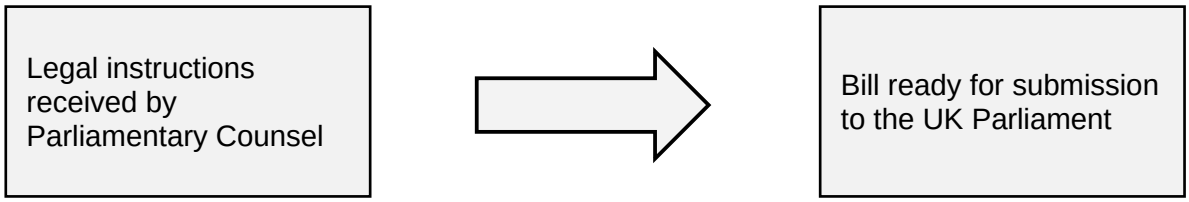

Figure 3: UK Government: Finalising the legal solution for introduction to the legislature.

In the case of the European Commission, the proposed legal solution is sent to legal advisers and legal revisers from the Legal Service once the ISC is launched, in the form of a draft legislative proposal. The two types of lawyers must then provide a written legal opinion for the lead DG with both of their comments, with the opinion taking one of three forms: a positive opinion, positive opinion with comments, or a negative opinion.[278] In the legal opinion, legal advisers provide their input on the legal substance of the proposal (i.e., non-drafting matters) to determine compliance with the treaties and to ensure consistency with the broader EU legal framework. Legal revisers, on the other hand, will assess whether the proposal is drafted in accordance with EU drafting rules. Legal revisers may also assess the drafting quality and linguistic parallelism of translated texts but this is rarely undertaken nowadays. As both types of lawyers are working with the draft proposal as opposed to legal instructions, there is arguably less scope for them to analyse the policy intention to ensure that the legislation achieves the desired policy. Figure 4 outlines that the end of this analytical phase is when the ISC is completed and the proposal is ready for submission to the European Parliament and Council:

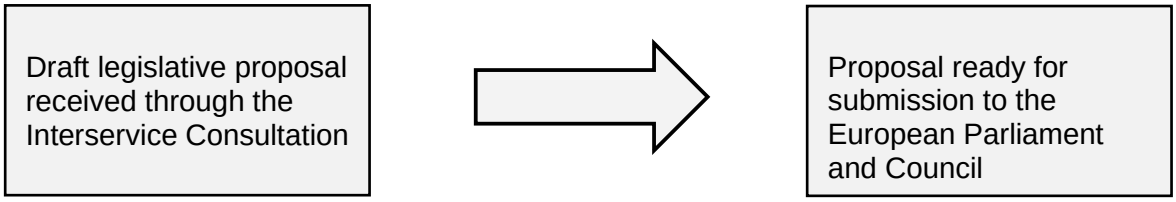

Figure 4: European Commission: Finalising the legal solution for introduction to the legislature.

[278] Leino-Sandberg (n 193) 166.

3.2.4. Section summary

So far, this chapter has established the framework for exploring the 'what' and 'when' dimensions of UK Government and European Commission lawyers' work in the empirical analysis. Following the academic claims made in the broader policy-making literature, coupled with insights provided in chapter two, I argued that there is a need to depart from relatively broad and straightforward descriptions of what these lawyers do. To achieve this, the thesis will gather qualitative data which offers a comprehensive and nuanced analysis of the lawyers' experiences while performing their work. Based on the key functions laid out in tables 1 and 2, this chapter also formulated two chronological phases to serve as a logical and coherent structure for the empirical analysis. Chapter six of the thesis will explore the work performed by lawyers during the first phase while chapter seven will explore their work during the second phase. In combination, both chapters will capture the second research question of this thesis: 'What are the functions of these lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?' This chapter will now further develop the framework so that it can also accommodate an empirical analysis of the 'how' dimension.

3.3. The 'how' dimension

As mentioned in the introductory section, the 'how' dimension of this framework relies on two lines of analysis, the first of which concerns the political-professional behaviour of UK Government and European Commission lawyers. I propose an analytical approach which explores the *role perceptions* of bureaucratic lawyers to better understand why they might approach political-professional conflicts in a particular way. In accordance with neo-institutionalism, the framework emphasises the importance of in-house socialisation processes in shaping role perceptions. Utilising insights from the disciplines of legal ethics and political science, I construct two ideal types of bureaucratic lawyers which will serve as analytical tools in subsequent chapters to assess how closely the role perceptions of UK Government and European Commission lawyers align with these ideal types. The following discussion will then explore the second line of analysis which relates to the expertise

of UK Government and European Commission lawyers. I rely on a realist theory of expertise to establish a robust foundation for acquiring a comprehensive understanding of how in-house socialisation processes facilitate knowledge acquisition and development among bureaucratic lawyers.

3.3.1. Political-professional behaviour

The academic literature discussed in chapter two highlighted that bureaucratic lawyers operate in environments where political objectives might conflict with their professional legal views. This theme was a central focus in the legal ethics scholarship, albeit from a normative standpoint, and also featured in a small proportion of studies related to UK Government and European Commission lawyers.[279] The studies on UK Government and European Commission lawyers identified a set of organisational mechanisms available to these lawyers to resolve such conflicts, including the veto power of the Commission Legal Service and the escalation of a proposal to the UK Law Officers.[280] While this information is useful, this thesis goes a step further as it uncovers how these lawyers perceive their own roles and, in turn, how this influences the ways they approach this conflict.

This political-professional conflict has led to some public controversies involving European Commission and UK Government lawyers. For example, in 2015 and 2016, the Commission Legal Service strongly advocated that the EU's development aid could not be used to contribute to capacity building for military and security actors in partner countries.[281] Additionally, in 2016, Jean-Claude Juncker who served as Commission President at the time criticised legal advice given by the Legal Service with regard to the Canada-EU trade agreement.[282] In the case of the UK

[279] Miers and Page (n 151) 52; Page (n 116) 804; Leino-Sandberg (n 193) 184.
[280] Leino-Sandberg (n 193) 167–68; Yong (n 5) 57.
[281] Heidi Hautala, 'Europe's Legal U-Turn on Militarising Development Policy' (*EURACTIV*, 3 July 2017) <https://www.euractiv.com/section/development-policy/opinion/europes-legal-u-turn-on-militarising-development-policy/> accessed 2 September 2023.
[282] Leino-Sandberg (n 193) 139. See also Daniela Vincenti, 'EU Leaders on Collision Course with Commission over CETA' *EURACTIV* (29 June 2016) <https://www.euractiv.com/section/trade-society/news/eu-leaders-on-collision-course-with-commission-over-ceta/> accessed 28 July 2023.

Government, Sir Jonathan Jones resigned as Permanent Secretary of GLD in 2020 over government plans to override parts of the Brexit withdrawal agreement.[283] Jones' resignation was initiated by the UK Government's strategy to use the Internal Market Bill to overrule parts of the Withdrawal Agreement, which Jones argued was a breach of their international treaty obligations.[284]

This political-professional conflict has a strong heritage back to organisational sociology and Max Weber's writings on bureaucracy. Weber understood a bureaucracy to be a hierarchical system of administration exercised by trained professionals according to prescribed rules, without favouritism, or arbitrariness.[285] Weber distinguished bureaucrats who are 'appointed from above' to carry out the organisation's policies from those individuals who are elected to manage the affairs of the organisation.[286] In terms of the state apparatus, this distinction applies to bureaucrats (civil servants) and elected officials (politicians). In an ideal type of bureaucracy, Weber saw bureaucrats as impartial individuals who should comply

[283] Laura Kuenssberg, 'Senior Government Lawyer Quits over Brexit Plans' *BBC News* (8 September 2020) <https://www.bbc.co.uk/news/uk-politics-54072347> accessed 2 September 2023; Beckie Smith, 'Closing Argument: Ex-Legal Chief Jonathan Jones on Brexit, Covid and Leaving Government' *Civil Service World* (21 January 2021) <https://www.civilserviceworld.com/in-depth/article/closing-argument-jonathan-jones-on-leaving-gld> accessed 2 September 2023. Another example sits on the opposing side of this and relates to Suella Braverman's issuing of updated legal risk guidance following the government's controversial scheme to send asylum seekers to Rwanda. See Miranda Bryant, 'Braverman Orders Government Lawyers to Offer "Solutions" to Legal Challenges' *The Guardian* (30 July 2022) <https://www.theguardian.com/politics/2022/jul/30/braverman-orders-government-lawyers-to-offer-solutions-to-legal-challenges> accessed 2 September 2023; Gazette reporter, 'AG Denies Plan to Ban Government Lawyers from Rejecting Policy' *The Law Society Gazette* (31 July 2022) <https://www.lawgazette.co.uk/news/ag-denies-plan-to-ban-government-lawyers-from-rejecting-policy/5113290.article> accessed 2 September 2023.

[284] For the Law Officers' advice on the legal effect of the Withdrawal Agreement, specifically the Protocol on Ireland and Northern Ireland, see Attorney General's Office, 'Legal Effect of the Protocol on Ireland/Northern Ireland' (2018) <https://www.gov.uk/government/publications/exiting-the-eu-publication-of-legal-advice> accessed 1 September 2023.

[285] David Beetham, *Bureaucracy* (2nd edn, Open University Press 1996) 9. For an English translation of Weber's key papers and a more detailed account of Weber's model of bureaucracy see HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (2nd edn, Routledge 1991).

[286] Gerth and Mills (n 285) 200. See also Beetham (n 285) 11.

with the orders of politicians irrespective of party affiliation. They should also comply with these orders even when they appear 'wrong' to them:

> The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction. This holds even if the order appears wrong to him and if, despite the civil servant's remonstrances, the authority insists on the order. Without this moral discipline and self-denial, in the highest sense, the whole apparatus would fall to pieces.[287]

Weber justified this view by referring to the authority of political power, expressing that the honour of the politician 'lies precisely in an exclusive *personal* responsibility for what he does'.[288] This adopts the reasoning that bureaucrats should refrain from making autonomous choices because, unlike politicians, they are not democratically elected and therefore not accountable to the public for the outcome of their decisions.[289] Despite presenting this ideal relationship, Weber appreciated that its realisation was improbable in practice. Even if bureaucrats want to simply follow the orders of a politician, this is unlikely in practice as politicians tend to lack the expertise and information required to make decisions on all policies.[290] Weber therefore believed that the expertise of a bureaucrat should not be used to determine the selection of objectives (value rationality), but should only be used to determine how these objectives can be achieved efficiently and effectively (instrumental rationality).[291]

The legal ethics scholarship already discussed in chapter two introduces various models to conceptualise how bureaucratic lawyers may approach the political-professional conflict. While these models are developed in relation to American or Canadian lawyers, and lack an empirical grounding, their insights can still be applied

[287] Gerth and Mills (n 285) 95.
[288] ibid.
[289] Tholen and Mastenbroek (n 5) 492–93.
[290] Gerth and Mills (n 285) 232.
[291] Guenther Roth and Claus Wittich (eds), *Max Weber: Economy and Society: An Outline of Interpretive Sociology* (Bedminster Press 1968) 24; Weber (1998) as cited in Tholen and Mastenbroek (n 5) 493.

to other modern bureaucracies, including those featuring in this thesis. The following discussion will introduce these models to illustrate the contrasting behaviours that bureaucratic lawyers may demonstrate when presented with a political-professional conflict. Later in this chapter, a reframed version of these models will be utilised to construct two ideal-typical representations of bureaucratic lawyers, which will feature in the subsequent empirical analysis.

3.3.1.1. The contrasting models of political-professional behaviour

As mentioned in chapter two, a well-defined strand of academic literature on bureaucratic lawyers is generally found in the American and Canadian legal ethics scholarship. This research makes normative assumptions about how bureaucratic lawyers *should* act on the basis of various principles, including legal indeterminacy,[292] partisanship,[293] and public interest.[294] While chapter two argued that there is no clear consensus reached by legal ethics scholars on what 'proper' ethical conduct should entail, the literature develops a set of conceptual models to illustrate the range of behaviours available to lawyers should they be confronted with a political-professional conflict. Without a real-life application of these models, it is challenging to envision how they might materialise in practice and there are considerable gaps in the precise meaning of certain concepts, such as the notion of a 'reasonable' legal defence. The empirical findings presented in chapters six and seven will nevertheless help to overcome several of these limitations.

The advocate model is premised on the notion of 'political loyalty' which aligns with the traditional Weberian view that bureaucrats should refrain from making autonomous choices.[295] According to Hutchinson, political loyalty is the 'institutional price' that lawyers pay when working for a government organisation.[296] The advocate

[292] Moss (n 14) 1306; Johnsen (n 88) 1580.
[293] Cramton (n 91) 296; Lund (n 87) 449.
[294] Miller (n 95) 1294–95; Monahan (n 84) 49; Wendel, 'Government Lawyers in the Trump Administration' (n 84) 294ff.
[295] Tom Christensen, 'Bureaucratic Roles: Political Loyalty and Professional Autonomy' (1991) 14(4) 303, 305.
[296] Hutchinson (n 15) 995.

model is developed in relation to legal advisers and advances that they should not obstruct political objectives unless there are 'clearly insurmountable' legal hurdles.[297] The literature indicates that such insurmountable hurdles exist when legal advisers cannot find any 'reasonable' legal arguments to defend the policy.[298] While the concept of reasonableness leaves room for interpretation, Hutchinson emphasises that this model does not encourage legal advisers to breach legal rules as no professional code of conduct would allow lawyers to behave unlawfully.[299]

On the opposite side of the conflict is the neutral expositor model. This is based on the notion of 'professional autonomy' which views bureaucratic lawyers as more independent and encourages them to promote and enforce their professional legal views even if these do not align with political preferences.[300] This model advances that legal advisers should reject any legal arguments advanced by political superiors, even if reasonable, that are not regarded as 'the *best* view of the law.'[301] The best view of the law refers to an interpretation of the law which is uncoloured by the politician's interests and is therefore as serious and impartial as that undertaken by the courts.[302] If the politician refuses to follow this legal advice, legal advisers should attempt to persuade them otherwise, or in most extreme cases, withdraw from the project. This might require them to forego their employment 'or at least threaten such a move'.[303]

Given that the two models represent extreme behaviours, albeit at opposite ends of the spectrum, there exist a wide range of behaviours falling between them. This is acknowledged by Moss who argues that the models are 'a caricature, both overstating and understating the obligations of the executive branch lawyer.'[304] In this sense, Moss believes that bureaucratic lawyers are likely to adopt an integrated

[297] Moss (n 14) 1306.
[298] ibid.
[299] Hutchinson (n 15) 995.
[300] Christensen (n 295) 310.
[301] Moss (n 14) 1306.
[302] Lund (n 87) 447; Moss (n 14) 1306.
[303] Hutchinson (n 15) 996.
[304] Moss (n 14) 1306.

model where political and professional elements are combined in their work.[305] From an ethical standpoint, Moss proposes that an integrated model should be characterised by efforts to further political goals on the basis of democratic accountability while still engaging in an impartial legal interpretation.[306] If the proposal is deemed unlawful, legal advisers should propose sound legal alternatives and work with the client to refine the proposal accordingly. If political wishes cannot be reconciled with legal alternatives, a commitment to the law must prevail.[307]

With regard to legislative drafters, the legal ethics scholarship provides fewer insights into the range of behaviours expected if a political-professional conflict emerges.[308] Nevertheless, valuable perspectives can still be achieved from the models developed for legal advisers, coupled with specific references made about legislative drafters. On one end of the spectrum, in accordance with the notion of political loyalty, legislative drafters should translate the wishes of elected officials into legal language, without attempting to convince them of their own professional legal views.[309] On the other end of the spectrum, legislative drafters should enforce more professional autonomy in an attempt to improve the form and content of legislation. As indicated in chapter two, this might encompass a duty to the public where legislative drafters actively promote the comprehensibility of legislative texts to ensure they are easily understood by those governed by them.[310] This duty to the public may also require legislative drafters to verify that the proposed legislation upholds values integral to the legal order, such as equality and fairness.[311]

The legal ethics literature proposes various strategies which legislative drafters should employ if they are prevented from upholding duties extending beyond the interests of political officials. These include attempts to educate the official about the

[305] See the notion of an integrated role in Christensen (n 295) 303.
[306] Moss (n 14) 1330.
[307] ibid 1329–30.
[308] Legal revisers do not feature in the legal ethics scholarship as both the United States and Canada adopt common law systems.
[309] Cherkewich (n 6) 257.
[310] Crabbe (n 176); Laws (n 166); Crabbe (n 7).
[311] Cherkewich (n 6) 257.

conflict, enforce their views through verbal or written statements, disassociate from the project, or in most extreme cases, refuse to draft.[312] Their selected approach should nevertheless be proportionate to the 'seriousness' of the matter.[313] On this point, Roger Purdy advances that drafters should strike an appropriate balance and consider whether the initiative is 'objectionable on legal, moral, or procedural grounds, and whether the resulting law would be flawed for formal or substantive reasons, or be problematic in its drafting or its policy.'[314] Furthermore, given their specialist drafting expertise, legislative drafters should feel encouraged to express themselves more assertively and 'vigorously' in matters of technical drafting.[315]

While the legal ethics models offer valuable insights into a range of possible behaviours when bureaucratic lawyers are faced with a political-professional conflict, there is still significant room to empirically investigate whether these behaviours are demonstrated in practice and under what conditions. My analytical framework adopts the notion of a *role perception* which is central to explaining and understanding the behaviour of bureaucrats. Empirical research currently demonstrates that bureaucrats' formal organisational positions are 'overwhelmingly' important in shaping their role perceptions.[316] The following discussion will introduce the notion of a role perception and examine its brief application to bureaucratic lawyers. It will then outline a neo-institutional perspective of a role perception which emphasises the significance of in-house socialisation, before it develops two ideal-typical representations of bureaucratic lawyers. The discussion will then present certain organisational features which are expected to influence which of these ideal types is adopted while acknowledging that these types represent opposing extremes.

[312] Purdy (n 14) 85–86; Richard C Nzerem, 'The Role of the Legislative Drafter in Promoting Social Transformation' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 133.
[313] Purdy (n 14) 84, 86.
[314] ibid 84.
[315] ibid 86.
[316] Morten Egeberg and Inger Marie Stigen, 'Explaining Government Bureaucrats' Behaviour: On the Relative Importance of Organization Position, Demographic Background, and Political Attitudes' (2021) 36(1) Public Policy and Administration 3, 5.

3.3.1.2. Role perceptions

Academic research into the role perceptions of employees within their workplace environments has predominantly focused on the private sector.[317] However, given that bureaucrats generally operate in complex environments with 'ambiguous and often conflicting objectives', scholars have also demonstrated a keen interest in examining how bureaucrats perceive their roles and how this impacts their work behaviours.[318] The standard sociological understanding of a role is 'the behavior expected of an actor in a specific social position' and the way in which actors perceive their *own* role is frequently referred to as a 'role perception'.[319] Several empirical studies have demonstrated that the ways in which bureaucrats interpret and assign meaning to their own role consequently shapes the behavioural patterns they adopt within the workplace.[320] It has therefore been argued that understanding bureaucrats' role perceptions puts researchers 'in the best possible position to explain' the behaviours of these bureaucrats when performing their work.[321]

[317] For example see Sharon K Parker, '"That Is My Job": How Employees' Role Orientation Affects Their Job Performance' (2007) 60(3) Human Relations 403; Olga L Clark, Michael J Zickar and Steve M Jex, 'Role Definition as a Moderator of the Relationship between Safety Climate and Organizational Citizenship Behavior Among Hospital Nurses' (2014) 29(1) Journal of Business and Psychology 101.

[318] Joëlle van der Meer and others, 'The Bureaucrat, the Entrepreneur, and the Networker: Developing and Validating Measurement Scales for Civil Servants' Role Perceptions' [2023] Public Administration Review 1, 2.

[319] Homans (1961) and Searing (1991) as cited in Jan Beyers, 'Multiple Embeddedness and Socialization in Europe: The Case of Council Officials' (2005) 59(4) International Organization 899, 902. The term 'role perception' is often used interchangeably with the term 'role conception' in the academic literature.

[320] Jarle Trondal, 'Balancing Roles of Representation in the European Commission' (2008) 43 Acta Politica 429; Jarle Trondal and others, *Unpacking International Organisations: The Dynamics of Compound Bureaucracies* (Manchester University Press 2010); Liesbet Hooghe, 'Images of Europe: How Commission Officials Conceive Their Institution's Role' (2012) 50(1) Journal of Common Market Studies 87; Joëlle van der Meer, 'Role Perceptions, Collaboration and Performance: Insights from Identity Theory' [2023] Public Management Review 1.

[321] Jarle Trondal and Frode Veggeland, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in EU Committees' (2003) 10(1) Journal of European Public Policy 59.

Much of the empirical research investigating how bureaucrats perceive their own role and how this shapes their ideas of appropriate behaviour, specifically in relation to political-professional conflicts, is situated in the political science discipline.[322] This research approaches the study of bureaucratic role perceptions in various ways. Some studies compare the role of bureaucrats and politicians, including a well-known study by Joel Aberbach, Robert Putnam, and Bert Rockman which relies on interviews with politicians and bureaucrats from Western democracies between 1970 and 1974 to uncover in what respects they think and behave in similar or distinctive ways.[323] Other studies deviate from a comparative analysis to solely focus on the role of bureaucrats.[324] Many of these studies use survey data to measure role perceptions with regard to the influence of political signals or professional norms. For example, bureaucrats may be asked whether they would propose a course of action which they believe is correct on professional grounds but would evoke objections from their political superiors.[325] Other studies measure role perceptions by asking bureaucrats how strongly they 'feel allegiance' to their professional disciplines.[326]

These empirical studies demonstrate that a bureaucrat tends to hold multiple role perceptions and that their behaviour incorporates elements of each, albeit to varying degrees.[327] As the presence of one role perception does not necessarily exclude the presence of another but instead reduces the extent to which the other is exhibited in practice, scholars have argued that the overall behaviour of a bureaucrat should be regarded as 'a result of the interplay and conflict' between different role perceptions.[328] While the predominant quantitative approach is useful to systematically 'test' the presence of the various role perceptions, it is not as effective

[322] Christensen (n 295); Tholen and Mastenbroek (n 5) 487; Ellen Mastenbroek, 'Guardians of EU Law? Analysing Roles and Behaviour of Dutch Legislative Drafters Involved in EU Compliance' (2017) 24(9) Journal of European Public Policy 1.
[323] Joel D Aberbach, Robert D Putnam and Bert A Rockman, *Bureaucrats and Politicians in Western Democracies* (Harvard University Press 1981).
[324] Christensen (n 295).
[325] ibid. See also fn 3 of Christensen's study for more details on the survey.
[326] Trondal and Veggeland (n 321).
[327] van der Meer and others (n 318) 4.
[328] Trondal and Veggeland (n 321) 63. See also Trondal (n 320).

in producing rich, in-depth data on how bureaucrats explain their role perceptions and the associated behaviours. This thesis helps to address this by adopting a qualitative approach which uncovers how bureaucratic lawyers describe their own roles, especially how they understand these roles as part of the broader bureaucratic organisation, and consequently how this influences the behaviours they adopt when faced with a political-professional conflict.

Thus far, bureaucratic lawyers have received minimal attention within the academic scholarship on role perceptions. There is therefore considerable scope and value in exploring their role perceptions and the associated behavioural patterns. A notable exception that focuses on bureaucratic lawyers is an empirical study conducted by Berry Tholen and Ellen Mastenbroek which does in fact depart from the quantitative approach dominating much of the research.[329] Based on interviews with lawyers from the Government of the Netherlands, this study demonstrates that these lawyers perceive their role as falling within the advocate model described above where they regard themselves as 'loyal advocates for the political executive rather than as guardians of the law'[330] When participants articulated their reasons behind this role perception, they relied on a traditional Weberian line of reasoning and therefore emphasised their unelected status compared to politicians. In order to satisfy their role perceptions, they avoided compatibility tests with existing legislation or simply drafted legislation which failed to comply with legal principles.[331]

In 2017, a further analysis of the same data demonstrated that lawyers from the Government of the Netherlands would in fact attempt to integrate political and professional norms in the first instance by engaging in a creative interpretation of the law, allowing political interests to be fulfilled while still staying within legal boundaries.[332] According to Mastenbroek, this empirical finding has clear parallels

[329] Tholen and Mastenbroek (n 5); The empirical data used derives from a study by Ellen Mastenbroek and Peeters T Weem, 'In Spagaat Tussen Brussel En Den Haag: De Europeanisering van Het Wetgevingsvak' (Radboud University 2009).
[330] Tholen and Mastenbroek (n 5) 487.
[331] ibid 491.
[332] Mastenbroek (n 322) 11.

with the previously mentioned integrated model developed by Moss.[333] However, in contrast to Moss' view that lawyers adhering to an integrated model should ultimately prioritise a commitment to the law if the political-professional conflict cannot be resolved through reasonable measures, Mastenbroek emphasised that loyal advocacy would prevail if the lawyers were unable to balance political and professional demands through a creative interpretation of the law. In situations of irresolvable conflict, the lawyers from the Government of the Netherlands would revert back to the strategies identified above, including the avoidance of compatibility tests.

While these studies introduce valuable insights into the role perceptions of bureaucratic lawyers, there remains an opportunity for an exploration of how role perceptions shape routine considerations and judgments too, as opposed to just the major strategies employed once a conflict has materialised. Moreover, aside from emphasising the classic Weberian distinction between bureaucrats and politicians, both studies overlook the diversity of factors which could have contributed to shaping the role perceptions adopted. The following discussion will introduce the theory of neo-institutionalism which places a strong emphasis on the importance of socialisation experiences in shaping how individuals perceive their roles. This theoretical perspective has influenced much of the academic research on the role perceptions of bureaucrats working in international bureaucratic organisations, including the European Commission.[334] The research on international bureaucracies provides valuable insight into certain organisational features that can guide the in-house socialisation of bureaucrats, with more details provided later in this chapter.

[333] Moss (n 14).
[334] For example see Morten Egeberg, 'Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making' (1999) 6(3) Journal of European Public Policy 456; Jarle Trondal, 'Is There Any Social Constructivist-Institutionalist Divide? Unpacking Social Mechanisms Affecting Representational Roles Among EU Decision-Makers' (2001) 8(1) Journal of European Public Policy 1; Trondal and Veggeland (n 321); Beyers (n 319).

3.3.1.3. A neo-institutional perspective

Neo-institutionalism emerged in the discipline of political science in the early 1980s as an attempt to integrate old institutionalism with the non-institutional theories of behaviouralism and rational choice.[335] Although there are various intellectual and analytical approaches to this theory, they are all united by the understanding that institutions have a central role in explaining behaviour.[336] James March and Johan Olsen, leading scholars in the study of political organisations, define institutions as 'collections of interrelated rules and routines that define appropriate actions'.[337] The interrelationship between rules and routines is that routines reflect 'a stable pattern of behaviour' within organisations which are developed to implement rules.[338] When routines become more established over time and have greater meaning associated to them, the extent of institutionalisation is increased.[339]

March and Olsen's definition of institutions broadens the scope of institutional analysis to a more sociological approach that encompasses both formal and informal rules. Accordingly, rules are not necessarily formalised but can form 'part of a code of appropriate behaviour' that actors learn through education and socialisation within the organisation; in-house socialisation.[340] It is generally agreed that formal rules include those that are written-down, created, and enforced through official

[335] For an overview of the vision that has characterised non-institutionalist theories since the 1950s see James G March and Johan P Olsen, 'The New Institutionalism: Organizational Factors in Political Life' (1984) 78(3) The American Political Science Review 734. For a discussion on how old institutionalism and neo-institutionalism differ see Paul J Dimaggio and Walter W Powell, 'Introduction' in Paul J Dimaggio and Walter W Powell (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991).
[336] For a discussion on the various intellectual and analytical approaches of neo-institutionalism in the political science discipline see B Guy Peters, *Institutional Theory in Political Science: The New Institutionalism* (3rd edn, Continuum 2012).
[337] March and Olsen (1989) as cited in ibid 30.
[338] ibid 33.
[339] ibid 35. For more on the process of institutionalisation see Johan P Olsen, 'Change and Continuity: An Institutional Approach to Institutions of Democratic Government' (2009) 1(1) European Political Science Review 3, 10–11.
[340] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press 1989) 22.

channels.[341] There is considerable diversity in the understanding of informal rules. Some advance that informal rules include all norms or expectations that shape 'virtually any behavior that departs from, or is not accounted for by, the written-down rules.'[342] A main criticism of this approach is that if an institution is understood to mean everything, then it can end up meaning 'nothing'.[343] Others adopt a narrower interpretation which is based on the view that institutions are rooted in shared expectations and thus their violation has the capacity to generate social sanction or disapproval.[344]

The different meanings assigned to informal institutions has led to criticisms that neo-institutionalism is characterised by 'methodological uncertainty.'[345] For March and Olsen, however, the most important feature is not the formal or informal nature of rules but the way they shape behaviour. Central to this is the idea that institutions have a 'logic of appropriateness' rather than a 'logic of consequentiality'. That is, if institutions are effective in shaping behaviour, actors faced with a situation will think more about whether their behaviour matches their organisation's institutional context as opposed to what the resulting consequences will be for themselves.[346] When applying this logic, individuals must ask themselves a series of questions: What kind of situation am I faced with? Who am I? How appropriate are different actions for a person like me in this situation?[347] In accordance with the logic of appropriateness, there are different methods by which an actor adopts a role perception, one of which includes 'playing' a role once they learn the relevant institutional rules, irrespective of

[341] Paul Cairney, *Understanding Public Policy: Theories and Issues* (2nd edn, Bloomsbury 2020) 78.
[342] See Gretchen Helmke and Steven Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2(4) Perspectives on Politics 725, 727.
[343] Rothstein in Lowndes (2010) as cited in Cairney (n 341) 79.
[344] Helmke and Levitsky (n 342) 726.
[345] Vivien Lowndes, 'How Are Things Done Around Here? Uncovering Institutional Rules and Their Gendered Effects' (2014) 10(4) Politics & Gender 685, 685.
[346] Peters (n 336) 30.
[347] March and Olsen (n 340) 23.

whether they like or agree with them.[348] Actors may also engage in more than conscious role playing if they accept the institutional rules as 'the right thing to do'.[349]

As neo-institutionalism emphasises the importance of internal socialisation processes in shaping role perceptions, it makes sense to explore the formal organisational positions of bureaucratic lawyers as a starting point. This can encourage an understanding of the institutional contexts the lawyers are immediately socialised into within the broader organisation which, in turn, can allow us to make empirically-informed assumptions about the types of role perceptions expected. A body of empirical research that will help to formulate these assumptions is introduced below. Furthermore, prior to this, it is important to note that in line with the interdependent relationship between actors and institutions advanced in neo-institutionalism, as indicated already in this chapter, the qualitative approach of this thesis allows me to uncover how bureaucrats interpret and give meaning to rules, norms, and practices located within their organisational environments. This is especially important because while institutional rules shape how bureaucrats perceive and conduct themselves, there are often degrees of ambiguity and discretion in their interpretation and application.[350]

3.3.1.4. Socialisation in the (fragmented) bureaucratic context

The previous section introduced the theory of neo-institutionalism which emphasises the importance of in-house socialisation in shaping role perceptions. It is helpful to now engage with empirical research that offers insights into the organisational contexts in which socialisation processes take place within bureaucracies, and how these contexts might impact the formation and adoption of role perceptions. Academic research drawing on neo-institutional theory and devoting much attention to this organisational focus is located in the political science discipline and examines

[348] Jeffrey T Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 59(4) International Organization 801, 804.
[349] Checkel (n 348).
[350] Stephen Bell, 'Do We Really Need a New "Constructivist Institutionalism" to Explain Institutional Change?' (2011) 41(4) British Journal of Political Science 883.

the role perceptions of bureaucrats working in international organisations. Similar to the broader literature on bureaucratic role perceptions identified above, the emphasis of this research is not directed towards bureaucratic lawyers, and in fact many of the studies do not explicitly specify the professional background of those involved. This chapter will ultimately rely on insights from this literature to better understand how certain organisational features in bureaucracies might promote the adoption of one of the two ideal-typical role perceptions developed for this thesis.

According to the literature on international bureaucracies, 'it is necessary to unpack the basic organisational characteristics' of bureaucracies to understand the formation of bureaucrats' role perceptions.[351] This is grounded in the view that the 'organizational context' in which a bureaucrat is socialised makes certain role perceptions more likely than others.[352] This literature adopts a central interest in organisational factors as it is tends to examine the role perceptions of national bureaucrats temporarily working in international organisations. These bureaucrats provide a 'valuable laboratory' for examining the impact of organisational factors as they operate within distinct organisational contexts, encompassing both national and international bureaucracies.[353] This logic of multiple embeddedness is also applicable to bureaucrats situated permanently in one organisation as they are socialised into individual teams and departments within the broader organisation, each with their own institutional environments. This view is supported by Liesbet Hooghe who emphasises that the fragmentation of an individual bureaucratic organisation leads to different socialisation experiences for its members:

> Organizations are rarely unitary. Compartmentalization multiplies opportunities for socialization, but it also produces diversity within an organization. Compartmentalization intensifies ties within organizational subunits while loosening those among them. Because members' experiences are usually more intense in organizational

[351] Morten Egeberg, 'An Organisational Approach to European Integration: Outline of a Complementary Perspective' (2004) 43(2) European Journal of Political Research 199, 201.
[352] Jarle Trondal, Zuzana Murdoch and Benny Geys, 'How Pre- and Post-Recruitment Factors Shape Role Perceptions of European Commission Officials' (2018) 31(1) Governance 85, 90.
[353] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320).

> subunits, socialization is likely to be more effective there. However, different subunits within an organization may socialize different norms, some of which may reinforce the international organization's mission, and others not.[354]

Given that socialisation is central in shaping the role perceptions of bureaucrats and hence their ideas of appropriate behaviour, this organisational fragmentation challenges the taken-for-granted assumption that members of the same bureaucracy will adopt an 'overall, generic identity and vision'.[355] For the purposes of this thesis, this indicates that lawyers working in the same bureaucracy may also exhibit different behaviours depending on their specific organisational positions. Before this section introduces the organisational variables found to influence the role perceptions of bureaucrats, I will rely on insights from both the political science literature on role perceptions and the legal ethics literature outlined above to develop two ideal types of role perceptions applicable to bureaucratic lawyers, each of which represents the opposing side of political-professional behaviour. While ideal types provide accentuated or generalised representations of a social phenomenon, they are often used as 'methodological tools' or 'yardsticks' in empirical research as they help researchers analyse and make sense of the phenomenon being investigated.[356]

The ideal types of role perceptions include (1) a Weberian bureaucrat and (2) an autonomous professional bureaucrat.[357] Weberian bureaucrats perceive themselves as party-politically neutral individuals who remain loyal to the objectives of political superiors. Their expertise is used to determine how political objectives can be achieved effectively, but they refrain from persuading or imposing their viewpoints.[358]

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[354] Liesbet Hooghe, 'Several Roads Lead to International Norms, But Few Via International Socialization: A Case Study of the European Commission' in Jeffrey T Checkel (ed), *International Institutions and Socialization in Europe* (Cambridge University Press 2007) 68.
[355] Trondal and others (n 320) 169–70.
[356] Emily Stapley, Sally O'Keeffe and Nick Midgley, 'Developing Typologies in Qualitative Research: The Use of Ideal-Type Analysis' (2022) 21 International Journal of Qualitative Methods 1, 2.
[357] The term 'epistemic' is typically used in the literature but the term 'autonomous professional' is more obviously associated with the political-professional conflict featuring in the empirical analysis.
[358] Roth and Wittich (n 291) 24; Weber (1988) as cited in Tholen and Mastenbroek (n 5) 493.

In contrast, autonomous professional bureaucrats perceive their role as being guided by 'professional correctness and the power of the better argument'.[359] They are inclined to raise their professional opinions persuasively and attempt to negotiate with politicians (or their administrators) on the grounds of professional competence. As mentioned already, these role perceptions represent accentuated patterns of behaviour. For example, an autonomous professional bureaucrat is unlikely to be entirely decoupled from political loyalties in practice, especially if they have lifelong positions in the bureaucracy. This perspective can also be understood in line with the aforementioned claim that a bureaucrat's role perception is better understood as the 'result of the interplay and conflict' between different role perceptions.[360]

Relying on insights from the legal ethics scholarship, a Weberian lawyer is anticipated to adopt behaviours that closely align with the advocate model described above where they do not see it as appropriate to obstruct political decisions unless the legal or drafting hurdles are insurmountable.[361] Such hurdles exist when lawyers cannot find any 'reasonable' legal arguments to defend the proposed course of action before the courts.[362] Furthermore, hurdles may be considered insurmountable if the legislative language used seriously obstructs the accessibility or integrity of the legislation. In contrast, an autonomous professional lawyer is expected to adopt behaviours that align more closely with the neutral expositor model. They are therefore more likely to perceive themselves as independent from political loyalties and will consequently see it as appropriate to promote and defend their professional legal views. This model advances that legal advisers should reject legal arguments made by political superiors that do not represent 'the *best* view of the law'.[363] Legislative drafters should challenge requests that undermine their ability to improve the form and content of legislation which includes, for example, a desire to make the

[359] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.
[360] Trondal and Veggeland (n 321) 63. See also Trondal, 'Balancing Roles of Representation in the European Commission' (n 320).
[361] Moss (n 14) 1306; Cherkewich (n 6) 257.
[362] Moss (n 14) 1306.
[363] ibid.

text more comprehensible.[364] Ultimately, if bureaucratic lawyers are prevented from upholding their professional autonomy, the legal ethics scholarship proposes various strategies, such as educating political officials and their administrators about the political-professional conflict, enforcing legal views through oral or written means, or in most extreme cases withdrawing from the project.[365]

Given that the two role perceptions have now been developed, it is appropriate to examine the organisational variables that could influence the degree to which each of these role perceptions is adopted. The literature on international bureaucracies often uses correlation analysis to examine whether certain organisational features of a bureaucracy can lead to the adoption of a particular role perception.[366] Many of these features relate to the ability of an organisation to socialise bureaucrats in accordance with its institutional context, largely by means of interactions and hierarchical structures. It is important to note that the academic literature on role perceptions explores the effects of other variables too, including demographic features and pre-recruitment experiences.[367] However, it is beyond the scope of this thesis to provide a comprehensive review of all possible variables. Moreover, the choice to focus on organisational variables is further justified by the fact that other types of variables have been found to have considerably less explanatory power.[368]

The literature on international bureaucracies indicates that the role perception evoked to the greatest degree generally reflects the *primary* organisational affiliation of a bureaucrat. The empirical findings demonstrate that bureaucrats are likely to attach the strongest affiliation towards their 'own' organisational unit or subunit where they spend most of their time and energy, even when compared to the

[364] Crabbe (n 176).
[365] Purdy (n 14) 84–86; Hutchinson (n 15) 996.
[366] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320). A notable exception to a quantitative approach is Trondal and others (n 320).
[367] Hooghe (n 354); Morten Egeberg and Jarle Trondal, *An Organizational Approach to Public Governance: Understanding and Design* (Oxford University Press 2018) ch 4.
[368] Morten Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (1994) 7(1) Governance 83, 91.

organisation that employs them or the bureaucracy as a whole.[369] The more intense their participation, often measured by the frequency of face-to-face interactions, the more likely they will develop a feeling of belonging and allegiance towards that collective group.[370] This organisational affiliation may encompass an attachment to both the unit and higher-level department if they share a physical location, especially if there are regular cross-unit interactions which encourage a sense of team spirit at the departmental level.[371] The length of tenure also has an influence on organisational affiliation. More specifically, staff mobility systems that require bureaucrats to change units within a department can in fact hinder identification towards a specific unit as there is a longer tenure at the departmental level overall.[372]

A primary affiliation towards organisational units or departments that are led by political actors, including ministerial departments and the sector DGs of the Commission, are expected to encourage behaviours associated with the Weberian role perception.[373] Those organisational environments are more likely to be guided by political pressures and hierarchies, with many of the interactions and processes centered on the advancement of political interests.[374] In contrast, some units or departments may promote the socialisation of professional norms to a greater extent.[375] These tend to represent 'exclusive' networks where all members must possess a certain type of knowledge related to their job (e.g., law degree or legal professional qualification).[376] The professional autonomy is expected to be greater if the 'recognised knowledge' of the network is central to the operation and legitimacy of the bureaucracy, and even more so if it can serve as a basis to circumvent

[369] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441; Trondal and others (n 320) 31, 131.
[370] Egeberg and Trondal (n 367) 61–62.
[371] Trondal and others (n 320) 135.
[372] ibid 131.
[373] Johan Christensen and Ronen Mandelkern, 'The Technocratic Tendencies of Economists in Government Bureaucracy' (2021) 35(1) Governance 233, 241.
[374] ibid.
[375] Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (n 368) 89–90.
[376] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).

political hierarchies (e.g., veto power).[377] This idea of 'recognised' knowledge rests on the idea that it is approved by others in the bureaucracy as being central to the proper functioning and legitimacy of the organisation.[378]

While primarily affiliation is often the strongest predictor for a role perception, the literature identifies two organisational features that can weaken or strengthen the extent of socialisation within the given unit or department. This includes *formal* vertical hierarchies which represent 'impersonal and explicitly given' rules by management such as incentive systems or administrative commands used to control and/or discipline members.[379] Strict vertical hierarchies have been found to have a considerable influence on role perceptions in the sense that members are more inclined to 'play' or internalise a role that is closely associated with the interests and preferences of that organisation.[380] Ambiguous or broad hierarchies can facilitate more 'flexible responses' and leave more room for members to create informal hierarchies, often based on shared interests.[381] These informal hierarchies usually emerge to compensate, support or bypass formal rules.[382]

The horizontal specialisation of an organisational unit or department is an additional feature found to influence the extent to which bureaucrats are socialised into a given context. *Purpose*-specialised organisations represent national ministries, or the sector DGs of the Commission, as they are specialised according to the main sector served (e.g., food safety).[383] In the absence of practices compelling them to clear their policies with other parts of the bureaucracy, members are more inclined to be

[377] Trondal and others (n 320) 159.
[378] ibid 156.
[379] Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (n 368) 86; Trondal and others (n 320) 26.
[380] Trondal and others (n 320) 124.
[381] Morten Egeberg, 'How Bureaucratic Structure Matters: An Organizational Perspective' in B Guy Peters and Jon Pierre (eds), *Handbook of Public Administration* (SAGE Publications 2003) 118. See also Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (n 368) 86.
[382] Semin Suvarierol, 'Beyond the Myth of Nationality: Analyzing Networks within the European Commission' (PhD thesis, University of Utrecht 2007); Trondal and others (n 320).
[383] Suvarierol (n 382) 6.

socialised within the unit or department they are embedded into.[384] This is likely to foster 'silo thinking' where bureaucrats adopt strong inward-looking contact patterns and behaviours.[385] In contrast, *process*-specialised organisations which are specialised according to the main service provided (e.g., legal services) may weaken socialisation within a specific unit or department as members are usually expected to interact with members of other units or departments to fulfil the service.[386]

Cross-unit or -departmental collaborations emphasise that interactions are not always constrained by formal organisational boundaries but rather by what is required to find solutions to policy problems.[387] Repeated interactions across boundaries can expose bureaucrats to norms of appropriateness which are not confined to their 'own' institutional environment but are also developed through interactions with other collective groups of the organisation. These institutional norms may shape bureaucrats' role perceptions, especially if the interactions go beyond what is formally expected as this can lead to perceptions of a shared purpose.[388] Although an affiliation towards the primary organisation may remain the strongest as interactions are expected to be more intense there, a (partial) shift of affiliation away from the primary organisation in which a bureaucrat is located is referred to as a supra-departmental affiliation.[389] For lawyers situated in exclusive legal departments who collaborate with policy departments (i.e., ministries or sector DGs), this affiliation is expected to lead to some outward-looking behaviours where lawyers perceive their roles in the context of the 'bigger picture' of the

[384] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 435–36; Trondal and others (n 320) 49.
[385] Trondal and others (n 320) 46.
[386] Gulick (1937) as cited in Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 436.
[387] van der Meer (n 320) 6.
[388] Jarle Trondal, 'Is the European Commission a "Hothouse" for Supranationalism? Exploring Actor-Level Supranationalism' (2007) 45(5) Journal of Common Market Studies 1111, 1118.
[389] While the term 'supranational' is used in the literature, this is often used to denote a loyalty transfer to an international bureaucracy 'above' the Member States. I have relied on certain principles underpinning the supranational role to create a supra-departmental role that can be applied to this thesis.

organisation.[390] In this context, the 'bigger picture' is expected to represent a distinct acknowledgement of the political preferences and pressures emerging in the policy departments, and a consideration of these by bureaucratic lawyers when assessing the appropriateness of their behaviours.[391]

The discussion above has illustrated that bureaucrats' primary organisations have significant explanatory power in shaping their role perceptions. Thus, bureaucratic lawyers situated in a government department led by political superiors are inclined to adopt behaviours associated with a Weberian role perception, especially if they are subject to strict internal hierarchies. On the other hand, bureaucratic lawyers situated in a government department which constitutes an exclusive legal network are inclined to adopt behaviours aligned with an autonomous professional role perception, especially if they can circumvent political hierarchies on professional legal grounds. In practice, however, bureaucratic lawyers are not confined to organisational silos, especially given the *process*-specialisation of legal services. Thus, repeated interactions with other collective groups can encourage outward-looking behaviours where bureaucratic lawyers will perceive the appropriateness of their behaviours not solely in the context of their own departments.

3.3.2. Section summary

Section 3.3.1 has established the groundwork for exploring one of the concepts related to the 'how' dimension of UK Government and European Commission lawyers' work, specifically their political-professional behaviour. The legal ethics scholarship was initially revisited to introduce conceptual models that outline a spectrum of behaviours if lawyers are to be confronted with a political-professional conflict. While these models offer valuable insights, they provide a normative approach which is distanced from the practical realities of bureaucratic lawyering.

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[390] Trondal and others (n 320) 128.

[391] For lawyers situated in ministries or sector DGs, as opposed to separate legal departments, this would represent their primary affiliation. For an analysis on the variations of the meaning of 'political' in bureaucracies, especially in the Commission context, see Neill Nugent and Mark Rhinard, 'The "Political" Roles of the European Commission' (2019) 41(2) Journal of European Integration 203.

Thus, a neo-institutional perspective of role perceptions was introduced which emphasises the importance of in-house socialisation to better understand how bureaucrats determine the appropriateness of their behaviours. Drawing significant inspiration from the political science scholarship on role perceptions, and the legal ethics models, two ideal types of role perceptions were developed. The section then relied on the literature on international bureaucracies to introduce organisational variables which are expected to influence the extent to which each of these role perceptions are adopted in practice.

It is worth repeating that the aim of this thesis is not to systematically 'test' the presence of role perceptions and their relationship with particular organisational features, an approach which would be better suited to quantitative analysis. Instead, the aim is to utilise insights from this chapter to formulate a set of expectations about the lawyers' role perceptions based on their organisational positions, with these expectations presented in chapter five. Chapters six and seven will then rely on additional empirical findings to explore whether these expectations are reflected in practice. Combined, these chapters will capture two of the key research questions outlined in chapter one, namely: 'What are the organisational positions of UK Government and European Commission lawyers in their respective bureaucracies?' and 'How do lawyers perceive their roles, and how does this influence their political-professional behaviour? Furthermore, drawing on insights provided in this chapter, some additional sub-questions are formed to guide this analysis further:

(1) Are lawyers in policy departments (i.e., ministries or sector DGs) more likely to adopt a Weberian role perception when facing political-professional conflicts compared to those in exclusive legal departments, while lawyers in exclusive legal departments are more likely to adopt an autonomous professional role perception?
(2) Do interactions across departmental boundaries encourage a supra-departmental affiliation where the lawyers perceive their roles in accordance with the 'bigger picture' of the organisation?

3.3.3. Expertise

The second line of analysis that relates to the 'how' dimension is the expertise needed by UK Government and European Commission lawyers when performing their work, and how this is acquired. The relevant academic literature in chapter two highlighted that these lawyers acquire knowledge in various domains such as substantive areas of law, procedural requirements, and legislative drafting. However, the vast majority of this literature lacked a sufficient explanation of how these lawyers actually acquire their knowledge which risks giving rise to the assumption that most of this knowledge is gained prior to recruitment or that it remains static over time. An exception to this was a small proportion of the literature outlined in chapter two, specifically on Parliamentary Counsel and to a lesser extent Commission legal revisers, which emphasised the crucial role of on-the-job learning for these lawyers.[392] Accordingly, this chapter will introduce a realist theory of expertise to establish a foundation for understanding the ongoing and dynamic process of acquiring knowledge while on the job.

This theory of expertise is located within Science and Technology Studies (STS) which is an interdisciplinary discipline that emerged in the 1970s. Expertise has been a central interest in STS since its emergence, although there have been various intellectual approaches. The first generation of STS scholars produced a distinctive field which examined how scientific knowledge was socially constructed; the sociology of scientific knowledge.[393] This was then further developed by ethnographies of the production of scientific knowledge in laboratories.[394] Other approaches included 'boundary work' studies which sought to determine how the limits and boundaries between science and non-science were constructed and

[392] Almaeida and Moll (n 208) 263; Laws (n 166) 34, 20.
[393] See the 'Strong Programme' in David Bloor, *Knowledge and Social Imagery* (University of Chicago Press 1976).
[394] An early example of this approach is Bruno Latour and Steve Woolgar, *Laboratory Life: The Social Construction of Scientific Facts* (SAGE Publications 1979).

maintained.[395] Specific focus was often on the boundaries between science and politics in policy discussions where scientific knowledge plays an important role.[396] This approach has also been applied to the forum of adversarial legal proceedings, with scholars exploring how judges confront the admissibility of scientific evidence.[397] Related to boundary work studies is the literature on 'boundary organisations' which explores organisations sitting at the frontier of science and non-science.[398]

My particular interest is in a theoretical approach within STS called the Studies of Expertise and Experience (SEE) developed by Harry Collins and Robert Evans.[399] This approach advances a realist as opposed to a relational notion of expertise, perceiving 'expertise as real and as the property of social groups.'[400] Central to this perspective is the idea that acquiring expertise is a social process which depends on sustained socialisation in the relevant social group. This process of socialisation takes 'time and effort' and the acquired expertise can be lost if one spends too much time away from the group.[401] The link between socialisation and expertise is premised on the idea that only through prolonged immersion in a particular domain

[395] Thomas F Gieryn, 'Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists' (1983) 48(6) American Sociological Review 781; Thomas F Gieryn, 'Boundaries of Science' in Sheila Jasanoff and others (eds), *Handbook of Science and Technology Studies* (SAGE Publications 1995).
[396] For example see Clark A Miller, 'Climate Science and the Making of a Global Political Order' in Sheila Jasanoff (ed), *States of Knowledge: The Co-production of Science and Social Order* (Routledge 2004).
[397] For example see Sheila Jasanoff, 'Law's Knowledge: Science for Justice in Legal Settings' (2005) 95(1) American Journal of Public Health 49.
[398] David H Guston, 'Boundary Organizations in Environmental Policy and Science: An Introduction' (2001) 26(4) Science, Technology & Human Values 399, 403. There is also the academic literature on 'boundary objects' which explores objects with different meanings for various social groups, including scientific and non-scientific, but with a structure common enough to remain recognisable to all, such as Susan Leigh Star and James R Griesemer, 'Institutional Ecology, "Translations" and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19(3) Social Studies of Science 387.
[399] HM Collins and Robert Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (2002) 32(2) Social Studies of Science 234.
[400] Harry Collins and Robert Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' in Paul Ward and others (eds), *The Oxford Handbook of Expertise* (Oxford University Press 2020) 85.
[401] Harry Collins and Robert Evans, *Rethinking Expertise* (University of Chicago Press 2007) 2–3.

of practice can one acquire the tacit knowledge needed to become an expert in that domain.[402] This chapter has already acknowledged that the idea of tacit knowledge is a 'hidden' element often overlooked in studies on bureaucratic work.[403] The following discussion will explore the theoretical approach of SEE, commencing with a discussion on the parallels between this theory and neo-institutionalism.

3.3.3.1. Studies of Expertise and Experience

The fundamental role of socialisation in SEE resembles elements of the theory of neo-institutionalism which posits that individuals learn and potentially internalise rules of appropriate behaviour through in-house socialisation processes. The notion of appropriateness is also foregrounded in SEE as the process of becoming an expert is defined as 'becoming a full and active member of that group and learning to act in ways that other group members will recognize as *appropriate* or, at least, not inappropriate...'[404] In some cases the appropriate standards of a group are codified whereas in other cases 'what counts as the standard is shared tacitly and only revealed through the group's practices.'[405] However, even if codified rules do exist, socialisation is still needed to acquire the tacit knowledge of how those rules should be interpreted and applied within that particular institutional context.[406]

In addition to both theories emphasising the importance of in-house socialisation, I propose that SEE can in fact complement neo-institutional theory. While neo-institutionalism advances that individuals in a shared institutional context are influenced by the rules and norms of that context, and that their resulting actions

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[402] Collins and Evans, *Rethinking Expertise* (n 401); Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press 2010) 133.
[403] Wagenaar (n 239) 643–44.
[404] Harry Collins and Robert Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' in K Anders Ericsson and others (eds), *The Cambridge Handbook of Expertise and Expert Performance* (2nd edn, Cambridge University Press 2018) 23 (emphasis added).
[405] ibid.
[406] Robert J Fogelin, *Wittgenstein* (2nd edn, Routledge & Kegan Paul 1987); David Bloor, *Wittgenstein, Rules and Institutions* (Routledge 1997); Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 23–24.

aggregate up to form the practices of that group, it does not offer much explanation of how practices are learnt or shared between different groups. This omission can be addressed by SEE as this theory explores how knowledge can be transmitted between different collective groups, specifically through linguistic socialisation. This knowledge transmission not only increases the chances of meaningful communication between the various groups, but it also facilitates an understanding of the different practices within a bureaucratic organisation which can contribute to broadening the perspectives of those involved.

SEE introduces a more nuanced way of discussing expertise as it introduces a typology that represents different kinds of socialisation experiences. This is illustrated in a Periodic Table of Expertises, part of which is shown in table 3. On the left-hand side of the table, three lower levels of specialist expertise are introduced which 'are better described as levels of knowledge – like knowledge of the kind of facts needed to succeed in general knowledge quizzes.'[407] These three levels of knowledge require individuals to exercise their *ubiquitous expertise* which represents the learning of widely distributed skills through immersion in everyday human society, such as learning the natural language of the country in which you live.[408] Ubiquitous expertise contains a significant amount of tacit knowledge because, like language-speaking, it includes 'things you just know how to do without being able to explain the rules for how you do them.'[409] In order to acquire the highest of these three knowledge levels, specifically primary source knowledge, individuals must utilise their ubiquitous expertise in language to read primary or quasi-primary sources, such as journal articles or scientific papers.[410]

[407] Collins and Evans, *Rethinking Expertise* (n 401) 13–14.
[408] ibid 16.
[409] ibid 13.
[410] Nicky Priaulx and Martin Weinel, 'Behaviour on a Beer Mat: Law, Interdisciplinarity & Expertise' (2014) 2 Journal of Law, Technology & Policy 361, 384.

SPECIALIST EXPERTISES	UBIQUITOUS TACIT KNOWLEDGE			SPECIALIST TACIT KNOWLEDGE	
	Beer-mat knowledge	Popular understanding	Primary source knowledge	Interactional expertise	Contributory expertise

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Table 3: Extract from 'the periodic table of expertises'.

Although engaging with such published sources allows individuals to acquire new information, such written sources can only communicate explicit knowledge.[412] Explicit knowledge is that 'which can be expressed in formal language and shared through texts, manuals or explanation'.[413] Existing studies have demonstrated that the acquisition of explicit knowledge alone results in a 'shallow or misleading appreciation' of another discipline or of the practices of another social group.[414] In the context of lawyers, STS scholars have focused on lawyers' engagement with scientific evidence in the courtroom. Given their lack of scientific background, and their exclusive focus on written materials, judges are inclined to adopt a positivist approach to science which dismisses its inherent indeterminacy.[415] Nicky Priaulx and Martin Weinel move away from the courtroom to apply insights from SEE to a socio-legal study on legal interdisciplinary research.[416] Their case study focused on two American lawyers, Samuel Bagenstos and Margo Schlanger, who sought to apply a theory from the disputed field of hedonic psychology to the law of torts.

Both Bagenstos and Schlanger relied on scientific papers which professional experts in the area criticised for lacking conceptual clarity and empirical grounding.[417] As a result, their own paper lacked the scientific justification needed to qualify as a valid policy recommendation. While both lawyers understood the explicit knowledge

[411] Extracted from Collins and Evans, *Rethinking Expertise* (n 401) 14.
[412] Ikujiro Nonaka, Ryoko Toyama and Noboru Konno, 'SECI, Ba and Leadership: A Unified Model of Dynamic Knowledge Creation' (2000) 33(1) Interdisciplinarity & Expertise 5, 7; Priaulx and Weinel (n 410) 380.
[413] Priaulx and Weinel (n 410) 380.
[414] Collins and Evans, *Rethinking Expertise* (n 401) 22.
[415] Sheila Jasanoff, 'What Judges Should Know about the Sociology of Science' (1992) 32(3) Jurimetrics 345. For the later version of this article see Sheila Jasanoff, 'What Judges Should Know about the Sociology of Science' (1993) 77(2) Judicature 77.
[416] Priaulx and Weinel (n 410) 381.
[417] ibid 373.

presented in the scientific studies they relied on well enough to outline and articulate them into their own policy paper, they did not acquire a deeper understanding of the scientific domain which would enable them to make reliable and effective judgments on scientific reliability and validity.[418] According to Collins and Evans' realist theory of expertise, this 'deep understanding' is reliant on the acquisition of specialist tacit knowledge which, in Bagenstos and Schlanger's case, could have been gained by talking to experts with considerable experience to uncover the 'community-specific' knowledge of the field, such as how the quality of a journal or paper is perceived by others.[419]

Following this logic, the theory of SEE advances that it is only through sustained socialisation in a domain that individuals can acquire the specialist tacit knowledge needed to become an expert, that is to say they develop a deep understanding of 'the unwritten rules, processes and conventions' of that domain.[420] However, as illustrated on the right-hand side of table 3, there are two levels of specialist tacit knowledge; contributory expertise and interactional expertise. Contributory experts represent what one typically means when they talk of an expert, that is a skilled practitioner who can competently perform and contribute to a specialist domain of practice.[421] In addition to carrying out the activities that constitute the practice, contributory experts have the capacity to describe the practice, teach it, and come up with new ways of doing it. In this thesis, 'contributory expertise' refers to the specialist tacit knowledge required by each type of bureaucratic lawyer to *do* their work effectively.

To develop contributory expertise, individuals cannot solely rely on written text which only communicates explicit knowledge but instead, they must be extensively socialised into the language and practices of a specialist domain.[422] In other words,

[418] ibid.
[419] ibid 381.
[420] ibid 380.
[421] Collins and Evans, *Rethinking Expertise* (n 401) 14; Harry Collins, 'Studies of Expertise and Experience' (2018) 37(1) Topoi 67, 72.
[422] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.

contributory experts must develop their knowledge and skills through on-the-job participation, such as engaging in conversations with more experienced colleagues, solving real and often complex problems, and gaining hands-on experience within the domain. In doing so, they will eventually gain 'the specialist tacit knowledge needed to act independently but in ways that other members of the group would endorse as correct'.[423] This process of socialisation as a means of acquiring contributory expertise ultimately represents an 'apprenticeship model of learning' where individuals learn the necessary skills and knowledge by combining practical learning experiences with mentorship from more experienced colleagues.[424]

Interactional expertise represents the ability of an individual to acquire the specialist tacit knowledge of *another* group in which they lack contributory expertise. This is acquired through prolonged linguistic socialisation within the specialist group, acquired crucially through extended and continuous discussions with the contributory experts of that practice.[425] Over time, individuals will learn the 'practice language' of the specialist group, namely the language which the group uses to describe and explain their practices.[426] A fundamental element of a practice language is that it is laden with tacit and context-specific knowledge and so a surprising amount of the practice can in fact be represented in language alone.[427] Therefore, by learning this language, individuals deepen their understanding of the meaning of words and ideas as they are used in the associated practice, and the norms and nuances of the practice which are not explicitly articulated in written texts. Collins and Evans

[423] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 92.
[424] Collins and Evans, *Rethinking Expertise* (n 401) 35; Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 23, 24.
[425] Collins and Evans, *Rethinking Expertise* (n 401) 32.
[426] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 93. The term 'special interactional expert' refers to those individuals who become fluent in the practice language of a specialist group but lack the corresponding contributory expertise. See Harry Collins, 'Language and Practice' (2011) 41(2) Social Studies of Science 271, 274.
[427] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 24. See also Collins and Evans, *Rethinking Expertise* (n 401) 32.

emphasise that a transition to interactional expertise is not marked by a sudden 'aha moment' but its gradual acquisition is still apparent.[428] Ultimately, as interactional expertise is developed, communicative exchanges with contributory experts from other domains will become more informed and misunderstandings will become less likely.[429] Although it is rare, it is not impossible for an interactional expert to acquire some contributory expertise if the domain of practice is not too difficult or dissimilar to their own.[430]

Face-to-face interactions are considered to be the most effective method of effective linguistic socialisation, making them a crucial element in acquiring the specialist tacit knowledge needed by both interactional or contributory experts. This claim is based on empirical evidence in the STS scholarship which draws out the special characteristics of face-to-face interactions, including that they are more likely to enhance a sense of trust and rapport between participants which, in turn, facilitates 'the transfer of tacit knowledge' among them.[431] While trust and rapport can still be developed through other remote means, including telephone calls and virtual meetings, the success of this often depends on an 'initial period' of face-to-face interactions.[432] A further benefit of face-to-face interactions is that they facilitate conversational turn-taking at a quicker speed, particularly due to the influence of body language and intonation.[433] Thus, face-to-face interactions are more time efficient in developing shared understandings between participants.

The socialisation capabilities of face-to-face interactions indicates that individuals, whether they are interactional experts engaging with individuals from other domains

[428] Collins and Evans, *Rethinking Expertise* (n 401) 33.
[429] The marker of a true interactional expert is the 'Imitation Game' developed by Collins and Evans which is a methodological innovation relying on computer software. For more on this innovation see Harry Collins and others, 'Experiments with Interactional Expertise' (2006) 37(4) Studies in History and Philosophy of Science 656.
[430] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 32, fn 24.
[431] Harry Collins and others, *The Face-to-Face Principle: Science, Trust, Democracy and the Internet* (Cardiff University Press 2022) 60.
[432] ibid 91–92.
[433] ibid 101.

of practice, or new recruits collaborating with experienced colleagues within their own domain, are likely to find this method of interaction more efficient for knowledge acquisition. The socialisation capabilities of face-to-face interactions, especially their ability to foster a sense of trust and rapport, can also help to better understand empirical findings provided in the aforementioned literature on international bureaucracies.[434] Here, I am specifically referring to the positive relationship found between the frequency of face-to-face interactions and the degree to which bureaucrats develop a sense of allegiance towards a collective group, whether this represents their own group or not.[435] As highlighted above, such feelings of allegiance ultimately increase the extent to which bureaucrats adopt behaviours that align with the institutional rules belonging to that group.

So far, this discussion has explored a realist conception of expertise which emphasises the idea that specialist tacit knowledge is acquired through socialisation experiences, both linguistic and practical ones. The notion of contributory expertise enhances our understanding of how bureaucratic lawyers acquire the knowledge and skills needed to perform their work successfully, in a way that aligns with the expectations and norms of their own specialist group. The notion of interactional expertise helps to explain how individuals from different specialist groups engage in meaningful collaborations with each other, encompassing more than just a mutual comprehension of the language used but also an understanding of the nuances linked to each of the groups' practices. Interactional expertise becomes especially important in the context of law-making which relies on a complex division of labour between different types of actors. Specifically, the academic literature outlined in chapter two identified that UK Government and European Commission lawyers work closely with policy officials to find a legal solution to a policy problem.

Given that UK Government and European Commission lawyers cannot be expected to acquire contributory expertise in all specialist domains with which they must collaborate, the notion of interactional expertise provides a more realistic and

[434] See section 3.3.1.4.
[435] Egeberg and Trondal (n 367) 61–62.

sensible way of bridging the gap to ensure meaningful collaboration. However, in both bureaucratic organisations, the law-making process takes place across several departments, some of which are physically separated. Furthermore, the law-making processes in both organisations are subject to considerable resourcing and timing constraints. A combination of these factors is likely to make it challenging for UK Government and European Commission lawyers to engage with all types of actors extensively enough to acquire interactional expertise in their respective domains of practice. For this reason, the following section will explore how interactional expertise can be used to facilitate dialogue between two specialist groups that are not themselves able to engage in meaningful communication.

3.3.3.2. Interactional expertise: The use of interpreters

The theoretical framework of SEE considers how interactional expertise can also facilitate collaborations between specialist groups who have not undertaken sufficient linguistic socialisation in each other's domains of practice. More specifically, interactional expertise can be used by *interpreters* to go 'backward and forward' between groups who want to collaborate but are unable to do so effectively as they have not acquired a deep understanding of each other's distinct practices.[436] As interpreters learn the practice languages of each group, which is laden with tacit knowledge, their go-between role can bring two groups 'into a productive relationship with one another'.[437] An empirical study mentioned in chapter two indicated that a go-between role used to be adopted by legal advisers in the UK Government as most communication between policy officials and Counsel would be mediated through them.[438] Nevertheless, it was suggested that this role is less frequent due to

[436] Harry Collins, Robert Evans and Mike Gorman, 'Trading Zones and Interactional Expertise' (2007) 38(4) Studies in History and Philosophy of Science 657, 662; Lekelia D Jenkins, 'The Evolution of a Trading Zone: A Case Study of the Turtle Excluder Device' (2010) 41(1) Studies in History and Philosophy of Science 75, 80.
[437] Rodrigo Ribeiro, 'The Language Barrier as an Aid to Communication' (2007) 37(4) Social Studies of Science 561, 562.
[438] See Yong (n 5) 49.

the increased informality in Whitehall where policy officials and Counsel might meet directly.

A helpful example of interpretation facilitated by the acquisition of interactional expertise is provided by Lekelia Jenkins who explored the engagement between various types of stakeholder groups in the resolution of the sea turtle bycatch issue, that is the incidental death of sea turtles caused by shrimping.[439] Sea Grant, an agency operating through a university-based network, was asked to facilitate exchanges between the federal agency of the National Marine Fisheries Service and the fishing community. As Sea Grant had developed a relationship with each of these groups through sustained interactions over four years, it was already in a position to serve the role of an interpreter as it had an understanding of the practice languages of both groups. By exercising this interactional expertise, Sea Grant was able to 'broker more productive trades between the NMFS and the shrimping industry.' [440] While it is expected that Sea Grant might have translated words to make them more understandable for either group, this agency also had a 'cultural understanding of the two groups' which facilitated its interpreter role.[441]

Rodrigo Ribeiro provides additional insight into how an interpreter's interactional expertise allows them to bring two distinct groups into a productive relationship with each other, specifically through the use of 'buffering strategies' and 'explanatory conversations'.[442] The buffering role of interpreters is made possible when they utilise their monopoly over the means of communication to minimise the likelihood of conflicts arising between the distinct groups.[443] Ultimately, through significant engagement with both groups, interpreters became aware of possible tensions or disagreements if they were to interpret a comment or question directly to the other group. Buffering can be achieved using various strategies: (1) radically amending

[439] Jenkins (n 436).
[440] ibid 80.
[441] ibid.
[442] Ribeiro (n 437). See also Rodrigo Ribeiro, 'The Role of Interactional Expertise in Interpreting: The Case of Technology Transfer in the Steel Industry' (2007) 38(4) Studies in History and Philosophy of Science 713.
[443] Ribeiro (n 437) 562.

participants' utterances (2) smoothing participants' utterances (3) a refusal to interpret.[444] Interpreters can also go beyond such linguistic interventions where they engage in 'explanatory conversations' with the groups to explain to them how to act in accordance with the social rules and accepted practices of the other.[445]

3.3.4. Section summary

This discussion has emphasised a possible risk of overlooking the dynamic process of knowledge acquisition for UK Government and European Commission lawyers. Accordingly, it introduced a realist theory of expertise which emphasises the importance of socialisation experiences in acquiring specialist tacit knowledge.[446] Attention was drawn to two categories of expertise, namely contributory expertise and interactional expertise. The former provided insight into how bureaucratic lawyers gain the tacit knowledge needed to practise their *own* work while the latter explored how they acquire the tacit knowledge needed to understand the work of *others* and to communicate meaningfully with them. The discussion also identified how the notion of interactional expertise can be used by interpreters to facilitate dialogue between two distinct groups. This might be relevant in situations where bureaucratic lawyers are unable to engage in sustained communication with other groups, including policy officials who also serve a central role in the process of converting a policy problem into a legal solution.

I engage with UK Government and European Commission lawyers to uncover the knowledge and skills they identify as useful for the successful performance of their work, and also how this is acquired. The empirical findings will be presented in chapters six and seven which will emphasise the importance given to on-the-job learning by participants, including interactions with colleagues, mentorship opportunities, and practical hands-on experiences within the workplace. This analysis will capture one of the key research questions outlined in chapter one,

[444] See Cases 1-4 in ibid 567–72.
[445] ibid 570.
[446] For the purposes of this thesis, references to 'tacit knowledge' will pertain to 'specialist tacit knowledge'.

specifically: ‘How do lawyers acquire the expertise needed to perform their work?’. Furthermore, drawing on insights provided in the above discussion, some additional sub-questions are formed to guide the empirical analysis further:

(1) What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?
(2) Do the lawyers rely on interpreters for a productive relationship with other groups, or might they adopt this interpreter role themselves?

3.4. Conclusion

This chapter has developed a unique analytical framework to guide the empirical analysis in chapters five, six, and seven. The starting point of the framework was to establish a set of functions belonging to UK Government and European Commission lawyers (tables 1 and 2) and to formulate two distinct chronological phases that provide a coherent structure for examining these functions further using empirical data. The second half of the chapter introduced two analytical concepts to the analytical framework, both of which will be used to explore how bureaucratic lawyers perform their work; political-professional behaviour and expertise. As emphasised already, the notion of in-house socialisation serves as the common link between these concepts. For this reason, the organisational positions of UK Government and European Commission lawyers will be unpacked in chapter five to acquire a better understanding of the institutional environments these lawyers are socialised into. This understanding will enable me to formulate a set of expectations about their political-professional behaviours and to gain an awareness of their working spaces which will help contextualise their on-the-job learning experiences. Prior to this, chapter four will outline the methodological approach adopted in this thesis.

Chapter Four: Methodological approach

4.1. Introduction

This chapter will outline the methodological approach that guides this thesis. This is especially important as legal scholarship has been criticised for not explaining its methodology, resulting in claims that legal academics 'need to begin clarifying and explaining what they do and how they do it.'[447] The chapter begins by identifying the key research questions and reiterating the significance of this thesis within the context of socio-legal scholarship. The social constructionist position of this thesis will then be considered. The chapter will then explore the reasons for adopting a multiple case-study design, along with an explanation of why semi-structured interviews were selected as the preferred method. The chapter will then outline the thematic analysis approach adopted and identify the steps taken to ensure research quality. Finally, the chapter will discuss how certain ethical issues were mitigated. Throughout this chapter, consideration will be given to issues encountered when working with elite participants.

4.2. Research questions

As identified already in previous chapters, the following key research questions have been developed to guide this thesis:

1) What are the organisational positions of UK Government and European Commission lawyers in their respective bureaucracies?
2) What are the functions of these lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?

[447] Brendon Murphy and Jeffrey McGree, 'Phronetic Legal Inquiry: An Effective Design for Law and Society Research' (2015) 24(2) Griffith Law Review 288, 291.

3) How do lawyers perceive their roles, and how does this influence their political-professional behaviour?
4) How do lawyers acquire the expertise needed to perform their work?

The research questions include a combination of descriptive ('what' and 'when') and explanatory ('how') questions.[448] Descriptive questions are important in developing our knowledge of under-researched social phenomena.[449] As revealed in chapter two, there are significant knowledge gaps concerning the work of lawyers in the UK Government and European Commission during the stages of converting a policy problem into a legal solution for the legislature. To help overcome this knowledge gap, it is essential to provide a rich description of the range of functions performed during these stages. A 'rich' description in this context encompasses a detailed understanding of the various components that make up these functions, such as the relevant tasks, judgments, interactions, and time frames. Explanatory questions, on the other hand, seek to uncover the underlying factors influencing a social phenomenon.[450] The explanatory questions in this thesis focus on the impact of in-house socialisation processes, that is the experiences and interactions of lawyers within their respective bureaucracies, on both their political-professional behaviours and expertise.

The first research question on the organisational positions of the lawyers will be answered in the following chapter. This will provide useful context information for the empirical analysis, especially as it provides a more comprehensive and up-to-date understanding of the lawyers' organisational positions and affiliations than what is currently available in the academic literature. In addition, chapter three emphasised that an examination of bureaucratic lawyers' organisational positions helps to uncover the institutional contexts they are immediately socialised into which, in turn, can enhance our understanding of their role perceptions and hence the political-professional behaviours they demonstrate. An awareness of their organisational

[448] Yin (n 21) 10; Clark and others (n 126) 75.
[449] Clark and others (n 126) 75.
[450] Yin (n 21) 10, 15.

positions, including the colleagues they are situated with, also provides a useful context for understanding the range of on-the-job experiences and interactions that lawyers participate in for knowledge acquisition.

The second research question is answered in chapters six and seven and provides a rich, nuanced account of what functions the lawyers perform during the two chronological phases developed in chapter three: (1) converting the policy problem into a legal solution and (2) finalising the legal solution for introduction to the legislature. In each of these phases, the functions performed by the different types of lawyers will be presented in the order they were described by participants to provide a more realistic understanding of when the functions are carried out, including any instances of overlap or a return to previous functions. The third and fourth research questions will also be answered in chapters six and seven, delving into the two analytical concepts developed in chapter three. In contrast to the largely descriptive accounts outlined in chapter two, these concepts provide a valuable opportunity to explore sociological dynamics that influence how UK Government and European Commission lawyers perform their work within their respective bureaucratic contexts.

4.3. Socio-legal research

The socio-legal movement departs from the traditional emphasis on doctrinal legal research which is typically concerned with the 'identification, interpretation and application of relevant legal rules… and is broadly characterised by an exhaustive literature review and close reading of case law and legislation.'[451] Instead, this movement embraces the study 'of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.'[452] Chapter two has already argued that the topic of bureaucratic lawyering is overlooked by most socio-legal scholars. It was suggested that this could be due to a broader limitation where the process of formulating and developing legislation has

[451] Murphy and McGree (n 447). See also McCrudden (n 17); Chynoweth (n 17) 29.
[452] David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005) 864.

yet to receive as much attention as the implementation and meaning of legal rules in society. With this in mind, chapter two argued that this thesis makes a considerable contribution in overcoming this knowledge gap, especially in a category of socio-legal scholarship which relies on empirical methods; empirical studies in law.[453]

In line with the socio-legal movement, this thesis utilises theories and methodologies from the social sciences. While the theories of neo-institutionalism and expertise have already been discussed in chapter three, this chapter provides more insight into the methodological choices adopted, including the empirical method of semi-structured interviews. Given that this thesis provides real-life insights into the work of bureaucratic lawyers, it was necessary to engage with empirical methods rather than pure theory. In order to encourage a greater use of empirical methods in UK socio-legal scholarship, some scholars have argued for university law schools to place a greater emphasis on teaching social science research methods.[454] This thesis benefits from the research methods training received when studying a Social Science Research Methods Masters at Cardiff University.[455] This academic training was part of a funded studentship I was awarded by the Economic and Social Research Council on the Empirical Studies in Law pathway.[456] A central aim of this pathway is to encourage interdisciplinary legal research that is closely connected to the social sciences, both in substance and design.

[453] For various definitions of the 'socio' see Feenan (n 18); For the concept of the 'legal' see Cowan and Wincott (n 121); For differences between socio-legal studies and the sociology of law see Banakar and Travers (n 18).
[454] Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163; Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 23; Genn, Partington and Wheeler (n 19).
[455] Cardiff University, 'Social Science Research Methods (Socio-Legal) (Law) (MSc)' <https://www.cardiff.ac.uk/study/postgraduate/taught/courses/course/social-science-research-methods-socio-legal-studies-msc> accessed 5 June 2023.
[456] ESRC Wales Doctoral Training Partnership, 'Empirical Studies in Law' <https://walesdtp.ac.uk/pathway/empirical-studies-in-law/> accessed 6 June 2023.

4.4. Social constructionism

A researcher's ontological position is associated with what they consider to be the nature of social reality while epistemology relates to what knowledge they can acquire of this reality.[457] This thesis adopts the ontological and epistemological position of social constructionism which is interested in the relationship between human thought and the social context in which it takes place.[458] In their influential book, often regarded as the foundation of social constructionism, Peter Berger and Thomas Luckmann propose that sociologists should concentrate on how 'knowledge' becomes everyday 'reality' in a given social context.[459] In their view, reality has a 'dual character' as it encompasses both a subjective and objective aspect.[460] While social reality is constructed by humans and their interactions, there is also a sense that this reality is experienced by humans as fixed and pre-given. Berger and Luckmann explain this using the three moments of externalisation, objectivation and internalisation.[461]

Externalisation is the process through which individuals express their subjective experiences to others. Berger and Luckmann argue that these subjectivities are most accessible to others in face-to-face situations.[462] Objectivation occurs when these subjectivities become detached from the individual and are 'experienced as possessing a reality of their own'.[463] This encompasses the process of institutionalisation where habitualised actions become embedded as routines that are shared by members of a particular social group.[464] In addition to routines, objectivations can take the form of linguistic expressions available to all members of the group. Internalisation denotes the process of individuals being socialised into this

[457] Colin Hay, *Political Analysis: A Critical Introduction* (Palgrave Macmillan 2002) 62–63.
[458] Vivien Burr, *Social Constructionism* (3rd edn, Routledge 2015) 104 acknowledges that social constructionism has both ontological and epistemological underpinnings.
[459] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Open Road 2011) 20.
[460] ibid 51.
[461] ibid.
[462] ibid 72–75.
[463] ibid 130.
[464] ibid 122–23.

objective reality, and this reality becoming subjectively meaningful to them. According to Berger and Luckmann, 'language constitutes both the most important content and the most important instrument of socialization.'[465]

The view that there is not one fixed reality to be discovered is consistent with the socio-legal approach adopted in this thesis.[466] More specifically, the empirical analysis of this thesis explores how lawyers' perceptions, behaviours, and actions are shaped through socialisation processes within their respective bureaucratic contexts, including through their interactions with colleagues. Furthermore, in line with the neo-institutional approach outlined in the previous chapter, this analysis is based on the idea that written rules and guidance only offer a 'partial' description of why bureaucrats perform their work as they do.[467] While rules and guidance can ultimately provide a framework for guiding actions and interactions, they are insufficient to fully predict or explain how actors will behave within a social context.

4.5. Case study research

This thesis adopts a multiple-case study research design. Case studies generate the context-dependent knowledge shown to be necessary in socio-legal studies and social constructionist research.[468] As mentioned by Robert Yin, 'you would want to do a case study because you want to understand a real-world case and assume that such an understanding is likely to involve important contextual conditions pertinent to your case'.[469] In case study research, the use of theory has been described as 'important and necessary'.[470] Typically, theory in case study research is not used to precisely 'test' relationships between variables and hypotheses but rather to offer

[465] ibid 277–76.
[466] Murphy and McGree (n 447) 288, 291, 293. See also Burr (n 458) 170.
[467] Wagenaar (n 239) 651.
[468] Celiane Camargo-Borges and Emerson F Rasera, 'Social Constructionism in the Context of Organization Development: Dialogue, Imagination, and Co-Creation as Resources of Change' (2013) 3(2) SAGE Open 1.
[469] Yin (n 21) 15.
[470] Peter Rule and Vaughn Mitchell John, 'A Necessary Dialogue: Theory in Case Study Research' (2015) 14(4) International Journal of Qualitative Methods 1, 1. See also Peter Burnham and others, *Research Methods in Politics* (2nd edn, Red Globe Press 2008) 64.

'lenses that afford different ways of seeing and understanding phenomena.'[471] The use of theory also ensures that the research does not simply tell a story of the case being studied (the subject) but that it also examines and illuminates something meaningful related to the subject (the object).[472]

The case study 'subjects' are UK Government lawyers and European Commission lawyers, with chapters one and two providing further information about who these lawyers are. The case study 'object' of this thesis is a contextual investigation of the work of UK Government and European Commission lawyers, including the effects of in-house socialisation processes on their political-professional behaviour and expertise. Tables 5 and 6 illustrate that actors who fall outside the defined subjects were also interviewed for this thesis, including parliamentary lawyers. This is acceptable in case study research although researchers must 'bound' the case by making this distinction clear.[473] The purpose of interviewing these additional participants was to inquire about their interactions with UK Government and European Commission lawyers and to acknowledge any potential differences or similarities in the context of their work.

In multiple-case studies, cases are selected because they are predicted to have similar outcomes or different outcomes for reasons that can be anticipated.[474] Chapter one identified anticipated differences in the work of UK Government and European Commission lawyers, stemming from national-supranational differences and the distinct law-making models in each of the organisations. A review of the literature in chapter two also indicated differences in the work of UK Government and European Commission lawyers, largely due to variations found in common law and

[471] Rule and John (n 470) 2. For 'theory testing' see Hans-Gerd Ridder, 'The Theory Contribution of Case Study Research Design' (2017) 10(2) Business Research 281, 300.
[472] Rule and John (n 470) 8.
[473] Yin (n 21) 31.
[474] ibid 55.

civil law systems.[475] It also suggested that these lawyers are subject to different legal principles and constraints due to the national-supranational distinction, with Commission lawyers having to ensure that legislative proposals are in compliance with the EU Treaties. Finally, in accordance with theoretical insights provided in chapter three, the ways in which UK Government and European Commission lawyers approach their work, including how they navigate conflict situations, is likely to differ given their socialisation in distinct bureaucratic organisations.

4.6. Semi-structured interviews

This thesis relies on semi-structured interviews with open-ended questions. This qualitative method of data collection was deemed to be appropriate for achieving rich, detailed insights into the perceptions and experiences of participants. Given the considerable gaps in knowledge regarding the work of UK Government and European Commission lawyers, open-ended questions created a valuable opportunity for participants to introduce insights, nuances, and complexities that may not have been considered in the initial research design. Semi-structured interviews are also aligned with the paradigm of social constructionism as they uncover how participants 'construct meaning around their lived experiences.'[476] Finally, semi-structured interviews are preferred in multiple-case studies as they can facilitate more 'cross-case comparability' than unstructured interviews.[477]

Prior to conducting the interviews, my knowledge of EU lawyering was limited due to the minimal research available. While I engaged with the broader literature on EU law-making, and the limited studies on Commission lawyers, this was not enough to acquire a sufficient understanding about the subject. The first interview conducted with a Commission lawyer was one of the longest in duration and proved to be

[475] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 264. See also Xanthaki, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe' (n 26) 133 for a suggestion that 'the sacred civil versus common law dividing wall is now critically shaken.'
[476] Joanna K Fadyl and David A Nicholls, 'Foucault, The Subject And The Research Interview: A Critique of Methods' (2013) 20(1) Nursing Inquiry 23, 24.
[477] Clark and others (n 126) 428.

immensely valuable as they offered helpful explanations and descriptions regarding the processes, functions, and organisations of lawyers. This allowed me to focus and adapt the interview guide for the remaining participants. In the case of the UK Government, I had a stronger foundation of knowledge from the outset as I had previously worked as a research assistant at the Law Commission where I acquired valuable real-life insight into the inner workings of government.

The final interview guide for both UK Government and European Commission lawyers was framed around four broad areas, namely: (1) the recruitment and organisation of lawyers (2) the functions and influences of lawyers (3) the expertise of lawyers and (4) the interactions of lawyers. While I would address each section of the interview guide separately, the ordering and wording of questions within each section would be adapted based on participants' responses to help maintain a natural conversation flow. In addition to the interview guide, I prepared additional documents including an information sheet, a consent form, and an initial recruitment email. These will be discussed in further detail below.

4.6.1. Participant recruitment

I anticipated that gaining access to interview lawyers from the UK Government and European Commission could be challenging. Due to their elite status, I was aware of issues surrounding time pressures or a heightened sensitivity to confidentiality issues. While there is no single definition of an elite participant, lawyers working for public bodies have already been acknowledged as such.[478] Elites are not necessarily the figureheads of an organisation but are often those able to exert influence upon decision-making due to their positions of prestige and knowledge.[479] The challenges of gaining access to elite participants is likely to explain why there are limited studies

[478] Moorhead, Vaughan and Godinho (n 9) 29.
[479] Xu Liu, 'Interviewing Elites: Methodological Issues Confronting a Novice' (2018) 17(1) International Journal of Qualitative Methods 1, 1. See also William S Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11(4) Qualitative Research 431, 432.

exploring their work and why, among those studies, a ‘relatively small number’ of participants are usually interviewed.[480]

In the case of the UK Government, initial access to lawyers was facilitated by a ‘gatekeeper’ who was not part of the population under investigation but had professional connections with two Parliamentary Counsel.[481] Those Counsel participants then referred me to another four participants, and two of those participants referred me to an additional three. Snowball sampling can be very useful when wanting to interview ‘hard-to-reach’ populations, including elite participants.[482] While initial contact was initiated by the gatekeeper, I would email participants myself once they had provisionally agreed to be interviewed. I would introduce myself, invite them to ask questions, attach an information sheet and consent form, and request to schedule the interview. All UK participants agreed to proceed with the interview.

In the case of the EU, I did not have a gatekeeper to facilitate access but I was fortunate enough to secure a month-long research trip to Antwerp University. This enabled me to offer multiple dates to participants without having to worry about travelling back and forth to Belgium. Knowing that access to elite participants can be challenging, I contacted as many individuals as possible. I primarily relied on the official electronic directory of the EU to gather contact information.[483] An effort was made to recruit participants working in different legal fields to gather diverse perspectives but for some legal teams, the directory would only provide details of the directors. I decided against asking these individuals to act as gatekeepers because if no response was received, it would have felt inappropriate to reach out to other team members, resulting in a loss of access to that team entirely. I therefore decided to

[480] Rebecca S Natow, ‘The Use of Triangulation in Qualitative Studies Employing Elite Interviews’ (2019) 20(2) Qualitative Research 160, 163.
[481] Guro Korsnes Kristensen and Malin Noem Ravn, ‘The Voices Heard and the Voices Silenced: Recruitment Processes in Qualitative Interview Studies’ (2015) 15(6) Qualitative Research 722, 725.
[482] ibid 724.
[483] ‘Official Directory of the European Union (EU Whoiswho)’ <https://op.europa.eu/en/web/who-is-who> accessed 30 June 2023.

search for additional information using LinkedIn or other public sources (e.g., official EU documents) to identify and connect with members of those teams.

In qualitative research, an appropriate sample size is shaped by 'what you want to know, the purpose of the inquiry, what's at stake, what will be useful, what will have credibility, and what can be done with available time and resources'.[484] A total of twenty-six participants were interviewed, with nine of them working in the UK and the remaining seventeen working in the EU. This variation in sample size is primarily driven by the fact that interviews were conducted in three institutions in the EU while only two UK institutions were included. As mentioned above, all individuals contacted in the UK agreed to an interview (albeit via a gatekeeper) while this was not the case in the EU. Table 4 illustrates the responses received in the EU. Among those who declined, the reasons provided were a lack of time or limited experience in the preparation of legislative texts.

Type of actor (total contacted)	**European Commission (61)**			**Parliament (30)**		**Council (7)**	
	Directorate-General officers (29)	Legal advisers (26)	Legal revisers (6)	Legal advisers (11)	Lawyer linguists (19)	Legal advisers (5)	Lawyer linguists (2)
Agreed	4, but one officer was unable to attend due to unforeseen reasons	6	1, internal agreement to act on behalf of other legal revisers	1	2	2	2
No response	17	17	5	9	16	2	0

[484] Patton (2002) as cited in Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE Publications 2013) 55.

Declined	8	3	0	1	1	1	0

Table 4: Responses in the EU institutions.

While choosing EU participants based on the availability of publicly accessible information reflects convenience sampling, the recruitment email clearly indicated that participants would require experience in the preparation of legislative texts, demonstrating an element of purposive sampling too.[485] Efforts were made to recruit more EU participants. During interviews, I attempted to use snowball sampling by utilising the rapport developed with some participants and asking them if they knew any colleagues who might be interested in participating in the study. However, this only led to one additional interview and the Commission lawyer preferred to keep their insights 'off record' and so their data has not been presented in the thesis. In the UK, I was grateful for the advice and support offered by gatekeepers and felt it would have been inappropriate to bypass them to recruit additional participants.

4.6.2. Recording and transcription

Interviews typically lasted for an hour and took place at the participants' workplaces. While I initially hoped to audio-record each interview, five participants would only accept the interview if it was not audio recorded. For these interviews, I took handwritten notes and subsequently recorded myself after to capture a more detailed discussion of the participants' responses. This was done on the same day to minimise losing any depth of meaning conveyed by the participants. When audio-recording was possible, handwritten notes were kept to a minimum so that I could pay full attention to the participants' responses. Notes were only made as reminders for follow-up questions if participants made a comment that required clarification or further enquiry. The twenty-one recorded interviews were transcribed within two weeks of their occurrence, totalling approximately 162,000 words. Transcripts

[485] Clark and others (n 126) 176.

reproduced the participants' spoken words but disfluencies and hesitations were not included. The emphasis was placed on capturing the substantive content of the discussions rather than the linguistic characteristics or individual speech styles of the participants. This was a very time-consuming process, taking approximately five hours to transcribe one hour of recording. Nevertheless, as discussed below, transcription is a necessary first step in data analysis as it familiarises researchers with the dataset.

4.7. Data analysis

My data was analysed using Virginia Braun and Victoria Clarke's reflexive approach to thematic analysis which is composed of six stages.[486] This process is reflexive as it acknowledges the researcher's active involvement in generating knowledge. More specifically, the development of codes and themes represent the researcher's interpretation of meaningful patterns within the dataset.[487] The first stage required me to 'deeply and intimately' familiarise myself with the dataset.[488] I achieved this by transcribing my interviews.[489] Once I had transcribed an interview, I would read the completed transcript to get an overall sense of it. I would then re-read the transcript and write down my initial thoughts and reflections about the various meanings presented in the data (e.g., the various types of knowledge mentioned by participants).

This process helped me prepare for the second stage of thematic analysis; the generation of initial codes to help capture interesting concepts and ideas associated with the research questions. Codes have been described as 'the most basic

[486] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77; Virginia Braun and Victoria Clarke, 'One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?' (2021) 18(3) Qualitative Research in Psychology 328; Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE Publications 2022).
[487] David Byrne, 'A Worked Example of Braun and Clarke's Approach to Reflexive Thematic Analysis' (2022) 56(3) Quality & Quantity 1391, 1393. Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 55.
[488] Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 35.
[489] ibid 43–44.

segment, or element, of the raw data or information that can be assessed in a meaningful way regarding the phenomenon'.[490] I initially attempted to use a software programme called NVivo for the coding process but found it easier to rely on the hard-copy transcripts and use different coloured pens to make sense of the data and identify different codes. The coding performed in this thesis had elements of both inductive and deductive orientations.[491] While the codes were used to capture the experiences and perspectives of participants, I also coded based on the insights already presented in chapter three, such as the behaviours associated with the Weberian bureaucrat and autonomous professional bureaucrat.

Following the coding process, the third stage of thematic analysis required me to generate themes which are defined as 'patterns of shared meaning, united by a central concept of idea'.[492] To generate themes, I examined the various codes and explored any 'broad ideas that a number of different codes could be clustered around.'[493] Figure 5 illustrates the process of generating themes, and the relationship between themes and codes.[494]

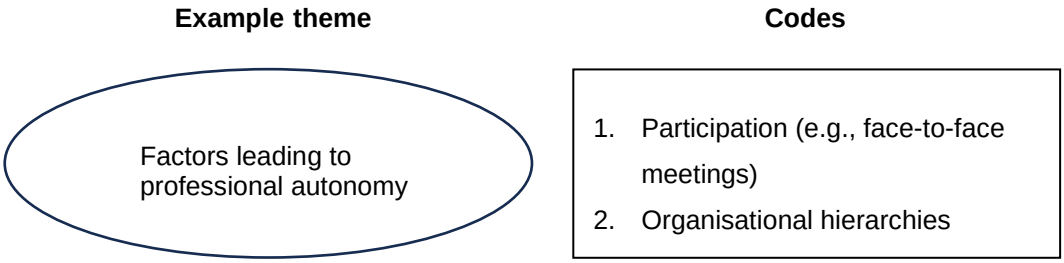

Figure 5: Generation of themes

[490] Boyatzis (1998) as cited in Braun and Clarke, 'Using Thematic Analysis in Psychology' (n 486) 88.
[491] Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 56.
[492] Braun and Clarke, 'One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?' (n 486) 341.
[493] Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 80.
[494] ibid 86.

The fourth stage required me to review the original themes.[495] I reviewed all themes to ensure they were each framed around a single organising concept, did not overlap with each other, and were related to the research questions. For the fifth stage, I further developed each theme by elaborating its meaning and significance.[496] A narrative description was written for each theme, taking into account how it contributed to the overall story of the relevant research question. The sixth and final stage involved the 'final analysis and write-up of the report' in a way which convinced readers of the validity and merit of the analysis.[497] I carefully selected data extracts which clearly illustrated the analytical claims made for each theme. I also aimed for a fair distribution of extracts from participants and removed any unnecessary details, as indicated by […] for the purpose of making the meaning as clear as possible to readers.

4.8. Research quality

Yvonne Lincoln and Egon Guba propose that the criteria of validity and reliability as indicators of research quality are best suited to positivist research.[498] Accordingly, they replace this criteria with the notion of 'trustworthiness' to assess and ensure quality in non-positivist research. This includes research adopting a social constructionist paradigm, like the approach employed in this thesis. The notion of trustworthiness and its associated criteria has gained widespread acceptance among researchers.[499] The following sections illustrate efforts made to ensure the research quality of this thesis based on Lincoln and Guba's criteria.

4.8.1. Credibility

Credibility (internal validity) is one criterion associated with trustworthiness. This is concerned with how 'believable' the findings and hence how congruent they are with

[495] ibid 97.
[496] ibid 100, 111.
[497] Braun and Clarke, 'Using Thematic Analysis in Psychology' (n 486) 93.
[498] Yvonne S Lincoln and Egon G Guba, *Naturalistic Inquiry* (SAGE Publications 1985).
[499] Andrew K Shenton, 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects' (2004) 22(2) Education for Information 63, 64.

reality.[500] One method of increasing credibility is triangulation where different methods can be used to verify the details supplied by participants.[501] I relied on official publications from the UK Government and European Commission, coupled with the existing academic literature discussed in chapter two, to corroborate the participants' responses.[502] As this thesis does not seek to discover a fixed 'truth', this corroboration was primarily intended to ensure I had accurate and relevant information about the operational aspects of the respective law-making processes.

Another form of triangulation is based on the inclusion of a broad range of participants.[503] As mentioned above, interviews were carried out with participants who do not form the immediate focus of the study, including UK Parliament and European Parliament lawyers. The key purpose of these interviews was to enquire about their interactions with lawyers from the UK Government and European Commission and to investigate any contrasting features between them. In addition to triangulation methods, credibility can be enhanced through 'member checks' where participants are offered the opportunity to review their data extracts included in the thesis.[504] According to Guba and Lincoln, this is 'the single most important provision that can be made to bolster a study's credibility.'[505] Four of my participants chose to engage in these checks. This not only enabled participants to verify the credibility of their quotes but it also provided reassurance to those who may have been hesitant about their participation.

I also engaged in measures to help ensure the honesty of participants and hence increase the likelihood of responses reflecting their true feelings and behaviours.[506] At the beginning of each interview, I emphasised that there were no right or expected answers to the questions asked. At the same time, I also made clear that participants

[500] Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 49.
[501] Shenton (n 499) 66; Jason Loh, 'Inquiry Into Issues of Trustworthiness and Quality in Narrative Studies: A Perspective' (2013) 18(33) The Qualitative Report 1, 5.
[502] Natow (n 480).
[503] Shenton (n 499) 66.
[504] ibid 68; Loh (n 501) 6.
[505] Guba and Lincoln (1989) as cited in Shenton (n 499) 68.
[506] ibid 66–67.

could withdraw at any time with no explanation, giving them the opportunity to refuse participation either at that point or after. This was in the hope that participants remaining in the study were genuinely willing to participate and freely share their insights. Moreover, I hoped that the assured confidentiality of their contributions, and the ethical handling of their data more generally, would foster an environment where participants would feel more comfortable to provide honest insights.

4.8.2. Transferability

Transferability (external validity) is concerned with the extent to which research findings can be generalised to other settings or populations. As social constructionist research emphasises contextual significance and uniqueness, suggestions of transferability are often avoided.[507] While my thesis explores the local and situated experiences of lawyers, I do not seek to avoid the question of transferability altogether. As argued by Malcolm Williams, 'the sociologist is interested in knowing something of the social world beyond isolated and fragmented accounts of interactions, or individual biographies.'[508] Multiple-case studies, particularly those incorporating theoretical propositions, have a greater potential for transferability than single-case studies.[509]

Lincoln and Guba propose that transferability is further enhanced if researchers provide sufficient contextual information, enabling others to make informed judgments about the potential transferability of the findings.[510] Throughout the analysis chapters, particularly in chapter five, I provide a rich and detailed description of the organisational contexts in which lawyers' experiences acquire their meaning.

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[507] Malcolm Williams, 'Generalization in Interpretive Research' in Tim May (ed), *Qualitative Research in Action* (SAGE Publications 2002).
[508] ibid 126.
[509] Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50(1) Academy of Management Journal 25, 27. See also Burnham and others (n 470) which explains how the use of theory enables case studies to 'have a wider impact' than purely descriptive case studies.
[510] Lincoln and Guba (n 498); Arya Priya, 'Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application' (2021) 70(1) Sociological Bulletin 94, 102.

This description covers various organisational aspects including location, hierarchies, and intra- or inter-departmental mobility. Moreover, based on the theoretical perspectives in chapter three, I also predict and subsequently explore how these organisational features are able to shape and influence bureaucratic lawyers' behaviours.

4.8.3. Dependability

Dependability (reliability) is concerned with the ability of future researchers to conduct the study again and 'arrive at the same findings and conclusions.'[511] This can be obtained using the 'auditing approach' where a researcher maintains records of the various stages of the research including, but not limited to, the development of research questions, participant recruitment, the transcription of interviews, and the data analysis. The researcher should then ask peers to conduct an audit of the study in order to encourage a critical discussion and review about the various procedures and interpretations.[512] This chapter provides readers with a transparent outline of the various steps taken, from the development of research questions to the analysis of empirical data. An audit would have been extremely challenging, if not impossible, due to the confidentiality of participants' responses. Moreover, to a large extent, the auditing approach contradicts the social constructionist paradigm as it is premised on the idea that a peer can produce the same results if the same steps are taken. As indicated above, the subjectivity of the researcher is central to reflexive thematic analysis as it is a 'process of *interpretation* – or meaning-making' as opposed to 'truth-seeking or discovery'.[513]

4.8.4. Confirmability

Confirmability (objectivity) is concerned with ensuring, as far as possible, that the interpretations and findings represent the participants' views and experiences as

[511] Yin (n 21) 46.
[512] Priya (n 510) 102.
[513] Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 55.

opposed to the biases of the researcher.[514] As researchers are '*part* of the data production process' in social constructionist research, it is highly unlikely that complete confirmability can be achieved.[515] However, researchers should still attempt to do this by engaging in reflexive practices and developing an awareness of their own biases and preconceptions.[516] Throughout this research, I made a conscious effort to remain reflexive and adopt strategies to reduce the likelihood of my own biases and preconceptions influencing the interpretations and findings. For instance, as I engaged extensively with the literature on international bureaucracies in chapter three, I identified several organisational variables that had already been empirically proven to influence bureaucrats' behaviours. I was mindful of not allowing this knowledge to bias my understanding of the range of factors shaping participants' behaviours towards the political-professional conflict. During interviews, I asked open-ended questions that encouraged them to reveal and discuss factors *they* deemed relevant in influencing their behaviours and perceptions. Moreover, when coding, I included all factors mentioned by participants, including any that went beyond the scope of the existing academic literature.

4.9. Ethical considerations

An ethics application was submitted to the Research Ethics Committee of the Cardiff School of Law and Politics. The application described the recruitment and interview process, and explained how I would overcome any anticipated ethical issues. The application was approved by the Ethics Committee, allowing me to arrange and proceed with the interviews.

[514] Gerard A Tobin and Cecily M Begley, 'Methodological Rigour Within a Qualitative Framework' (2004) 48(4) Journal of Advanced Nursing 388, 392.
[515] Braun and Clarke, *Thematic Analysis: A Practical Guide* (n 486) 176. See also David Marsh, Selen A Ercan and Furlong, 'A Skin Not a Sweater: Ontology and Epistemology in Political Science' in Vivien Lowndes, David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (4th edn, Palgrave Macmillan 2018) 190.
[516] Priya (n 510) 102.

4.9.1. Informed consent

All participants had to give their informed consent to take part in this research. In order for participants to make an informed choice about their participation, I had to give them full information about the research process.[517] This covered points such as my role as a researcher, what my research was about, who financed the research, the purpose and expected length of the interviews, and how the research was to be distributed. I also emphasised to participants that they had a right to withdraw from the study at any time, with no explanation required. A comprehensive information sheet outlining all these points was sent to potential participants when I initially contacted them. I also invited them to raise any further questions or concerns they might have about the research. Once a participant had agreed to an interview, I would also send them a consent form which further emphasised the voluntary nature of their participation and clearly highlighted their ability to choose a data collection method that best suited their preferences, specifically whether they were happy to be audio-recorded.[518]

I was aware that elite interviews could raise specific ethical issues, particularly as the participants had demanding professional schedules that could limit their ability to review the information sheet and consent form. Therefore, at the beginning of each interview, I would restate the key points covered in both documents and offer participants an opportunity to ask questions or seek clarification. This was all done before participants were asked to sign the consent form.

4.9.2. Confidentiality

While the topic of bureaucratic lawyering may not be an inherently sensitive topic, bureaucratic lawyers often handle sensitive legal matters regarding politically complex issues. Moreover, as participants were asked to explain the effectiveness of processes within their organisations, and to discuss their relationships with

[517] Clark and others (n 126) 113.
[518] UK participants were sent the information sheet and consent form at the same time as they had already provisionally agreed to an interview via the gatekeeper.

colleagues, their responses could potentially create strain or tension in their professional careers. For these reasons, it was important to approach the interviews with respect for the confidentiality of participants. Several measures were implemented to ensure the confidentiality of all participants. As indicated in tables 5 and 6, each participant was assigned an artificial identifier which will be used for the presentation of their data throughout the thesis.[519] Other identifying factors such as age, gender, team affiliations, or details about legislative proposals also had to be redacted to protect their confidentiality. If the presentation of their data was still considered possible to reveal their identity, permission would have to be sought to reproduce the statement and if this was not granted by the participant, the statement would have to be removed from the text.

All hard copies of consent forms, interview notes, and transcripts were kept in a locked office, along with the recording device used. Any electronic copies of these documents were stored on a Cardiff University server which was password protected. The interview transcripts and notes were named with the artificial identifiers, with the connecting codes for these identifiers stored on the university server too but in a different file. As interviews frequently took place at the participants' workplaces, largely to accommodate their convenience, there was a potential risk that their confidentiality may be compromised if we were seen meeting by their colleagues. I did not make it mandatory to meet at their workplace, ensuring that participants were given the opportunity to suggest a location where they felt most at ease. In situations where interviews occurred at their workplace, this was typically in a private room where only myself and the participant were present, reducing the risk of their confidentiality being compromised.

[519] Legal advisers working for GLD will be referred to as 'GLD participants' to make a clear distinction between them and legal advisers working for the Commission Legal Service.

Artificial identification	Description
OPC 19	Parliamentary Counsel
OPC 20	Parliamentary Counsel
OPC 21	Parliamentary Counsel
GLD 22	GLD Legal adviser
GLD 23	GLD Legal adviser
HCC 27	Clerk (House of Commons)
HC 24	Parliamentary lawyer (House of Commons)
HC 25	Parliamentary lawyer (House of Commons)
HL 26	Parliamentary lawyer (House of Lords)

Table 5: Artificial identification and description of UK participants.

Artificial identification	Description
CLA 1	Commission legal adviser
CLA 2	Commission legal adviser
CLR 3	Commission legal reviser
CLA 4	Commission legal adviser
CLA 5	Commission legal adviser
CLA 7	Commission legal adviser
CLA 14	Commission legal adviser
DG 6	DG policy officer
DG 9	DG legal officer
DG 10	DG legislative officer
EPLA 16	Parliament legal adviser
EPLL 17	Parliament lawyer linguist
EPLL 18	Parliament lawyer linguist
CnLA 11	Council legal adviser
CnLA 12	Council legal adviser
CnLL 13	Council lawyer linguist
CnLL 15	Council lawyer linguist

Table 6: Artificial identification and description of EU participants.

4.10. Conclusion

This chapter has outlined the methodological approach guiding this research. It situates the research within the socio-legal scholarship and explains its epistemological and ontological position. It also draws attention to various decisions informing the research design, such as the choice to adopt a multiple-case study and the suitability of semi-structured interviews for gathering rich data on the lived

experiences of bureaucratic lawyers. The chapter also identified certain challenges faced during participant recruitment, especially in the EU, and highlighted how I attempted to overcome these. The data analysis approach of this thesis was also explained, before outlining the range of steps taken to maximise the research quality of this thesis. The final section revealed how ethical issues were mitigated, with a particular focus on confidentiality issues. Throughout this chapter, emphasis was placed on potential challenges that might arise when interviewing elite participants. In the following three chapters, I will present the empirical analysis of this thesis.

Chapter Five: The organisational positions of UK Government and European Commission lawyers

5.1. Introduction

This chapter captures one of the key research questions, that is: 'What are the organisational positions of UK Government and European Commission lawyers in their respective bureaucracies?' Through the presentation of empirical findings, the chapter will unpack the organisational positions of UK Government lawyers before proceeding to explore the organisational positions of European Commission lawyers.[520] Gaining insight into the lawyers' organisational positions provides a meaningful foundation for understanding their in-house socialisation processes by revealing their immediate institutional environments, including the spaces they have access to and the colleagues with whom they interact. The analytical framework in chapter three formulated two analytical concepts, both of which are grounded in the significance of in-house socialisation. There are other advantages to this chapter, specifically that it addresses a gap in the academic literature given the difficulties of locating comprehensive, up-to-date information on these lawyers' organisational positions. Moreover, as mentioned in chapter four, a rich description of their organisational positions can enhance research quality as it enables readers to make informed judgments about the potential transferability of the findings.[521]

Throughout this chapter, emphasis will be placed upon organisational features outlined in chapter three which have been found to shape the role perceptions of bureaucrats. This will enable me to form a set of expectations on whether the lawyers are more likely to adopt behaviours associated with the Weberian or autonomous professional bureaucrat when faced with a political-professional conflict, which are two ideal-typical role perceptions developed in chapter three.[522] This will

[520] Some references are also made to publications from the UK Government and European Commission to increase the credibility of the findings, as explained in chapter four (section 4.8.1).
[521] Lincoln and Guba (n 498); Priya (n 510) 102.
[522] See section 3.3.1.4.

help to establish the context for the first sub-question developed in chapter three which asks whether lawyers in policy departments (i.e., ministries or sector DGs) are more likely to adopt a Weberian role perception compared to those situated in exclusive legal departments who are more likely to adopt an autonomous professional role perception. Throughout this chapter, the potential of socialisation *beyond* lawyers' departments will also be considered as this could lead to the emergence of a supra-departmental affiliation which, as identified in chapter three, might encourage lawyers to adopt a role perception that is not solely shaped by their 'own' institutional environments.[523] This will ultimately begin to establish the context for the second sub-question, specifically: 'Do interactions across departmental boundaries encourage a supra-departmental affiliation where the lawyers perceive their roles in accordance with the 'bigger picture' of the organisation?'

It is important to note that while the analytical concept of political-professional behaviour features prominently in this chapter, specifically because of the close connection between organisational features and bureaucratic role perceptions highlighted in chapter three, this chapter provides a useful foundation for exploring the concept of expertise in subsequent chapters too. More specifically, by providing an in-depth examination of the organisational positions of UK Government and European Commission lawyers, including their working spaces and professional networks, this chapter provides valuable context information for understanding the range of on-the-job learning experiences and interactions mentioned by participants in chapters six and seven. As such, this chapter also begins to establish the groundwork for the third sub-question outlined in chapter three, namely: 'What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?'.

5.2. The UK Government

The executive branch of the UK Government is headed by the Prime Minister who appoints ministers from the members of the House of Commons and the House of

[523] See section 3.3.1.4.

Lords. The Cabinet, which is the ultimate decision-making body of the government, is made up of the most senior ministers. Below the Cabinet are several government departments that 'are responsible for putting government policy into practice.'[524] Twenty-three of these departments are currently headed by ministers while twenty of them are non-ministerial.[525] Working in these departments are bureaucrats appointed to the UK Home Civil Service which is the permanent secretariat carrying out 'the practical and administrative work of government.'[526] These bureaucrats are bound by the Civil Service Code which specifies that they must support the government with objectivity, integrity, honesty, and political impartiality.[527] As of March 2023, there were 488,400 bureaucrats working in a full-time equivalent post.[528]

Included in this figure are lawyers working for the Government Legal Department (GLD) which is a non-ministerial department that provides legal services to the vast majority of ministerial departments. It is made up of around 2,100 lawyers whose work can be divided into advisory and parliamentary work, litigation, commercial, employment, and bona vacantia.[529] This thesis focuses exclusively on their advisory work, specifically the advice given to ministerial departments during Bill preparation. Also included in this figure are lawyers working for the Office of the Parliamentary

[524] The government is also run by executive agencies and other public bodies. For an overview of how these differ from government departments see UK Government, 'How Government Works' (*GOV.UK*) <https://www.gov.uk/government/how-government-works> accessed 24 May 2022.
[525] For a list of government departments, agencies and public bodies see UK Government, 'Departments, Agencies and Public Bodies' (*GOV.UK*) <https://www.gov.uk/government/organisations#departments> accessed 24 May 2022.
[526] UK Government (n 524). While these bureaucrats are typically referred to as civil servants, I have selected the term 'bureaucrats' for consistency in the thesis.
[527] For more on these values see Civil Service, 'Statutory Guidance: The Civil Service Code' <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code> accessed 24 May 2022.
[528] Institute for Government, 'Civil Service Staff Numbers' (*Institute for Government*, 14 March 2023) <https://www.instituteforgovernment.org.uk/explainers/civil-service-staff-numbers> accessed 5 August 2023.
[529] For an overview of these activities see Government Legal Department, 'About Us' (*GOV.UK*) <www.gov.uk/government/organisations/government-legal-department/about> accessed 4 July 2022. For a more extensive list of GLD activities see Government Legal Department, 'Annual Report and Accounts 2021-22' (2021) HC 188 15.

Counsel (OPC) which is part of the Cabinet Office. OPC is made up of around fifty lawyers, referred to as Parliamentary Counsel or Counsel, whose work can be divided into drafting government Bills, advising departments on parliamentary procedure, reviewing regulations and orders amending Acts of Parliament, and advising government on various constitutional and legal issues.[530] This thesis will focus exclusively on the drafting and advisory aspects of their work central to Bill preparation. The chapter will now explore the organisational positions of GLD legal advisers and Parliamentary Counsel, in that respective order.

5.2.1. Government Legal Department

GLD was formed in April 2015 with the core vision and purpose of helping 'the government to govern, well, within the rule of law.'[531] It replaced the Treasury Solicitor's Department (TSol) which provided legal services to fewer government departments, with many departments still employing their own lawyers during that period.[532] A move towards a shared services agenda increased the scope of departments to be serviced by TSol which led to its rebranding as GLD.[533] At present, nearly all government legal advisers are employed and paid by GLD. A minority of lawyers are still employed directly by departments, including HM Revenue and Customs (HMRC) and the Foreign and Commonwealth Office (FCO). While the advisory work of GLD lawyers and those employed directly by departments is "very, very similar", a notable difference was raised in relation to FCO lawyers whose work is much more "internationally focused".[534]

The main office of GLD is based in Westminster (102 Petty France) and the employment, commercial, and litigation teams are generally based there.[535] In

[530] For a list of their responsibilities see Office of the Parliamentary Counsel, 'About Us' (*GOV.UK*) <https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about> accessed 13 July 2022.
[531] Government Legal Department, 'About Us' (n 529).
[532] For a discussion on the shared services agenda see Yong (n 5) 42–45.
[533] ibid 42–43.
[534] Interview with GLD 22 (10 December 2019).
[535] Some exceptions are likely due to the regionalisation of GLD offices which will see some of these teams based in other locations.

contrast, the vast majority of legal advisers are assigned to and located in central government departments, with participants using the term “co-location” to describe this arrangement.[536] These departments are led by ministers and are primarily located in offices across Westminster although a recent government attempt to diversify the Civil Service has led to the creation of offices in other UK regions too.[537] The GLD Business Plan 2022-23 outlines its own commitment to increased regionalisation and therefore the consequent relocation of some roles.[538] As all participants were located in London, this thesis cannot comment on how regional organisation might affect the in-house socialisation of legal advisers. This would nevertheless be an interesting avenue for future study, particularly as this thesis reveals the importance attached to face-to-face interactions with Parliamentary Counsel who are based in London.[539]

GLD participants highlighted considerable differences in the total number of legal advisers co-located in each ministerial department. Some of the larger departments, such as the Department for Environment, Food & Rural Affairs, might have “a hundred or so” legal advisers while the smallest departments might only have “about forty lawyers.”[540] Legal advisers co-located in the same ministerial department are collectively referred to as a “division”.[541] Divisions are then separated into smaller

[536] Interview with GLD 22 (10 December 2019); Interview with GLD 23 (10 December 2019). Each participant was co-located in a ministerial department, and this is very much the case for the vast majority of legal advisers, but there is potential for some smaller departments to not have lawyers permanently co-located there.
[537] See Civil Service, ‘Civil Service Diversity and Inclusion Strategy: 2022 to 2025’ (*GOV.UK*) <https://www.gov.uk/government/publications/civil-service-diversity-and-inclusion-strategy-2022-to-2025/civil-service-diversity-and-inclusion-strategy-2022-to-2025-html> accessed 4 January 2023.
[538] Government Legal Department, ‘GLD Business Plan 2022-23’ (*GOV.UK*, 23 June 2022) <https://www.gov.uk/government/publications/gld-business-plan-2022-23/gld-business-plan-2022-23#Our-purpose-vision-and-values> accessed 4 January 2023.
[539] Similar arguments can also be considered in relation to remote working, particularly since the COVID-19 pandemic. Data was collected prior to the pandemic and so this consideration falls outside the scope of this thesis, however, it would be interesting to explore whether virtual meeting platforms have similar effects to face-to-face meetings.
[540] First quote is attributed to GLD 22 (10 December 2019). Second quote is attributed to GLD 23 (10 December 2019).
[541] Interview with GLD 23 (10 December 2019).

legal teams, sometimes as many as ten to twelve teams, with each team responsible for different substantive areas covered by the ministerial department.[542] The division often occupies the same floor space of the department, with each team sat closest together. Each team consists of legal advisers belonging to different administrative grades which in ascending order include Grade 7, Grade 6, and the Senior Civil Service. Despite the different seniorities, "it is a fairly level hierarchy, not much by way of rank, we cooperate and assist as we can."[543] In line with the UK Civil Service rotation system, legal advisers are expected to rotate to another post every three to five years. This can be to another legal team in the ministerial department or to another division altogether, normally done through a "quasi-job application process":

> Yes, so normally, they normally sort of run exercises so that it is all done fairly and to avoid taps on shoulders. It is almost like a sort of quasi-job application process where you set out what your skills are, where you are looking to develop your skills, which teams you are particularly interested in, and you might have some sort of informal interviews as well. And sort of, in that process, you would hopefully be matched with somewhere that is looking for somebody, you know, you meet their profile and it is an area that you are interested in moving to.[544]

Legal advisers are in a dual organisational position as they are co-located in a ministerial department for at least three to five years but are employed and paid by GLD for the duration of their government legal career. One GLD participant explained, "GLD lawyers are for the most part, certainly in so far as advisory lawyers are concerned, co-located in departments [but] actually they will also be members of the Government Legal Department and will be paid by the Government Legal Department."[545] In line with insights provided in chapter three, legal advisers are expected to develop a primary affiliation to the ministerial department in which they are located as most of their face-to-face interactions are likely to occur there, with such interactions often contributing to a heightened sense of belonging towards a

[542] Interview with GLD 23 (10 December 2019).
[543] Interview with GLD 22 (10 December 2019).
[544] Interview with GLD 23 (10 December 2019).
[545] Interview with GLD 22 (10 December 2019).

collective group.[546] This expectation was confirmed by a participant who said that they perceive themselves "*primarily* as departmental lawyers" despite their GLD membership and remuneration.[547] In fact, all GLD participants identified themselves and their colleagues as "departmental lawyers" to a much greater extent than they did GLD lawyers.[548] This affiliation to the ministerial department is likely to be further strengthened by the fact that legal advisers have access to the departmental intranet and internal messaging service, and are assigned a departmental email for the duration of their post.

Chapter three revealed that the primary organisational affiliation of a bureaucrat serves as a strong indicator for their role perception. [549] On this basis, a primary affiliation towards a ministerial department is expected to lead to a Weberian role perception. If so, legal advisers will regard it as inappropriate to challenge or obstruct political decisions on professional grounds unless the legal hurdles are 'clearly insurmountable'.[550] As previously stated in chapter three, this expectation is based on the view that lawyers working in ministries are socialised into institutional environments where political pressures and considerations are felt more strongly during regular interactions and experiences, especially when compared to bureaucratic lawyers working in physically separated legal departments led by non-political administrators. Consistent with the organisational fragmentation of bureaucracies, however, the primary affiliation of legal advisers is not so clear-cut as they are assigned to their own legal teams within the ministerial department. If these legal teams operate as isolated silos, socialising different norms from the broader department, the likelihood of Weberian behaviours could be weakened.[551]

Nevertheless, as the following two chapters reveal, GLD participants emphasise the priorities and interests of the ministerial department to a greater extent than those of

[546] Hooghe (n 354) 68–69.
[547] Interview with GLD 22 (10 December 2019) (emphasis added).
[548] Interview with GLD 22 (10 December 2019); Interview with GLD 23 (10 December 2019).
[549] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441; Trondal and others (n 320) 31, 131.
[550] Moss (n 14) 1306.
[551] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).

their own legal teams. One potential explanation could be that legal advisers often rotate to different legal teams within the same ministerial department, meaning that they have a longer tenure in the department as a whole.[552] Another factor that is anticipated to limit socialisation within individual legal teams is that lawyers often serve a horizontal function of legal services in their respective bureaucracies.[553] Such a horizontal function represents a *process*-specialisation which is associated with high levels of interaction across team boundaries, hindering an affiliation towards a particular team.[554] The following two chapters confirm that legal advisers frequently collaborate with departmental policy officials to help find legal solutions to policy problems. Given their shared location, many of these interactions occur in face-to-face meetings, with the effective socialisation capacities of face-to-face interactions already identified in chapter three.[555] While legal advisers also consult with members of their own legal team, especially if legal queries arise, more emphasis was placed on the need for regular interactions with policy officials.

Chapter three also emphasised the importance of formal vertical hierarchies in shaping the role perceptions of bureaucrats. Legal advisers do not work under the direct supervision of ministers and in fact have their own mechanism which enables them to escalate ministerial proposals to the Law Officers if unlawfulness is suspected.[556] If this legal structure is felt regularly during their work, particularly to a greater extent than ministerial authority, legal advisers may also adopt a considerable sense of professional autonomy where they perceive their role as one that requires them to preserve and promote a respect for the law even if this obstructs or hinders departmental interests.[557] The possibility of a role conflict was

[552] Trondal and others (n 320) 131.
[553] ibid 135. See also Egeberg and Trondal (n 367) 61–62.
[554] Trondal and others (n 320) 131.
[555] Collins and others (n 431) 60.
[556] Interview with GLD 23 (10 December 2019). The ability for legal advisers to escalate matters to the Law Officers is enshrined in the Cabinet Manual and the Attorney General's legal risk guidance. Cabinet Office, 'The Cabinet Manual' (2011) 50; Attorney General's Office, 'Attorney General's Guidance on Legal Risk' (2022) <https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk> accessed 8 December 2022.
[557] Trondal and others (n 320) 159.

acknowledged in chapter three where it was argued that the behaviour of a bureaucrat should be understood as the 'result of the interplay and conflict' between different role perceptions.[558] While all GLD participants discussed the option of escalating proposals to the Law Officers, especially in the context of a legal risk assessment, chapter six will identify that this mechanism is rarely enforced and will also highlight the reasons behind this.

While the discussion has emphasised that legal advisers often rotate to different teams within the same ministerial department, it was briefly mentioned that they may also rotate to a different legal division, meaning that they will be assigned to a legal team in *another* ministerial department. While GLD participants regularly discussed the interests of the department in which they were co-located at the time, such cross-departmental rotation is expected to discourage a 'continued' attachment to just one department only.[559] On this point, GLD participants demonstrated a willingness to adapt and learn from the working practices of other departments, and to also enhance the practices of other departments. For instance, one participant expressed, "you would have acquired skills in a particular post and you can be taking those skills and experience elsewhere and helping enrich another team elsewhere through your unique perspectives."[560] Rotation to different ministerial departments can also encourage the development of an informal network of legal advisers across Whitehall. The following chapters will reveal that legal advisers coordinate with this network, typically to fill a knowledge gap within their own department.

Overall, the discussion unpacked the organisational positions of legal advisers, drawing attention to several organisational features, including their co-location in ministries, rotation to different legal teams or divisions, hierarchical structures (e.g., the escalation mechanism) and the horizontal *process*-specialisation of GLD. Based on insights provided in chapter three, the discussion also indicated how these

[558] Trondal and Veggeland (n 321) 63; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320).
[559] Hooghe (n 354).
[560] Interview with GLD 23 (10 December 2019).

features are expected to shape legal advisers' behaviours when presented with a political-professional conflict. Legal advisers' co-location in ministerial departments is considered to be the strongest indicator that they will adopt behaviours associated with a Weberian role perception, especially given their regular face-to-face interactions with policy officials. In contrast to the other three categories of lawyers featuring in this thesis, GLD legal advisers are the only ones not located in a separate legal department led by a non-political administrator. Although GLD legal advisers are granted the ability to circumvent political hierarchies on the grounds of their professional legal knowledge, which is expected to enhance their professional autonomy, chapter six will reveal that this mechanism is seldom enforced.

5.2.2. Office of the Parliamentary Counsel

OPC was established by Treasury Minute in 1869.[561] It ceased to be part of the Treasury from 1968 onwards when it became part of the Civil Service Department and since 1980, it has been part of the Cabinet Office. A central aim of OPC is 'to translate policy into clear, effective and readable law.'[562] Prior to its establishment in 1869, the process of drafting government Bills was 'haphazard' because it was undertaken by various actors, including counsel to the Home Office, independent counsel employed by departments, and departmental officials.[563] There was therefore great variation in drafting techniques leading to inconsistencies and conflict between legislative provisions.[564]

OPC is made up of around fifty lawyers who are situated together in an office within 1 Horse Guards Road which is a government building occupied by some of the

[561] HM Treasury, 'Treasury Minute of 8th February 1869' <https://blogs.bl.uk/files/treasury-minute.pdf> accessed 9 December 2022.
[562] GOV.UK, 'Office of the Parliamentary Counsel' (*GOV.UK*) <https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel> accessed 9 August 2022.
[563] Bowman (n 171) 69. See also Richard Spitz, '150 Years of the Office of the Parliamentary Counsel' (*GOV.UK*, 28 March 2019) <https://civilservice.blog.gov.uk/2019/03/28/150-years-of-the-office-of-the-parliamentary-counsel/> accessed 13 July 2022.
[564] Miers and Page (n 151) 48.

Cabinet Office teams.[565] A drafting monopoly held by such a small number of lawyers is not a common arrangement for primary legislation.[566] Similar to other civil service bodies, OPC is grade structured. Grades start at Assistant Parliamentary Counsel and proceed through to Senior Assistant, then to Deputy Parliamentary Counsel and Senior Deputy, until one reaches the position of Parliamentary Counsel or 'full Counsel'.[567] All Counsel are headed by First Parliamentary Counsel, currently Elizabeth Gardiner. Upon promotion, the job largely progresses from an initial training post, which typically lasts for around four to six years, to one where Counsel can perform the job on their own and eventually acquire the skills and familiarity to train and manage others.[568]

Counsel are organised into four teams. The smallest team has around two or three drafters and is led by First Parliamentary Counsel. The purpose of this team is to support First Parliamentary Counsel in their role as adviser to the Prime Minister and the Cabinet Secretary on certain constitutional matters. While this is a "completely different function" to legislative drafting, the team still helps with the drafting work of other teams as their constitutional role often constitutes between 10 to 20% of their workload.[569] This can nevertheless fluctuate as was the case during the 2019 government change over when this team was "very, very busy."[570] The remaining three teams provide a drafting service to ministerial departments. They are each led by a Director General and are made up of around a dozen drafters of different experiences and seniorities.

The three drafting teams are each allocated one or more ministerial departments and have "first-line responsibility" for any Bill projects emerging from them.[571] This allocation is intended to achieve a fair and proportionate workload across OPC. For

[565] The exception is Parliamentary Counsel seconded to the Law Commission and the Statutory Hub. 1 Horse Guards Road is also the office accommodation for the Treasury.
[566] Page (n 116) 792.
[567] Greenberg (n 124) 21.
[568] Interview with OPC 21 (15 August 2019).
[569] Interview with OPC 20 (1 August 2019).
[570] Interview with OPC 20 (1 August 2019).
[571] Interview with OPC 19 (6 September 2019).

example, one team is primarily allocated the Home Office as this is a "big drafting department" while another is primarily allocated HM Revenue & Customs as the Finance Bill is "a big chunk of work".[572] Similarly, there are also "some departments who don't produce much legislation, like the Foreign and Commonwealth Office."[573] Prior to the introduction of teams around twelve years ago, projects were simply "divvied out" to autonomous pairs of Counsel made up of a senior member and one or two junior members.[574] A Bill project is still assigned to a pairing from the relevant team to ensure the Bill has at least "two pairs of eyes" on it.[575] These pairings last for around a year to ensure that senior Counsel have enough time to "really focus" on their partner's training:

> When you're a junior drafter, we try and keep you for a few years working pretty much at any one time with just one person. Not for three or four years, but maybe for twelve months you will maybe do the bulk of your work with one other person, the same person, so they can really focus on your training. When you're more senior in the office, you could be working with different people on different projects. But however senior you are, you ought to be working with somebody else. And sometimes you'll be taking the lead as a senior person and sometimes you won't. But it's still your job to play the role of the person who checks the draft, who checks the analysis, who thinks about it.[576]

The importance of such apprenticeship style learning for the achievement of contributory expertise has already been identified in chapter three.[577] Chapter six will develop this further by exploring how Counsel acquire the practical 'know-how' of drafting a Bill through observations and conversations with their mentors. In terms of Counsel's political-professional behaviour, chapter three emphasises that the primary organisational affiliation of a bureaucrat serves as a strong indicator for their

[572] Interview with OPC 20 (1 August 2019).
[573] Interview with OPC 20 (1 August 2019).
[574] Interview with OPC 19 (6 September 2019).
[575] Interview with OPC 19 (6 September 2019).
[576] Interview with OPC 19 (6 September 2019).
[577] Collins and Evans, *Rethinking Expertise* (n 401) 35; Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 23, 24.

role perception.[578] On this basis, a primary affiliation towards OPC is expected to lead to behaviours associated with an autonomous professional role perception, especially when compared to legal advisers who are co-located in ministerial departments. If so, Counsel will perceive their role as being guided by 'professional correctness and the power of the better argument'.[579] They will be willing to raise their professional drafting views persuasively and attempt to educate or negotiate with the ministerial department on the grounds of their professional knowledge.[580] As emphasised already, this role perception represents an accentuated form of behaviour as it is unlikely that bureaucrats working in an executive-bureaucratic branch will be entirely decoupled from political loyalties in practice.[581]

In accordance with the analytical framework developed in chapter three, this expectation of professional autonomy is largely based on the fact that OPC is made up of an exclusive network of drafting lawyers, led directly by a non-political administrator.[582] Furthermore, their professional autonomy would be enhanced even further if their knowledge was recognised as central to the legitimacy and operation of the broader bureaucracy.[583] As demonstrated in chapter seven, the specialist knowledge of Counsel, encompassing their drafting skills and understanding of values integral to the legal order, is recognised in government for allowing them to adopt a constitutional role in which they safeguard the integrity of the statute book.[584] Despite these strong indicators for professional autonomy, the primary affiliation of Counsel needs to be examined further as they are each assigned to their own drafting teams within OPC.[585] While it is unlikely that team allegiances would lead to

[578] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441; Trondal and others (n 320) 31, 131.
[579] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.
[580] Purdy (n 14) 85–86; Nzerem (n 312) 133.
[581] Trondal and Veggeland (n 321) 63. See also Trondal, 'Balancing Roles of Representation in the European Commission' (n 320).
[582] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).
[583] Trondal and others (n 320) 159.
[584] ibid ch 8; Christensen and Mandelkern (n 373).
[585] While there is also a team in OPC dealing with constitutional matters, this thesis explores the work of drafting teams.

major shifts in behavioural patterns given the shared location in OPC, and hence the potential for more intra-team collaboration, there is still a possibility that the teams could operate as isolated silos with distinct institutional environments.

Responses clearly demonstrated a stronger affiliation to OPC as a whole. Although chapter three predicted that bureaucrats are socialised more effectively into the norms of their organisational subunits as face-to-face interactions are often more intense there, Counsel participants made many more references to their OPC membership and the overarching values of this department, including its commitment to the Good Law initiative.[586] Moreover, Counsel participants frequently drew attention to a strong "corporate feeling" in OPC which has been consistently developed through regular interactions across team boundaries and efforts such as monthly bulletins and know-how banks available to the office as a whole.[587] One Counsel participant emphasised that this strong sense of team spirit across team boundaries is facilitated by the fact that OPC is a relatively small department, with a shared location for all its members:

> We are very much a team because there are only fifty of us. So we get together a lot, we engage with one another a lot, we talk to each other a lot. We have got a very good office know-how which we put a lot of effort into and we keep it up to date… So a lot of that goes on and I think that's one of the real values to having us all here together as a central service rather than individuals sitting out in departments who would be much more isolated and wouldn't be able to sort of build on that.[588]

Another factor likely to foster a stronger affiliation towards OPC as a whole, and encourage the department to feel like one cohesive team, is the fluidity of individual team boundaries. While each team is responsible for drafting proposals emerging from a set of ministerial departments, Counsel often draft Bills belonging to other teams. The flexibility to move Bill projects around is intended to ensure a fair distribution of work across OPC if departments produce more or less legislation than

[586] Hooghe (n 354) 68. Interview with OPC 20 (1 August 2019).
[587] Quote attributed to OPC 19 (6 September 2019); Interview with OPC 20 (1 August 2019).
[588] Interview with OPC 19 (6 September 2019).

expected. A Counsel participant explained, “So one year, DCMS might be very legislation heavy and the Home Office who are traditionally a very heavy legislator might not have anything at all.”[589] Counsel are also expected to rotate to other teams throughout their career. Not only does this result in a longer tenure in OPC as a whole which can enhance the degree of affiliation towards that level, but it also strengthens the informal network of drafters across the office which reduces the likelihood of isolated team silos, each socialising their own institutional norms.[590] At the time of the interviews, the duration in which a drafter remained in a team was not standardised and OPC had been “grappling with how frequently people should move between teams.”[591] Although a decision had yet to be made, preliminary discussions considered that rotation might occur every three to five years in line with the parliamentary term.

While a primary affiliation towards OPC is expected to result in an autonomous professional role perception where Counsel are willing to defend professional views more persuasively, the *process*-specialisation of OPC implies that this is likely to be balanced with a supra-departmental affiliation.[592] This affiliation denotes that Counsel’s role perceptions are not *solely* shaped by their ‘own’ institutional environments, as if they were operating as isolated silos, but may also be shaped through socialisation experiences *outside* their department. As OPC provides a drafting service to all ministerial departments, it is likely that Counsel will have to interact with these departments to fulfil their responsibilities. If this collaboration is frequent enough, especially if it involves face-to-face interactions which extend beyond formal requirements, this will expose Counsel to norms of appropriateness which are not confined to their ‘own’ institutional environment.[593] Although Counsel may retain a considerable sense of professional autonomy due to their primary

[589] Interview with OPC 19 (6 September 2019). ‘DCMS’ stands for the Department for Digital, Culture, Media & Sport which has been replaced by the Department for Science, Innovation and Technology *and* the Department for Culture, Media and Sport.
[590] Hooghe (n 354) 87–89.
[591] Interview with OPC 19 (6 September 2019).
[592] Trondal and others (n 320) 126–27.
[593] Trondal, ‘Is the European Commission a “Hothouse” for Supranationalism? Exploring Actor-Level Supranationalism’ (n 388) 1118; Trondal and others (n 320) 128.

organisational affiliations, they may be less willing than initially expected to challenge or obstruct the delivery of a ministerial department's political objectives based solely on their own professional drafting views.

Chapter three also emphasised the significance of organisational structures able to circumvent political hierarchies.[594] Similar to GLD legal advisers, Counsel are able to escalate ministerial proposals to the Law Officers if they believe that the integrity of the statute book is compromised.[595] If this mechanism is felt regularly in Counsel's work, including during interactions with ministerial departments, this is expected to increase the likelihood that they perceive their role as one that requires them to maintain a sense of independence from political pressures.[596] While chapter seven will reveal that Counsel are willing to escalate proposals to the Law Officers, especially if proposals are unlawful or unconstitutional, there is rarely a need to do this as ministers are generally "not trying to do outlandish things" but also because Counsel possess a considerable amount of informal authority during collaborations with ministerial departments, largely as a result of their specialist knowledge and extensive experience on Bill projects.[597]

The discussion above explored the organisational positions of Counsel and highlighted several features, including their shared location, membership of drafting teams, rotation to different teams, hierarchical structures, and the horizontal *process*-specialisation of OPC. A considerable proportion of the discussion focused on how these features might influence Counsel's behaviours when presented with a political-professional conflict. As a starting point, it was anticipated that their primary affiliation to OPC would lead to behaviours associated with the autonomous professional role perception. However, given the *process*-specialisation of OPC, it was held that regular interactions with ministerial departments could encourage a supra-departmental affiliation where Counsel are likely to also perceive their role within the

[594] Trondal and others (n 320) 159.
[595] Interview with GLD 23 (10 December 2019).
[596] Trondal and others (n 320) 160–61.
[597] Interview with OPC 19 (6 September 2019).

context of political pressures faced in ministries. The following two chapters will reveal that Counsel have regular informal interactions with ministerial departments, albeit via legal advisers, reflecting a change from the traditional practice. Based on the socialisation capacities of informal interactions, especially face-to-face ones, this change might explain the academic claim in chapter two that Counsel are less inclined to 'question and push back' ministerial demands than previous years.[598]

5.3. The European Commission

The executive branch of the EU is the European Commission which is headed by the College of Commissioners, one from each Member State. The College represents the Commission's political leadership for a five-year term and has therefore been described as 'the functional equivalent of a cabinet or council of ministers in national government.'[599] One of the Commissioners is appointed as a President who is responsible for leading the College, currently Ursula von der Leyen. Below the College there are numerous departments called Directorates-General (DGs) and service departments. Each sector DG deals with a different policy area whereas each service department is responsible for certain administrative matters, including legal services.[600] One or more Commissioners are assigned to lead a DG, with these departments being compared to ministerial departments at the national level.[601]

Staff working in DGs and service departments form part of the European Civil Service which includes all staff working in the EU institutions and agencies. At the beginning of 2023, there were 32,262 bureaucrats working for the European Commission, some of whom were temporary or contract staff.[602] Bureaucrats

[598] Daintith and Page (n 8) 255; Jones (n 156) 16. See also Greenberg (n 183).
[599] McCormick (n 52) 74.
[600] The Commission is also organised into executive agencies. See European Commission, 'Departments and Executive Agencies' (*European Commission*) <https://ec.europa.eu/info/departments_en> accessed 24 May 2022. In this thesis, the terms 'DG' and 'sector DG' are both used to denote a DG that is responsible for a particular policy sector.
[601] McCormick (n 52) 75.
[602] European Commission, 'Human Resources Key Figures 2023' (*European Commission*) <https://commission.europa.eu/about-european-commission/organisational-structure/commission-staff_en> accessed 9 August 2023.

working for the European Commission are subject to various rules governing their professional behaviour, some of which require them to act in an objective, independent, loyal, and impartial manner.[603] This loyalty must be directed to the EU and therefore bureaucrats must not 'seek nor take instructions from any government, authority, organisation or person outside his institution.'[604] The overall figure of the European Civil Service includes lawyers working in the Commission Legal Service. As explained in previous chapters, this is an internal horizontal department of the European Commission which is made up of two distinct types of lawyers employed from all Member States.

The Commission Legal Service reports directly to the President of the Commission. The head of the Legal Service is the Director-General, currently Daniel Calleja Crespo. The aim of this department is to ensure that the Commission discharges its duties under Article 17 of the Treaty on the European Union which advances a commitment to ensure the application and respect of the EU Treaties.[605] The Legal Service will provide legal advice to the Commission, represent the interests of the Commission in all litigation, and strive to ensure the highest quality of legislation.[606] As this thesis is interested in the preparation of legislation, it will not explore the litigation work of the Legal Service. Chapters one and two have already revealed that the two types of lawyers in the Legal Service include legal advisers who advise on the legal substance of proposals and legal revisers who advise on the structure and form of proposals. Although the following sections will examine the organisational positions of these lawyers separately, dealing with legal advisers first, some overlap is inevitable as both types of lawyers are based in the Legal Service. A brief discussion will also be dedicated to the organisational positions of legal officers in

[603] European Commission, 'Staff and Ethics' (*European Commission*) <https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/ethics-and-good-administration/staff-and-ethics_en> accessed 24 May 2022. Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community 1962 (OJ P045/1385).
[604] Regulation No 31 (EEC), 11 (EAEC), art 11.
[605] Treaty on European Union, art 17.
[606] European Commission Legal Service, 'Strategic Vision for 2016-2020' (2016) 3.

sector DGs. While chapter two already explained that these officers do not constitute a primary focus of this thesis given their recruitment as policy officers, this discussion will further justify this rationale by revealing that their formal legal titles can in some instances exaggerate a distinction from other colleagues working in the same DG. This discussion will also take the opportunity to provide some context information on these actors as their work is still touched upon in the empirical analysis.

5.3.1. The Legal Service: Legal advisers

Legal advisers are situated in the thirteen thematic teams of the Legal Service, with each team responsible for different areas of law.[607] The 2022 Annual Report identified that 80% of the 440 staff members of the Legal Service are divided across these thematic teams.[608] The number of legal advisers in each team varies, with some teams having around ten legal advisers and others having just above twenty.[609] Each thematic team is linked to a set of sector DGs. For instance, the Agriculture & Fisheries thematic team is associated with proposals emerging in DG AGRI, DG MARE, and DG SANTE.[610] The allocation of a proposal to a legal adviser is made in a "more or less automatic" fashion by the team's coordinator based on the specific unit of the lead DG from which the proposal emerges.[611] Despite being linked to DGs in this way, legal advisers and DG officers are not located together. While legal advisers are based in the Legal Service which is located in the

[607] For a list of subject areas covered by each thematic team see European Commission, 'European Commission Legal Service Website' <https://ec.europa.eu/dgs/legal_service/equipes_en.htm> accessed 22 July 2022.
[608] European Commission Legal Service, 'Annual Activity Report 2022' (2023) 4. The remainder of staff work in a number of administrative units covering matters such as IT, Finance, Human Resources, Contracts and Recoveries, and Information and Documentation. For a list of these administrative units see European Union, 'EU Whoiswho: Official Directory of the European Union' (2023) <https://op.europa.eu/webpub/wiw/pdf/EUWhoiswho_COM_GA.pdf> accessed 1 September 2023.
[609] See Publications Office of the European Union, 'Official Directory of the European Union (EU Whoiswho - Legal Service)' <https://op.europa.eu/en/web/who-is-who/organization/-/organization/SJ/SJ> accessed 31 January 2023.
[610] Directorates-General Agriculture and Rural Development (AGRI), Health and Food Safety (SANTE) and Maritime Affairs and Fisheries (MARE).
[611] Interview with CLA 4 (27 April 2017).

Commission headquarters in Brussels, specifically known as the Berlaymont, DG officers are located in various offices across the Brussels-Capital Region.

Each thematic team is made up of one 'Principal Legal Adviser' and at least one 'Legal Adviser' while the remainder of the team are referred to as 'Members of the Legal Service'.[612] Principal Legal Advisers act as team directors while Legal Advisers act as their replacements. Legal Advisers often possess a higher administrative grade, believed to be AD 12, which entitles them to sign a legal opinion on behalf of the Legal Service.[613] This is not the case for most Members of the Legal Service who are required to co-sign a legal opinion with either a Legal Adviser or the Principal Legal Adviser. Aside from these differences, the everyday work of Legal Advisers is very similar to that of Members of the Legal Service.[614] To maintain consistency and uphold the confidentiality of participants, this thesis will refer to lawyers working in thematic teams as 'legal advisers' irrespective of their administrative grades.

Chapter three advanced that the primary organisational affiliations of bureaucrats serve as strong indicators for their role perceptions.[615] A primary affiliation towards the Legal Service is expected to lead to behaviours associated with the autonomous professional role perception. If so, legal advisers will be inclined to perceive their roles as independent from political loyalties and consider it appropriate to raise and defend their legal views persuasively, even if these views do not align with a DG's political objectives.[616] This expectation of professional autonomy is based on the fact that the Legal Service constitutes an exclusive network of lawyers, led directly by a non-political administrator.[617] Furthermore, as highlighted in chapter three, professional autonomy is expected to be enhanced if the recognised knowledge of the network is essential to the proper functioning and legitimacy of the bureaucratic

[612] European Union, 'EU Whoiswho: Official Directory of the European Union' (n 608) 31–33; Publications Office of the European Union (n 609).
[613] Interview with CLA 1 (26 April 2017).
[614] Interview with CLA 1 (26 April 2017).
[615] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441; Trondal and others (n 320) 31, 131.
[616] Moss (n 14) 1306.
[617] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).

organisation.[618] Chapter seven will reveal that the knowledge of legal advisers is recognised both by themselves and DG officers as serving an important guardianship function which helps to ensure that the Commission remains within its competence limits. This not only helps to safeguard the legality of Commission proposals but can also prevent a possible decline in trust from the Member States.

Legal advisers are able to 'block' Commission proposals from being adopted by written procedure through the issuing of a negative legal opinion.[619] As identified in chapter three, the ability to circumvent political hierarchies is expected to further enhance the professional autonomy of bureaucrats, especially if this is felt regularly in their work.[620] At first glance, this mechanism seems more 'powerful' than the escalation mechanism available in the UK Government, specifically because it is an internal decision which negates the need for escalation outside the department. An empirical study in chapter two nevertheless identified that this veto power is rarely enforced by the Legal Service.[621] Moreover, a decision to enforce the veto does not rest solely on the opinion of one legal adviser as it must be approved by the Director-General.[622] Despite its decreasing use, and the fact that it must be signed off by the internal hierarchy, chapter seven will illustrate that the veto still grants legal advisers a significant degree of informal authority during their interactions with DG officers.

Given the organisational fragmentation of the Legal Service into individual thematic teams, it is important to delve deeper into the primary affiliation of legal advisers as teams can operate as isolated silos with distinct institutional contexts. While chapter three predicted that bureaucrats develop stronger affiliations towards their own organisational subunits as face-to-face interactions are usually more intense there, legal adviser participants identified as members of the Legal Service to a greater extent. For example, when asked about their professional identity, one participant

[618] Trondal and others (n 320) 159.
[619] Rules of Procedure of the Commission, art 12.
[620] Trondal and others (n 320) 159.
[621] Leino-Sandberg (n 193) 183.
[622] Interview with CLA 4 (27 April 2017).

expressed, “I am a lawyer who works for the Legal Service”.[623] Some participants also highlighted the unique culture of the Legal Service within the Commission.[624] This was reflected in the language used, with the Legal Service being “one of the last hold-outs of the Commission where French is still present and spoken.”[625] Lawyers from the Legal Service also tend to adopt more “formal” behaviours than other Commission bureaucrats.[626] This distinction was not regarded as stemming from any different rules of conduct, but as a result of placing lawyers together whose nature of work is to uphold the rule of law and to protect the Commission from legal risks.

This primary affiliation to the Legal Service is enhanced by their shared location in the Berlaymont as this helps to create an informal network of legal advisers across the entire Legal Service. Based on insights provided in chapter three, informal networks associated with high levels of face-to-face interactions serve as a valuable foundation for fostering a sense of ‘team spirit’ among members.[627] Although participants mentioned interactions within thematic team boundaries too, they emphasised that members of different teams “get to know each other” through spontaneous interactions in the workplace.[628] The shared location also makes it easier for legal advisers to collectively attend training programmes and lunch-time conferences organised by the Legal Service. While attendance is not compulsory, it is a factor considered in performance reviews and there is therefore an incentive to participate.[629] In accordance with theoretical insights provided in chapter three, this informal network of legal advisers characterised by face-to-face interactions is also expected to facilitate knowledge exchanges among them.[630]

This informal network is further enhanced by the EU Civil Service mobility system as this requires legal advisers to rotate to a different thematic team every five to seven

[623] Interview with CLA 2 (27 April 2017).
[624] Interview with CLA 2 (27 April 2017).
[625] Interview with CLA 1 (26 April 2017).
[626] Interview with CLR 3 (27 April 2017).
[627] Trondal and others (n 320) 131.
[628] Interview with CLA 2 (27 April 2017).
[629] Interview with CLA 1 (26 April 2017).
[630] Collins and others (n 431) 60.

years which consequently expands the size of their own networks within the Legal Service.[631] This mobility system also results in a longer tenure in the Legal Service as a whole as opposed to individual teams, which can further hinder identification towards a specific team.[632] Finally, an additional factor that enhances the socialisation of legal advisers *across* team boundaries is a formal requirement in the Legal Service for a legal adviser to coordinate with other thematic teams if the legislative proposal impacts upon, or belongs to, another area of law.[633] As will be demonstrated in chapter seven, this horizontal coordination enables legal advisers to develop a heightened awareness of the boundaries and overlaps between different areas of law, especially when compared to officers working in sector DGs.

It is important to note that while legal advisers attach a strong affiliation towards the Legal Service as a whole, this is not to the point of overlooking their team memberships. Legal adviser participants often discussed internal hierarchies within their own teams, especially those participants who had to receive a co-signature from either the team director or deputy team director when issuing a legal opinion. Strict vertical hierarchies are expected to result in team directors' visions and priorities being felt more strongly throughout the team which might constrain the autonomy of the remaining team members.[634] This was in fact suggested by Leino-Sandberg in chapter two who emphasised that Commission legal advisers may feel pressure from more senior members to adapt their legal opinion to align with political goals.[635] While this might be the case, the discussion above highlighted that regular cross-team interactions are effective in preventing legal advisers from developing strong loyalties exclusively to one team. Furthermore, responses indicated that for particularly important or politically sensitive proposals, the hierarchical requirements transcend team boundaries as the signature of the Director-General is required.[636]

[631] Interview with CLA 14 (27 November 2017).
[632] Trondal and others (n 320) 131.
[633] Interview with CLA 14 (27 November 2017).
[634] Trondal and others (n 320) ch 6.
[635] Respondent 55 in Leino-Sandberg (n 193) 170.
[636] Interview with CLA 1 (26 April 2017).

While a primary affiliation towards the Legal Service is anticipated to result in an autonomous professional role perception where legal advisers are inclined to defend their professional legal views persuasively, the *process*-specialisation of this department suggests that this might be balanced with a supra-departmental affiliation.[637] As the Legal Service provides legal services to all sector DGs, legal advisers are likely to interact with DG officers. In fact, the literature outlined in chapter two has already revealed that legal advisers engage in both formal and informal interactions with DG officers for the provision of legal advice.[638] Through such interactions, legal advisers are expected to become familiar with the political pressures that exist within DGs and if these interactions are regular enough to foster a collective sense of purpose, the professional autonomy of legal advisers may become less evident than initially anticipated.[639] This could potentially offer an explanation for the academic claim in chapter two which advanced that legal advisers are not immune from political pressures emerging in the DGs.[640]

The discussion above considered the organisational positions of legal advisers from the Legal Service, including their shared location, the mobility system, the veto power, and the *process*-specialisation of the Legal Service. Much of the discussion focused on how legal advisers' primary affiliation to the Legal Service could lead to behaviours aligned with the autonomous professional role perception developed in chapter three. However, given the *process*-specialisation of the Legal Service, it was maintained that the professional autonomy of legal advisers may be weaker than initially anticipated, especially if a shared sense of purpose is developed with the DGs. On this point, it is nevertheless important to remember that legal advisers can circumvent the preferences of DGs on legal professional grounds and ultimately prevent the adoption of a legislative proposal by way of written procedure.[641] Although chapter seven will identify that this mechanism is rarely enforced in

[637] Trondal and others (n 320) 126–27.
[638] Leino-Sandberg (n 193) 164.
[639] Trondal and others (n 320) 126–27.
[640] Leino-Sandberg (n 193) 184.
[641] Rules of Procedure of the Commission, art 12.

practice, the legal and reputational risks associated with its use means that legal advisers still retain a considerable degree of informal authority as a result.

5.3.2. The Legal Service: Legal revisers

Legal revisers are situated in the Quality of Legislation team ('quality team') of the Legal Service which is also based in the Berlaymont. The 2022 Annual Report identified that 15% of the Legal Service staff work in the quality team.[642] The quality team is divided into three units, each of which follows the work of several thematic teams. The scope of these units is therefore broad, each covering a wide range of policy areas.[643] According to one legal reviser participant, one unit covers "agriculture and fisheries", another deals with "everything that has to do with money and finance", and another is responsible for "the rest so to speak."[644] Depending on the subject area of a proposal, it is distributed to a unit coordinator who must assign it to the appropriate legal reviser, often determined by their specialist knowledge.[645] Each unit is led by a 'Head of Unit' while the quality team itself is headed by a 'Principal Legal Adviser'.[646] The remaining lawyers are referred to as 'Members of the Legal Service – Revision'. Similar to thematic teams, the titles reflect different levels of seniorities. In this thesis, all lawyers working in the quality team will be referred to as 'legal revisers' for the purposes of consistency and confidentiality,

According to chapter three, bureaucrats' primary affiliations serve as a strong indicator for their role perceptions.[647] Similar to legal advisers, a primary affiliation towards the Legal Service is expected to encourage behaviours associated with the autonomous professional role perception where legal revisers perceive their role as independent from political loyalties.[648] They may therefore be willing to defend their

[642] European Commission Legal Service (n 608) 4.
[643] For a list of the units, and the associated DGs, see European Union, 'EU Whoiswho: Official Directory of the European Union' (n 608) 31.
[644] Interview with CLR 3 (27 April 2017).
[645] Interview with CLA 2 (27 April 2017).
[646] European Union, 'EU Whoiswho: Official Directory of the European Union' (n 608) 31.
[647] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441.
[648] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).

professional drafting views even if these do not align with the political preferences of the lead DG.[649] Despite this expectation of professional autonomy, a feature which could lead to a weakened sense of autonomy among legal revisers, especially compared to legal advisers, stems from the fact that they lack the authority to enforce the Legal Service veto power, with the reasons behind this highlighted in chapter seven.[650] Furthermore, the knowledge of legal revisers was not explicitly recognised either by themselves or other participants as serving a pivotal role in upholding the legitimacy of the Commission.[651] This is in contrast to legal advisers whose knowledge of the EU Treaties was recognised as being at the core of ensuring the Commission stays within competence limits.

It is expected that legal revisers will develop a stronger affiliation towards their own units rather than the entire Legal Service as their face-to-face interactions are likely to be more frequent there.[652] However, responses did not indicate a stronger affiliation towards one over the other, with chapter three revealing that multiple affiliations are common if the department and sub-units share a physical location.[653] The affiliation towards the Legal Service as a whole was defined by a strong sense of collegiality with legal advisers from the thematic teams. According to a legal reviser participant, although the Legal Service is made up of two types of lawyers, “we are still one service and we should approach the DGs as one service, with one opinion, a unified opinion”.[654] The same participant revealed that a shared location in the Berlaymont enhances a sense of team spirit between legal revisers and legal advisers.[655] More specifically, their close proximity makes it “much easier to interact spontaneously” which ultimately contributes to the development of an informal network of lawyers across the entire Legal Service.[656] A similar view was advanced

[649] Trondal, ‘Balancing Roles of Representation in the European Commission’ (n 320) 433–34.
[650] Trondal and others (n 320) 159.
[651] ibid 156.
[652] Hooghe (n 354) 68.
[653] Trondal and others (n 320) 135.
[654] Interview with CLR 3 (27 April 2017).
[655] Interview with CLR 3 (27 April 2017).
[656] Interview with CLR 3 (27 April 2017).

by a legal adviser participant who emphasised that the shared location promotes familiarity between legal advisers and legal revisers which, in turn, increases the possibility of informal interactions:

> Sometimes they come to my office or I go to theirs. I mean, it's only three floors of the building, so we know each other. I mean, it's not like they're on the other side of Brussels, they are down the corridor. So sometimes I just go, can I come over? It's quicker to just talk sometimes.[657]

Beyond an organisational affiliation towards the higher-level of the Legal Service, characterised by a sense of unity with legal advisers, legal revisers display a significant allegiance to their own respective units too. More specifically, legal revisers adopt strong inward-looking loyalties to the drafting preferences of their own units.[658] In stark contrast to legal advisers who actively engage across thematic team boundaries, there was no mention of cross-unit coordination. The silo thinking of legal revisers was demonstrated most clearly when a legal reviser participant highlighted a reluctance to share internal drafting guidance with other units.[659] The participant explained, "it is our own internal cuisine and if the other [units] realise what we are doing, they might actually object and then, you know, we would be hampered in what we feel is the right way to do things."[660] Such silo thinking may also be attributed to the fact that legal revisers are not required to change units throughout their Legal Service careers, meaning a lengthy tenure in an individual unit and limited exposure to other working practices.[661] As will be explained in chapter seven, their exemption from the EU Civil Service mobility system is linked to the recognised benefits of acquiring on-the-job experiences in a specified subject area.

As mentioned above, a primary affiliation towards the Legal Service, either at the higher-level or the unit level, is anticipated to encourage autonomous professional behaviours among legal revisers, possibly even in the absence of authority to

[657] Interview with CLA 2 (27 April 2017).
[658] Interview with CLR 3 (27 April 2017).
[659] Interview with CLR 3 (27 April 2017).
[660] Interview with CLR 3 (27 April 2017).
[661] Trondal and others (n 320) 131.

enforce the veto and despite their knowledge not being explicitly linked to the Commission's legitimacy. However, in line with claims made about legal advisers, the *process*-specialisation of the Legal Service may weaken the professional autonomy displayed by legal revisers. As they are responsible for providing legal services to all sector DGs, there is an expectation that they will have to interact with DG officers. Through such interactions, legal revisers might develop a supra-departmental affiliation which, according to chapter three, might increase the deference shown to political preferences.[662] The following two chapters will nevertheless emphasise that legal revisers maintain the greatest degree of separation from policy departments compared to other types of lawyers explored in this thesis. Chapter seven will reveal that a key factor behind this is the go-between role of legal advisers where they 'stand between' legal revisers and DG officers.

Overall, this discussion has examined the organisational positions of legal revisers, including their location in the Berlaymont, their unit memberships, their exemption from the mobility system, and their lack of decision-making authority in relation to the Legal Service veto power. While a primary affiliation to the Legal Service is expected to encourage professional autonomous behaviours, it was revealed that the *process*-specialisation of the Legal Service could weaken these behaviours if legal revisers engage in regular interactions with DG officers. This weakened sense of autonomy might be particularly true considering that legal revisers lack formal authority over the veto power, an authority which would have potentially enabled them to retain a considerable extent of professional autonomy even during these interactions. Nevertheless, despite this absence of authority, chapter seven will demonstrate that legal revisers continue to display a significant extent of professional autonomy due to their limited interactions with DG officers.

[662] Trondal, 'Is the European Commission a "Hothouse" for Supranationalism? Exploring Actor-Level Supranationalism' (n 388) 1118.

5.3.3. Directorates-General: Legal officers

While the work of DG legal officers does not form a primary focus of this thesis, this chapter has already suggested that it is still useful to provide a brief overview of their organisational positions and to explore what their legal titles represent in practice, especially when compared to other DG officers. Responses revealed that legal officers involved in the preparation of legislative proposals are often situated in the technical units of the sector DGs, alongside other DG colleagues. Although some DGs have a specific legal unit, these units tend to adopt a "helicopter" function where they oversee the legal activities of the DG as opposed to a "zoomed in" role which focuses on individual legislative proposals.[663] These oversight tasks might include, for example, a need to ensure consistency in what a DG asserts to Member States during infringement proceedings.[664] Similar to arguments made for GLD legal advisers, a location within a sector DG is expected to foster Weberian behaviours that are associated with a considerable degree of deference shown towards political objectives.[665] This is in fact suggested in chapter two as existing research identifies that legal officers demonstrate a high degree of creativity in their work to facilitate the DG's political will.[666]

Chapter two has already emphasised that DG legal officers are formally recruited as policy officers, however, the official EU directory implies that their positions involve a greater degree of legal responsibility as they are assigned titles such as 'legislative officer', 'legal officer', and 'legal/policy officer'.[667] However, responses highlighted that the allocation of titles is partly determined by DG officers having "a certain amount of freedom" in what they call themselves, with some officers choosing to carry titles on from their previous posts.[668] One DG officer participant who is

[663] Interview with DG 6 (15 December 2017).
[664] Interview with DG 9 (27 November 2017).
[665] Christensen and Mandelkern (n 373) 241.
[666] Leino-Sandberg (n 193) 160.
[667] Publications Office of the European Union, 'EU Whoiswho' <https://op.europa.eu/en/web/who-is-who/organization/-/organization/COM/COM> accessed 22 July 2022.
[668] Interview with DG 9 (27 November 2017).

assigned a legal title explained, “I don’t know why I got that title actually. I think probably because I had it in my old job in another DG so I just stuck to it.”[669] Participants were aware of the fact that the title of legal officer, or similar, can result in misleading assumptions as it sometimes implies a greater distinction from policy officers than what is true in practice. On this point, a DG officer participant consulted the EU directory to identify that a colleague with a legal title had a role that was essentially identical to a policy officer working in the same DG unit.[670]

According to a DG officer, the overlap between the work (and titles) of legal officers and policy officers might also be attributed to the fact that many policy officers have a considerable involvement in legislative matters, particularly because policy work can rarely be entirely separated from legislation.[671] The same participant explained that this overlap in responsibilities is likely to be exacerbated in sector DGs where a significant proportion of policy officers are recruited with legal backgrounds due to the nature of the policy areas covered. For example, in certain DGs, the participant revealed that around “90 per cent” of officers could have legal backgrounds.[672] A higher proportion of legal backgrounds is more likely in departments such as DG Employment, Social Affairs and Inclusion compared to scientific or technical departments, like DG Energy or DG Climate Action.

5.4. Conclusion

This chapter has explored the organisational positions of UK Government and European Commission lawyers to acquire an understanding of the institutional environments they are socialised into. Based on the unique analytical framework developed in chapter three, efforts were made to utilise the information provided in this chapter to formulate a set of expectations about the analytical concepts of political-professional behaviour and expertise, especially the former concept given its close connection to organisational characteristics. The information provided in this

[669] Interview with DG 9 (27 November 2017).
[670] Interview with DG 6 (15 December 2017).
[671] Interview with DG 6 (15 December 2017).
[672] Interview with DG 6 (15 December 2017).

chapter, including the expectations formed, provides a valuable foundation for examining these analytical concepts further in chapters six and seven to determine how they emerge in practice. Those chapters will also provide comprehensive insight into the actual work performed by the lawyers when converting the policy problem into a final legal solution for the legislature. Thus, in accordance with the analytical framework in chapter three, the next two chapters will provide an understanding of not only *what* work these lawyers perform and *when*, but also *how* they perform this work within the specific organisational environments they are socialised into.

Before proceeding to those chapters, it is worth emphasising some of the central findings regarding the key participants' organisational positions. One of these findings relates to the distinct organisational position of GLD legal advisers who are physically located within the ministerial department. This is in stark contrast to the other lawyers who are located in exclusive legal networks led by non-political administrators. As mentioned above, being located in a ministerial department is likely to encourage behaviours associated with a Weberian role perception where legal advisers are inclined to facilitate political objectives unless the legal hurdles are insurmountable.[673] The following two chapters will demonstrate that this expectation is indeed reflected in practice, although not to the extent that the quality of their legal advice is compromised. The chapters will also elaborate on the nature of an 'insurmountable' legal hurdle, including how rarely this emerges in practice.

While the remaining three categories of lawyers are situated in their own legal departments, the chapter emphasised the *process*-specialisation of legal services where lawyers are likely to interact with ministries or sector DGs to find a solution to policy problems. Thus, based on the socialisation capacities of interactions, there is an expectation that these collaborations might result in lawyers adopting a supra-departmental affiliation where they perceive their roles and determine their appropriate behaviours while also considering the political goals and interests emerging in ministries and sector DGs.[674] In practice, this may result in lawyers

[673] Moss (n 14) 1306; Cherkewich (n 6) 257.
[674] Trondal and others (n 320) 128.

striking a balance between professional autonomy and political loyalty which, in turn, might manifest in a role perception that falls somewhere between the two ideal-types established in chapter three. The following chapters will reveal that while these lawyers maintain autonomous professional behaviours in their work, their positioning on this scale varies depending on factors such as the legal issue in question.

Another interesting finding relates to the organisational mechanisms granted to lawyers to enforce their legal views and possibly circumvent political hierarchies. The formal veto of the Legal Service was described as being the most 'powerful' as the decision-making authority to enforce this veto lies exclusively within the Legal Service. This is in contrast to the mechanism in the UK Government where lawyers must escalate ministerial proposals to the Law Officers who have ultimate responsibility for deciding on the proposal's unlawfulness. Chapter seven will examine how such mechanisms provide lawyers with both formal and informal authority, including for Commission legal advisers where the *potential* for them to issue a negative legal opinion can often be enough for DG officers to comply with their legal suggestions. The following two chapters will also illustrate how the recognised knowledge of lawyers can prevent political-professional conflicts occurring in the first place, especially if their knowledge enables them to adopt a constitutional or guardianship function within the bureaucracy.

Chapter Six: Converting the policy problem into a legal solution

6.1. Introduction

This chapter explores the work of UK Government and European Commission lawyers during the first analytical phase outlined in chapter three, specifically that of converting the policy problem into a legal solution. In the UK Government, this phase includes the stages between policy initiation in the ministerial department and the submission of legal instructions to Parliamentary Counsel. In the European Commission, it includes the stages between policy initiation in the lead Directorate-General and the submission of the draft legislative proposal to the Interservice Consultation. Empirical findings will provide a detailed and up-to-date account of *what* functions lawyers perform during this phase. This account of their work will be presented chronologically, as told by participants, to also acquire a comprehensive understanding of *when* they perform these functions. These findings, combined with those presented in chapter seven, capture a key research question, namely: 'What are the functions of the lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?'

This empirical account will provide rich, detailed insights into the various tasks, judgments, chronologies, interactions, and experiences that make up lawyers' functions. As explained in chapter three, this approach helps to overcome a knowledge gap not just within the legal scholarship on bureaucratic lawyers but also within the wider body of literature on bureaucratic work.[675] This chapter will also present empirical findings on *how* lawyers perform their functions, focusing on their political-professional behaviour and expertise. These analytical concepts were developed in chapter three, with the notion of in-house socialisation being the common link between them. Exploring these concepts using empirical findings in this chapter and chapter seven will address two of the key research questions,

[675] Wagenaar (n 239) 643.

specifically: ‘How do lawyers perceive their roles, and how does this influence their political-professional behaviour?’ and ‘How do lawyers acquire the expertise needed to perform their work?’

The previous chapter reintroduced a set of sub-questions, initially developed in chapter three, related to the concepts of political-professional behaviour and expertise. The first of these sub-questions is captured in both this chapter and chapter seven, specifically: ‘Are lawyers in policy departments (i.e., ministries or sector DGs) more likely to adopt a Weberian role perception when faced with a political-professional conflict compared to those in exclusive legal departments, while lawyers in exclusive legal departments are more likely to adopt an autonomous professional role perception?’ Chapter five has already unpacked the organisational positions of UK Government and European Commission to formulate a set of expectations about their political-professional behaviours. While this chapter only examines the role perceptions of GLD legal advisers who are situated in ministries, and therefore expected to adopt Weberian behaviours, a comparison of these findings with those presented in chapter seven will offer a complete answer to this sub-question.

The previous chapter also reintroduced a sub-question regarding the analytical concept of expertise, specifically: ‘What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?’ Chapter five has already outlined the working spaces of lawyers, as well as the development of their professional networks both within teams and across them. This provides a useful context for understanding the organisational environments in which they develop their expertise, including the colleagues with whom they are likely to interact. Both this chapter and chapter seven will identify various on-the-job experiences highlighted by participants themselves when explaining how they acquire the knowledge and skills needed to perform their work. For example, this chapter will draw attention to the importance of regular interactions with lawyers and non-lawyers, practical experiences of drafting primary and secondary legislation in the UK, and observations and collaborations with mentors.

In terms of how this chapter will be organised, the work of UK Government lawyers will initially be explored before proceeding to explore the work of European Commission lawyers. While each type of lawyer from the bureaucracies will be discussed independently, some overlap in their work is inevitable given their close collaboration. The concluding section of this chapter will summarise how the empirical findings address the various sub-questions outlined in this introductory section and highlight some interesting and meaningful comparisons between UK Government and European Commission lawyers. Certain lawyers, particularly Commission legal revisers, do not feature to a significant degree in this chapter as they have a greater involvement in the second analytical explored in chapter seven.

6.2. UK Government

The work undertaken by GLD legal advisers during this phase includes their involvement in the clarification of policy details, the provision of legal advice, and the preparation of legal instructions for Parliamentary Counsel. As will be demonstrated below, legal advisers' functions tend to overlap in practice, particularly because their legal advice usually needs to be adjusted as the policy is clarified and developed. Counsel's work includes the provision of forward-looking advice on both drafting and procedural matters. While the existing academic literature identifies or alludes to certain elements of this work, which in turn helped me establish a set of functions in the analytical framework, both chapters two and three emphasised that there are significant knowledge gaps in terms of what these functions encompass in practice, when they are carried out, and how they are performed in the bureaucratic context.[676] The following discussion will address these knowledge gaps through the presentation of empirical findings.

The work of legal advisers will be discussed first, commencing with their significant role in clarifying the policy intention alongside departmental policy officials. Their legal advisory function will then be considered, which encompasses both a legal risk assessment and an examination of the legislative framework, before their function of

[676] See table 1.

preparing legal instructions for Counsel is explored. The analysis will then demonstrate that legal advisers' political-professional behaviours are closely aligned with the Weberian role perception, and then proceed to identify the range of on-the-job experiences that equip them with the knowledge needed to perform their work. Following this, Counsel's work will be explored, including their role in steering lead ministerial departments with drafting and procedural advice. Although their political-professional behaviours will be explored in chapter seven, this analysis will reveal various on-the-job experiences that enable Counsel to perform their work, including a mentoring scheme and their unmatched experience on Bill projects in Whitehall.

As a starting point, it is worth noting that both legal advisers and Parliamentary Counsel are involved at an earlier stage of this phase compared to previous years. Participants indicated that the main driver of this change was the increased informality in Whitehall, largely initiated by technological advancements and the need to adapt to broader changes in society too.[677] While a significant amount of work and communication used to be formally expressed in writing, an increasing amount was being achieved through phone calls, email correspondence, and face-to-face meetings. Over time, this informality fostered a collaborative process in which lawyers started to move more freely between the defined stages associated with their particular job roles. A Counsel participant emphasised the distinction between the previous practice, which encompassed clearly defined stages mapped onto job roles, and the current, more collaborative process featuring in this chapter:

> In the early 90s, it was a very linear process. So the policy officials sat and they produced their policy instructions in writing, which they sent to their [legal advisers] who thought about them and produced the legal instructions for us in writing. And it came to us. It just doesn't work like that now. Yes, all of that work goes on but it is in a more collaborative and less linear fashion.[678]

[677] Interview with OPC 19 (6 September 2019).
[678] Interview with OPC 19 (6 September 2019).

6.2.1. Legal advisers

Legal advisers' participation on a Bill project generally commences when the lead ministerial department anticipates that the policy initiative might involve the need for legislation. One GLD participant expressed, "if they're looking to legislate, they involve their lawyers at a very early stage of the planning. And so, I suppose, the first question is do we need to legislate? So we would possibly test, help them test, whether legislation is the answer as legislation is a very significant undertaking".[679] If the lead department decides, upon consultation with legal advisers, that legislation is necessary, policy officials will often ask legal advisers to help them assess which *form* of legislation is most appropriate. Secondary legislation is often preferred by the department as there are fewer hurdles to overcome, especially as the UK Parliament has already approved the powers and mechanisms to pass the legislation. In contrast, primary legislation is a much more burdensome undertaking and is therefore "almost the measure of last resort to deliver a policy."[680] To determine if secondary legislation is feasible, legal advisers will examine the existing legislative powers and assess whether they could be used to deliver the policy effectively.

As this thesis concentrates solely on the preparation of a Bill, this discussion explores the functions performed by legal advisers once it is decided that primary legislation is the most appropriate course of action. During the initial stages of a Bill project, GLD participants emphasised that the policy details still require further development as it is "probably unheard of" for them to begin their work on a Bill project with a clearly defined brief of the policy.[681] According to a GLD participant, "I would be very surprised if I sort of opened my inbox and there was a set of policy instructions for me".[682] Another GLD participant emphasised the mistaken assumption in "the textbooks which assume that there is a lovely, clear set of policy instructions to be handed to lawyers" from the outset.[683] In practice, there are likely

[679] Interview with GLD 23 (10 December 2019).
[680] Interview with GLD 23 (10 December 2019).
[681] Interview with GLD 23 (10 December 2019).
[682] Interview with GLD 23 (10 December 2019).
[683] Interview with GLD 22 (10 December 2019).

to be several meetings with departmental policy officials, often referred to as clients by GLD participants, who introduce and explain the policy ideas to legal advisers.[684] The policy is often spoken about in generalities and an ongoing "collaborative" effort between policy officials and legal advisers is required to develop it further.[685]

Although a small number of studies outlined in chapter two identified that legal advisers help to elaborate the policy details, they failed to provide adequate insights into the actual contribution of legal advisers, including how their contribution differs from that of policy officials.[686] Responses indicated that legal advisers contribute to policy development through the provision of legal advice which shapes the overall direction of the policy to ensure it aligns with legal requirements, however, they also adopt a central role in uncovering and clarifying the purpose and goals of the policy. Legal advisers are well-suited to help uncover and clarify policy details as they are relatively detached from the earlier policy initiation stages, especially in comparison to policy officials. This enables them to maintain a more critical, objective perspective than policy officials in which they "bring a second pair of eyes on the policy".[687] One GLD participant emphasised that the clarification of the policy intention, that is what the ministerial department intends the policy to achieve, is a prerequisite for providing effective legal advice on how to achieve the policy in legal terms.[688]

Legal advisers clarify the policy intention of a Bill by subjecting it to a thorough analysis. They do this by asking several questions to policy officials to tease out from them what the minister *actually* wants to achieve. Accurately capturing the policy intention is integral to ensuring the effectiveness of the resulting legislation, that is

[684] The ministerial department was also referred to as the 'client department'. This has similarities to the European Commission as DGs were referred to as 'client services' by two legal adviser participants, albeit infrequently.
[685] Interview with GLD 23 (10 December 2019).
[686] Page (n 129) 661–62. See also Zander (n 30) 58.
[687] Interview with GLD 23 (10 December 2019).
[688] Interview with GLD 22 (10 December 2019).

the degree to which it achieves the intended objectives of the minister.[689] On this point, a GLD participant stressed that the legislation "has to work. It has to be effective in terms of achieving the desired policy intent."[690] As the ministerial guidance offered to policy officials can be broad and vague at this stage, a significant amount of detail may need to developed before the policy intention can be converted to legislation. For instance, in response to a broad ministerial idea to establish a statutory body, legal advisers may ask policy officials the following questions: (1) what is the purpose of the body? (2) who are the members of the body? (2) who should the chair be? (3) what should the qualifications of the chair be? and (4) how should the chair be appointed?[691]

By asking policy officials these questions, several omissions in the policy will typically come to light which may initiate conversations between policy officials and the minister to clarify certain points. Once enough work has been done to firm up the policy details, formal submissions must be prepared for the minister which will outline the policy intention, the policy options considered apt to achieve this, and the strengths and weaknesses of each option. While the policy options are carefully considered by policy officials who have a greater understanding of the policy area and what is likely to be acceptable to stakeholders, legal advisers adopt a crucial role in shaping the legal solutions needed to give effect to the various policy options. This includes the provision of legal advice to steer the lead department away from policy options which could run into legal pitfalls at a later stage, with a strong emphasis placed on legal risk assessments. While the literature outlined in chapter two identified such legal risk-based advice, there is still much to learn about the

[689] While participants referred to the effectiveness of legislation, some of the academic literature refers to the idea of efficacy. Luzius Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22(2) Statute Law Review 119, 126; Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 4–5.
[690] Interview with GLD 22 (10 December 2019).
[691] Interview with OPC 21 (15 August 2019).

process of calculating legal risk, the acceptable threshold of risk, and the types of legal issues considered.[692]

GLD participants provided valuable insights by revealing that a legal risk assessment involves an evaluation of each policy option and associated legal solution to determine the likelihood of judicial challenge, the chances of that judicial challenge being successful, and the consequences and impact of that judicial challenge.[693] While the UK constitutional principle of Parliamentary Sovereignty means that the unlawfulness of primary legislation is largely immune from judicial scrutiny, especially when contrasted to legal constraints in the supranational order which have already been suggested but will be further explored in chapter seven, legal advisers must still examine non-compliance with specific public law principles. A GLD participant explained, "So I am thinking here… things like human rights, the European Convention on Human Rights in particular I suppose, to ensure the robustness of the policy to potential scrutiny by way of judicial review.[694] The participants also emphasised the need to ensure compliance with retained EU legislation, the public sector equality duty under the Equality Act, and a respect for the power of devolved administrations.[695]

In addition to offering valuable insights into the key considerations of a risk assessment, GLD participants shed light on the *acceptable* threshold of legal risk. At the time of the interviews, legal advisers were subject to written guidance from the Government Legal Department, although this was replaced by guidance prepared by the Attorney General's Office in 2022.[696] The GLD guidance applicable to

[692] Yong (n 5). See also Daintith and Page (n 8) 248.
[693] GLD 22 (10 December 2019) revealed that if a judicial challenge is brought, it is likely to start with legal advisers before it is passed on to the litigation team.
[694] Interview with GLD 23 (10 December 2019). European Convention on Human Rights and Fundamental Freedoms [1950] 4.X1.1950.
[695] Equality Act 2010, s 149.
[696] Government Legal Department, 'Guidance Note on Legal Risk' (2018) <https://www.gov.uk/government/publications/guidance-note-on-legal-risk> accessed 3 March 2023. For the updated guidance see Attorney General's Office, 'Attorney General's Guidance on Legal Risk' (2022) <https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk> accessed 8 December 2022.

participants at the time confirmed that ministers were entitled to legitimately proceed with legislative proposals that carried a high legal risk of 70% and above and that legal advisers should only advise that a proposal is unlawful if there is "no respectable legal argument" to support it in the courts.[697] In accordance with this guidance, one GLD participant expressed, "I think we'd only have serious concerns if a minister wants to do something and there was no respectable legal argument for doing it. So you couldn't even mount a defence if a challenge was brought."[698] The same participant emphasised the importance of presenting the legal risk on a numerical scale to ensure the lead ministerial department is well-informed about the probability of judicial challenge:

> We would normally advise on a very sort of risk-based approach. So we would say, well if you deliver this, there is a risk of it being challenged and so we would quantify that risk on a sort of 0 to 100% scale to give the department a sense of whether it is, sort of where it is on the scale.[699]

If legal advisers assigned to the Bill project suspect unlawfulness, they are required to escalate the proposal to senior lawyers within their legal team or division who may then decide to consult the Law Officers.[700] According to a GLD participant, the role of the Law Officers is to ensure "the government of the day upholds the law so they have a proprietary interest if a minister wants to do something for which there is no legal defence at all."[701] Although GLD participants were asked to describe the steps involved in this escalation process, none of them had any experience of this as "it is very unusual to be presented with a proposal which is clearly unlawful."[702] However, when asked about the potential outcome, a GLD participant anticipated that a

[697] Government Legal Department, 'Guidance Note on Legal Risk' (n 696). While the risk chart is updated in the new guidance, the basic principles including the threshold for unlawfulness remains the same.
[698] Interview with GLD 23 (10 December 2019).
[699] Interview with GLD 23 (10 December 2019).
[700] The legal risk guidance which participants were subject to at the time only specified escalation to senior lawyers, but the participants mentioned escalation to the Law Officers too. The possibility of involving the Law Officers was included in the updated legal risk guidance.
[701] Interview with GLD 23 (10 December 2019).
[702] Interview with GLD 22 (10 December 2019).

proposal would not "proceed any further" if senior lawyers advised to that effect and especially if the Law Officers confirmed this.[703] The same participant revealed that a more common case of material legal risk arises when the minister "wants to do something, and there are strong legal arguments against it, but there are also legal arguments you could raise for it".[704]

Responses highlighted that legal advice is more than just an assessment of legal risk as it includes guidance on how the policy fits within the existing legislative framework too. More specifically, as the policy is being developed, legal advisers are required to examine and advise the lead department on the legislative framework in which the proposal will operate, taking into account the ways in which the existing law prevents the implementation of the policy (the mischief) and the legal changes which would be necessary to give effect to the policy (the remedy or legal solution).[705] This legal context, including the mischief and remedy, provides the foundation for the legal instructions delivered to Counsel. The provision of legal advice, both on legal risk and legal context, involves a considerable degree of "back-and-forth" where legal advisers may have to adjust their legal advice as omissions continue to surface in the policy as it is examined and unpicked further, necessitating changes to its content or overall direction.[706] This is a key reason for why legal advisers eventually insist on receiving written policy instructions once a policy option has been approved by the minister as it forces policy officials to consider the policy ideas with much more rigour. A GLD participant went on to explain:

> We need to get our instructions from the policy team because while we might have talked to the high level and may have gone into quite significant depth about the plans, it is only once you see [the policy] written down that you can then start working through and I suppose, sort of pick at it to test it, to test its veracity.[707]

[703] Interview with GLD 22 (10 December 2019).
[704] Interview with GLD 22 (10 December 2019).
[705] These terms were used by participants but are also mentioned in UK Government official documents. For example see Office of the Parliamentary Counsel, 'Working with Parliamentary Counsel' (2011).
[706] Interview with GLD 23 (10 December 2019).
[707] Interview with GLD 23 (10 December 2019).

Chapter seven will reveal that the back-and-forth process of refining the policy and adjusting the legal advice carries on even once Parliamentary Counsel have been asked to draft the Bill clauses. With regard to this chronological phase, however, there will nevertheless come a point when policy officials and legal advisers believe that enough work has been done to instruct Parliamentary Counsel and the necessary clearances have been received from the minister. While the discussion above emphasises the communication of legal advice to policy officials, any advice impacting the policy must be delivered to the minister in a written submission for clearance. If the minister has questions or concerns regarding the legal advice, they will usually meet with policy officials but may request that legal advisers attend too. Although GLD participants revealed that they often "develop quite a close relationship with the minister" on a Bill project, their responses suggested that many of these interactions occur during the passage of the Bill as legal advisers must help to prepare and clear briefing materials for the minister.[708]

The academic literature in chapter two acknowledged that the preparation of legal instructions for Counsel is a function belonging almost exclusively to legal advisers.[709] However, I argued that significant knowledge gaps still remain in relation to this function, such as how developed or 'fixed' the policy must be before the instructions are prepared and the contents of the instructions. This chapter has already addressed some of these gaps, such as recognising the ongoing development of policy, but more insight is needed in terms of the contents of the instructions. As indicated already, the central purpose of the legal instructions is to communicate exactly what the ministerial department wants to achieve, how the current legislation obstructs the implementation of the policy intention, and the legal changes brought about by the Bill in order to give effect to the policy intention. While these points would have already been examined by policy officials and legal

[708] Interview with GLD 23 (10 December 2019).
[709] One exception to this is in the field of tax where the instructions tend to be written by technical experts. Tax is a very complex area and therefore individuals can "really struggle" to gain an understanding of this in the first year or so. Interview with OPC 19 (6 September 2019).

advisers, the instructions must go into significant detail from the 'bottom-up' because the fewer details provided, the more time Counsel will spend asking for basic clarifications which can be problematic given the time pressures of a Bill project.[710]

The legal instructions should also identify the political context of the proposal and highlight any potential legal issues that may arise, such as devolution matters or ECHR issues. According to a Counsel participant, the legal instructions should also provide background information on the area of law, especially as Counsel are not subject specialists in the area being legislated upon.[711] There is nevertheless a balance to strike in terms of the types of materials included and the quantity of information provided. The Counsel participant elaborated on this balance further:

> Sometimes people used to send us copies of the Acts and things and we would think, well we can get hold of this. So just a general overview of what you need to understand in relation to the law, and where you might find it, to set the picture and give you background. So point you to consultation documents or white papers or other things that might be interesting to read, indicate what is essential and what is kind of additional because sometimes they would send you so much stuff at the beginning that if you read it all, you'd never really make a start on the drafting.[712]

Chapter two has already identified that it can be detrimental for legal advisers to include drafting suggestions in the legal instructions as Counsel may consequently struggle to understand the policy intention behind the Bill.[713] More specifically, if drafting suggestions are used as an alternative to explaining what the lead department wants to achieve, this can result in the 'mischief' not being properly communicated. One Counsel participant illustrated this point further by drawing a comparison with the approach in the European Commission where lawyers will formally receive a draft legislative text as opposed to a set of instructions:

> I always find the European thing very interesting because what we find is if people send us drafting… what ends up happening is that we

[710] Interview with GLD 23 (10 December 2019).
[711] Interview with OPC 19 (6 September 2019).
[712] Interview with OPC 19 (6 September 2019).
[713] Miers and Page (n 151) 40; Zander (n 30) 20.

> have to write back and say, well that's very interesting, what that does is *this*. Is that actually what you want to do?... If we're sent drafting, we don't really have any idea what they think they're doing. What change do they think they're bringing about by making that change to the law? And what we want to understand is what the mischief is and therefore what they think they need to do.[714]

Furthermore, another Counsel participant explained that because legal advisers generally lack specialist drafting knowledge, their drafting suggestions can "get really confusing" and not give effect to the policy they thought they were giving effect to.[715] Nevertheless, in spite of Counsel not wanting legal advisers to put forward drafting suggestions, they are happy to be directed to relevant legal precedents as this can help improve time efficiency. A Counsel participant provided further insight:

> If you know as an instructing lawyer that there is a particular criminal offence relating to, I don't know, stealing bread and you want to make it a criminal offence to steal burger buns, it would be ludicrous for you not to say we want this criminal offence but we want it to say burger buns instead of bread. I mean, you know that would just be a complete waste of time to not direct you. But that does sometimes happen. You get these instructions and you spend ages kind of constructing something and then you send it out and then the letter comes back and it says oh, we were sort of thinking you might come back with something a bit more like [this] and you go, well why didn't you tell me?[716]

While the bulk of legal instructions would be delivered together in the past, the timescales are such now that this is not always possible. One Counsel participant explained, "I mean, they did send them in tranches before but that was the exception probably then while I would say that it is the rule now. So the Bill instructions will almost always come in drips and drabs effectively, all dealing with different bits"[717] As soon as Counsel receive the first set of legal instructions, the next chronological phase explored in chapter seven begins. As the following chapter will demonstrate, the process of policy clarification and development does not come to end once these

[714] Interview with OPC 19 (6 September 2019).
[715] Interview with OPC 20 (1 August 2019)
[716] Interview with OPC 20 (1 August 2019).
[717] Interview with OPC 19 (6 September 2019).

legal instructions are delivered as Parliamentary Counsel are required to subject the policy intention to a further intellectual analysis. This can result in the repetition of some of the functions discussed above as Counsel often uncover omissions in the policy intention which requires the lead department to rethink the original policy ideas which, in turn, may necessitate an adjustment of the original legal advice.

6.2.1.1. Political-professional behaviour

Following an examination of legal advisers' functions during the stages of converting a policy problem into a legal solution, this section will explore how legal advisers behave when approached with a political-professional conflict. Based on insights provided in the analytical framework, the previous chapter predicted that legal advisers' physical location in ministerial departments will foster behaviours associated with the Weberian role perception. Thus, rather than a desire to persuade ministers to adopt 'the best view of the law', legal advisers are more likely to perceive it as appropriate to facilitate the political will unless the legal hurdles are 'clearly unsurmountable'.[718] While chapter five argued that the possibility to escalate proposals to the Law Officers could increase legal advisers' sense of professional autonomy, this chapter has already identified that this measure is rarely enforced due to the high threshold required. The empirical findings presented below enable a comprehensive understanding of how legal advisers perceive their role within this conflict, what amounts to an insurmountable legal hurdle, and the various factors that shape their role perceptions and consequently their ideas of appropriate behaviour.

In accordance with Weberian behaviours, GLD participants revealed that they do not consider it appropriate to challenge or obstruct ministerial decisions unless an 'insurmountable' legal hurdle arise.[719] When defining what constitutes such a hurdle, participants emphasised that the ministerial decision must be "clearly unlawful" and ultimately have "no base for an argument that can be made for it being lawful".[720]

[718] Moss (n 14) 1306 (emphasis removed).
[719] ibid (emphasis removed).
[720] Interview with GLD 22 (10 December 2019).

Even if a minister chooses to proceed with an option that carries a higher legal risk than other proposed options, legal advisers believe that their duties are discharged once they have clearly communicated the legal risks to the lead department. A GLD participant expressed, “So long as the minister is fully aware of the legal risk and still wants to proceed, then that is their call.”[721] This has clear parallels with the classic Weberian view in chapter three where bureaucrats should use their expertise to determine how political objectives can be achieved but refrain from imposing their own professional viewpoints.[722] GLD participants did not refer to the aforementioned legal risk guidance when justifying their political-professional behaviour despite this conveying the same high legal threshold, but instead emphasised the significance of ministerial authority, their unelected status, and the broader context in which a legislative proposal emerges. This highlights the core premise of neo-institutionalism which advances that appropriate behaviour is not necessarily shaped by written rules alone but can also be learnt through socialisation within an institutional context.[723]

Chapter five revealed that legal advisers are assigned to their own legal teams within the lead department, each with their own team director. However, responses suggested that legal advisers view the minister as a key figure in their hierarchy. While they do not work under the direct supervision of ministers, nor do they receive strict commands from them, participants emphasised that “ministers are the deciding factors as they will always have to approve any proposal going forward.”[724] As mentioned above, all submissions must receive ministerial approval, including those concerning legal matters. The superiority of ministers is also felt by legal advisers during informal conversations with policy officials as both parties work together to establish what would be acceptable or desirable to the minister.[725] Moreover, through these interactions, a sense of shared responsibility arises between legal

[721] Interview with GLD 23 (10 December 2019).
[722] Roth and Wittich (n 291) 24; Weber (1988) as cited in Tholen and Mastenbroek (n 5) 493.
[723] March and Olsen (n 340) 22.
[724] Interview with GLD 22 (10 December 2019).
[725] Interview with GLD 23 (10 December 2019). See Trondal, ‘Balancing Roles of Representation in the European Commission’ (n 320) for insight into how sustained communication promotes the sense of a common purpose.

advisers and policy officials to not just understand the minister's intentions accurately but to also "*deliver* their ultimate goal".[726] Sustained face-to-face interactions tend to foster a sense of collective purpose which, in turn, can reduce the likelihood of members adopting behaviours that disrupt the group and its overall progress.[727]

Responses offered further explanations for why regular interactions with policy officials make legal advisers less inclined to defend their legal views persuasively.[728] Through these conversations, legal advisers essentially develop a comprehensive understanding of the numerous "drivers" guiding ministerial decisions, such as political priorities, economic considerations, and stakeholder interests.[729] According to a GLD participant, this reaffirms that legal advisers are just a "cog in the wheel" of a larger system influenced by various factors, including ones that extend beyond legal considerations.[730] Thus, as long as ministers remain within the boundaries of lawfulness, legal advisers should not expect them to consistently prioritise the highest standards of the law. GLD participants also relied on the classic Weberian view identified in chapter three to further justify their reluctance to enforce stricter legal standards, specifically advancing that ministerial authority reinforces the UK Government's democratic legitimacy.[731] This was articulated by a GLD participant who said, "they are the democratically elected public servants, not us. We don't have a power of veto over ministers, our role is to just make them aware of the risks."[732]

Although legal advisers demonstrate a considerable degree of political loyalty where they are unwilling to obstruct ministerial decisions unless they are clearly unlawful, it is important to stress that they do not engage in legal interpretation which deviates from accepted practice. When performing their legal risk assessments and advising the lead ministerial department on how to "mitigate any risks of vulnerability" in the

[726] Interview with GLD 23 (10 December 2019) (emphasis added).
[727] Trondal and others (n 320) 131.
[728] Moss (n 14) 1306.
[729] Interview with GLD 22 (10 December 2019).
[730] Interview with GLD 23 (10 December 2019).
[731] Gerth and Mills (n 285) 95.
[732] Interview with GLD 23 (10 December 2019).

courts, they rely on a careful and objective interpretation of the law.[733] In other words, even though legal advisers do not actively enforce the '*best* view of the law', they still make judgments based on quasi-judicial interpretations.[734] This is in stark contrast to empirical findings presented in chapter three concerning lawyers working in the Government of the Netherlands.[735] Relying on their unelected status as a key justification, many of these lawyers perceived themselves as 'loyal advocates for the political executive'.[736] On this premise, they were willing to engage in various strategies to prioritise politics at all costs, like avoiding legal compatibility tests or simply drafting legislation which failed to comply with existing legal principles.

Ultimately, this section has emphasised that legal advisers adopt behaviours associated with the Weberian role perception developed in chapter three where they do not find it appropriate to persuade against or obstruct ministerial decisions unless they are "clearly unlawful".[737] This corresponds with expectations formulated in previous chapters which advanced that legal advisers' extensive socialisation in ministries, coupled with their strong identification as departmental lawyers, would likely foster a considerable degree of deference towards ministerial decisions.[738] While chapter five predicted that the ability of legal advisers to circumvent political hierarchies might enhance their professional autonomy, responses did not suggest that this escalation measure has a notable impact on shaping their role perceptions.[739] Participants revealed that they rarely encounter situations that meet the high threshold for escalating proposals which could imply that such hierarchical measures must be experienced to a certain degree to shape behaviours. Moreover, as chapter seven will demonstrate, it is not only about the need for those enforcing the mechanism to feel its impact, but also the colleagues working alongside them.

[733] Interview with GLD 23 (10 December 2019).
[734] Moss (n 14) 1296. See also Johnsen (n 88) 1580.
[735] Tholen and Mastenbroek (n 5).
[736] ibid 487.
[737] Interview with GLD 22 (10 December 2019). Moss (n 14) 1306; Cherkewich (n 6) 257.
[738] Christensen and Mandelkern (n 373) 241.
[739] Trondal and others (n 320) 159.

6.2.1.2. Expertise

While legal advisers must be qualified to practise law upon recruitment, and are expected to already possess technical legal skills including a sound knowledge of public law, their responses placed significant emphasis on their learning experiences following recruitment.[740] This has clear parallels with the realist notion of expertise outlined in chapter three which highlights the importance of specialist tacit knowledge acquired through on-the-job experiences and interactions.[741] Chapter five has already identified certain organisational features that can shape and facilitate the interactions and experiences of legal advisers, including their co-location in ministerial departments and their rotation to different legal teams or divisions. This discussion will address the second sub-question outlined in the introductory section by illustrating the importance of on-the-job learning for legal advisers to acquire and develop the knowledge and skills needed to carry out their various functions.

As a starting point, GLD participants emphasised the need to acquire a meaningful understanding of the policy intention behind the Bill. In-person meetings with policy officials were regarded as "very helpful" for enabling a shared understanding to be formed quickly as policy officials can respond to questions there and then.[742] This particular focus on in-person meetings highlights the efficiency of face-to-face interactions in relation to knowledge sharing, with chapter three largely attributing this to the rapid speed of conversational turn-taking.[743] In terms of how legal advisers know *which* questions to ask policy officials, GLD participants reiterated their separation from earlier policy discussions as this enables them to identify and question assumptions that were made during the earlier initiation stages.[744] Legal advisers also determine their questions by predicting the types of questions Counsel

[740] For more information see Government Legal Department, 'GLD Qualified Site' <https://www.gld-qualified.co.uk/> accessed 25 August 2023. If not already qualified, applicants must be qualified three months from application date.
[741] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399).
[742] Interview with GLD 22 (10 December 2019).
[743] Collins and others (n 431) 101.
[744] Interview with GLD 23 (10 December 2019).

might ask during the next chronological phase.[745] Although many legal advisers do not have prior experience in instructing Counsel, they gain this knowledge through their own firsthand experience of drafting secondary legislation which is "the same thing really. It's drafting legislation in the clearest way possible to give effect to the policy intention."[746] Due to these parallels, a GLD participant explained, "we can start second guessing the kinds of questions Counsel might have from our own experiences of turning policy intentions into legislation".[747]

GLD participants also discussed the knowledge needed to perform a legal risk assessment. While a GLD vacancy notice specified that they must demonstrate an 'appreciation of legal risk' upon recruitment, participants emphasised the importance of on-the-job experiences to ensure a *reliable* assessment of the proposal's vulnerability before the courts.[748] Responses highlighted that legal advisers develop an increased awareness of non-compliance with public law requirements as they frequently advise ministerial departments about this, not only on Bill projects. According to a GLD participant, there are "common public law principles that government lawyers become particularly attuned to look out for. Not just in Bills but in all the policy advice that they give. This is what they alert to on a day-to-day basis".[749] Legal advisers also "have a feel" from their own experiences in government "as to whether a policy is going to stand up to judicial review".[750] This allows them to not only provide a reliable assessment of how robust a proposal might be, but to also propose solutions for mitigating legal risks. Making judgments about legal risk based on real-life experiences, rather than solely reading past court

[745] Interview with GLD 23 (10 December 2019). The drafting of secondary legislation is a task belonging exclusively to legal advisers.
[746] Interview with GLD 22 (10 December 2019).
[747] Interview with GLD 23 (10 December 2019).
[748] 'Qualified Lawyers (London): Government Legal Department' (2022) <https://www.gld-qualified.co.uk/wp-content/uploads/2022/07/Always-On-Phase-11-Wave-48-Notice.pdf> accessed 11 July 2022.
[749] Interview with GLD 23 (10 December 2019).
[750] Interview with GLD 23 (10 December 2019).

decisions or legal texts, indicates the importance of tacit knowledge that captures contextual elements and nuances that cannot be easily translated into written text.[751]

Legal advisers must also develop knowledge in the relevant area of law as they are recruited to GLD and assigned to ministerial departments as legal generalists. This point was emphasised by a GLD participant who said, "When you come to the department, you are not likely to have any relevant expertise in the area. You are expected to gain the expertise during your post."[752] A duration of three to five years before legal advisers are expected to rotate to another legal team or division was felt to be a sufficient amount of time to gain and develop this legal expertise. According to a GLD participant, "Although four years doesn't sound like long, I mean it is quite a long time if you are working in a particular team day in day out for four years. You do actually build up significant expertise in that field."[753] When participants were asked how this expertise is acquired, they emphasised that academic resources and know-how banks in the ministerial departments help to initially familiarise them with the legal landscape. They nevertheless stressed that most of their expertise develops naturally, typically prompted by policy officials asking them legal questions about the proposed legislation or broader policy issues. One GLD participant explained, "As you get questions from clients you work out, research what the answer is, you research what the question meant in the first place, you consult colleagues, the lot."[754]

Particular emphasis was placed on legal knowledge gained through interactions with more experienced lawyers from their own legal team.[755] One GLD participant who was the longest-serving member of their team explained that more junior colleagues would regularly consult them:

> I mean, I think it's always very helpful if you're in a team, particularly if the law is quite technical, if there is somebody who has been in that

[751] Priaulx and Weinel (n 410) 380.
[752] Interview with GLD 23 (10 December 2019).
[753] Interview with GLD 23 (10 December 2019).
[754] Interview with GLD 22 (10 December 2019).
[755] Interview with GLD 22 (10 December 2019).

> team a long time. It's always helpful because they have more experience and background knowledge of the subject matter which is obviously beneficial… So I am probably now the longest serving member so others in the team will often come to me with questions, or just to check something, or test something, or have some query, some technical query about the legislation.[756]

As Bills often have "cross-cutting elements", containing provisions that have relevance across several legal domains, legal advisers may at times be unable to acquire the relevant legal knowledge from their own team.[757] Instead, they may need to consult with legal advisers from other legal teams or divisions. The UK Civil Service rotation system discussed in chapter five, which requires legal advisers to change post every three to five years, makes it "much easier" to seek knowledge through such interactions as it enhances the informal network of legal advisers across Whitehall.[758] A GLD participant elaborated on this point and acknowledged that the development of this network represents one of the most significant benefits of the rotation system:

> Just knowing people in other, other departments because you have worked with them previously can be quite helpful. So you build, by moving around you build up this network of contacts. So yes, you build relationships and you then leave those relationships when you move on, but you still maintain some of them as well so it can actually be quite beneficial.[759]

In summary, this section has highlighted several on-the-job experiences relied on by legal advisers to acquire the knowledge needed to perform their functions successfully, with this knowledge referred to as contributory expertise in chapter three.[760] While legal advisers are expected to join GLD with certain knowledge and skills (i.e., legal qualifications and technical legal skills), participants consistently emphasised the expertise acquired through in-house socialisation experiences.

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[756] Interview with GLD 23 (10 December 2019). Redacted participant's duration of post to protect confidentiality.
[757] Interview with GLD 23 (10 December 2019).
[758] Interview with GLD 23 (10 December 2019).
[759] Interview with GLD 23 (10 December 2019).
[760] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.

These experiences included conversations with other legal advisers, either from their own legal team or another, sustained cooperation with policy officials, as well as experiences of drafting secondary legislation and advising ministerial departments on non-compliance with public law requirements. The need to be socialised into the practice of a domain in order to perform the associated functions effectively represents the need to go beyond explicit knowledge 'which can be expressed in formal language and shared through texts, manuals or explanation'.[761] Instead, it emphasises the importance of gaining specialist tacit knowledge which represents 'the unwritten rules, processes and conventions' of a domain.[762]

6.2.2. Parliamentary Counsel

Only a small number of existing academic studies acknowledge that Parliamentary Counsel are involved during this first analytical phase, prior to receiving legal instructions.[763] While these limited studies indicate that Counsel provide forward-looking advice on drafting and procedural matters, these discussions remain brief and several questions remain, such as how regular is this involvement, precisely how early does it occur, and what does it entail? A GLD participant revealed that the lead ministerial department often contacts OPC when it decides to pursue a Bill project, although Counsel may sometimes be consulted when the lead department is still thinking about proceeding with primary legislation.[764] This early involvement currently takes place more often than not, with a Counsel participant reflecting on the different situation in the 1990s, "you would get drafting authority from PBL and suddenly you would get a chunk of instructions on your desk and that would be the first you've seen of it."[765] The same participant nevertheless emphasised that an appropriate balance must be struck to ensure that OPC does not spend considerable time and resources on something that ultimately does not "come to fruition":

[761] Priaulx and Weinel (n 410) 380.
[762] ibid.
[763] Page (n 116) 790.
[764] Interview with GLD 23 (10 December 2019).
[765] Interview with OPC 20 (1 August 2019). 'PBL' refers to the Parliamentary Business and Legislation Committee.

> So I think generally, we try very hard at OPC to encourage departments to come to us as early as possible. I mean again, it is a balance because you don't want to spend ages kind of giving advice and thinking about stuff that isn't ever going to come to fruition but at the same time, you can save people a lot of time and energy by thinking about it in that very particular sort of drafting way at an early stage.[766]

Counsel's early involvement is intended to help steer the lead department "in the right direction" before legislative drafting commences.[767] Counsel are often asked to provide forward-looking advice on drafting matters, with questions directed to the relevant OPC team leader if drafters have not yet been allocated to the Bill. These questions may ask how "complex" a legislative provision will look or what impact it will have on the scope of the Bill.[768] Counsel may also be asked how long the drafting might take as this helps the lead department develop a realistic timetable when bidding for a legislative slot. This early involvement also enables Counsel to develop a better awareness of how resource intensive a particular Bill will be so they can offer the PBL Committee a realistic sense of what can be achieved in a parliamentary year, with chapter one mentioning the PBL Committee's role in the preparation of the legislative programme. On this point, a Counsel participant explained:

> Departments have any number of things that they would like to do in any given year but there is a limit on our drafting resource, but there is also a limit on parliamentary time and of course, that's been an acute issue since the 2017 election because of not having a government majority. Getting anything controversial through is almost impossible and things are taking a long time. So I think yeah, we very much would be aware from a very early stage what Bills were in the offing and how likely it was that they were going to come into fruition. So it's a much more fluid and iterative process I think than it might seem if you just read a book.[769]

[766] Interview with OPC 20 (1 August 2019).
[767] Interview with OPC 21 (15 August 2019).
[768] Interview with OPC 20 (1 August 2019).
[769] Interview with OPC 20 (1 August 2019).

Counsel may also be asked to provide forward-looking advice on the parliamentary passage of a Bill. Similar to drafting advice, this procedural advice is not exclusive to these stages and carries on throughout the analytical phase explored in chapter seven too. A procedural question often asked relates to the concept of hybridity, that is when a Bill includes characteristics of both a public and private Bill.[770] As a hybrid Bill must go through a more complicated and time-consuming parliamentary process, the lead department may want to avoid this if possible. The input of Counsel may go beyond a simple 'yes' or 'no' as the lead department may also ask for advice on how this process can be avoided. As hybridity is often influenced by the way in which a policy is framed, the advice provided by Counsel may impact the eventual policy decisions made.[771] However, the following chapter will reveal that Counsel exercise caution to ensure they do not impose their own views on the lead department with regard to policy matters, especially since they lack expertise on policy formulation.[772]

6.2.2.1. Political-professional behaviour

The political-professional behaviour of Counsel will be explored in chapter seven as the vast majority of their work occurs once they receive legal instructions from legal advisers. In brief, chapter seven will reveal that Counsel develop a sense of connectedness with ministerial departments (particularly with legal advisers) despite being physically separated from them.[773] This has been encouraged by an increasing amount of interaction between Counsel and ministerial departments, largely because of the increased informality mentioned above. This supra-departmental affiliation, which refers to a partial shift of affiliation away from the

[770] For more on Hybrid Bills see UK Parliament, 'Hybrid Bills' (*UK Parliament*) <https://www.parliament.uk/about/how/laws/bills/hybrid/> accessed 8 August 2023.
[771] Interview with OPC 21 (15 August 2019).
[772] Interview with OPC 19 (6 September 2019). For a recognition of the purist view see Hansard Society (n 142) 46; Bowman (n 113) 5; Stefanou (n 162); Page (n 116) 790.
[773] References made to the ministerial department by Counsel participants included legal advisers. As legal advisers are not formal members of the ministerial department, this reinforces the strong sense of connectedness between legal advisers and the ministerial department which was discussed in chapter five. In the empirical analysis of this thesis, references made by Counsel participants to the ministerial department will encompass legal advisers too unless there is a need to differentiate between them and policy officials.

primary organisation in which a bureaucrat is located, encourages Counsel to perceive their role in accordance with the 'bigger picture' of the organisation too, considering the political pressures and priorities that arise in ministries.[774] Chapter seven will nevertheless demonstrate that Counsel still retain a greater degree of professional autonomy compared to legal advisers, especially if the conflict compromises their duty to protect the integrity of the statute book.

6.2.2.2. Expertise

Counsel must be qualified to practise law upon recruitment and possess various skills such as 'excellent powers of analysis', 'reliable legal judgment', and a 'skilled use of language'.[775] Responses nevertheless prioritised on-the-job experiences gained while working in OPC over those achieved prior to recruitment. Similar to claims made above in relation to legal advisers, this evidences the importance of socialisation in the domain of practice to acquire the specialist tacit knowledge, needed to perform the work.[776] Chapter five has already identified a set of organisational features that can shape and facilitate the in-house socialisation experiences of Counsel, including their shared location in OPC and the mentoring system in which junior Counsel are assigned to more experienced colleagues. The following discussion will rely on empirical findings to demonstrate how on-the-job experiences enable Counsel to perform the functions identified above. While the function of legislative drafting features more heavily in chapter seven, the expertise

[774] Trondal and others (n 320) 126–28.
[775] Civil Service, 'Office of the Parliamentary Counsel: Assistant Parliamentary Counsel (up to 4 Roles)' (*GOV.UK*) <https://www.civilservicejobs.service.gov.uk/csr/index.cgi?SID=Y3NvdXJjZT1jc3FzZWFyY2gmcGFnZWFjdGlvbj12aWV3dmFjYnlqb2JsaXN0JnBhZ2VjbGFzcz1Kb2JzJnVzZXJzZWFyY2hjb250ZXh0PTEyMTY4ODgwMCZzZWFyY2hfc2xpY2VfY3VycmVudD0xJm93bmVyPTUwNzAwMDAmb3duZXJ0eXBlPWZhaXImam9ibGlzdF92aWV3X3ZhYz0xNzA5NzIzJnJlcXNpZz0xNjE0NTk5MzM0LTlkZmE4MzNlNjU4MjkxY2E3ZWUyYTFjNDFkOTZjZjc2YTBiODEwYzE=> accessed 1 March 2021.
[776] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399); Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.

needed to perform this function will be explored here given that Counsel advise on drafting matters during this phase too.

In contrast to other types of lawyers explored in this thesis whose expertise is rarely mentioned in the literature, a small handful of studies discussed in chapter two acknowledged the significance of practical experience for Counsel.[777]As a starting point, Counsel participants emphasised that their expertise on legislative drafting and parliamentary process is developed through their everyday work on Bill projects, which not only involves the actual drafting of Bill clauses but also the provision of advice and assistance on a Bill's passage in Parliament. Counsel's vast experience working on Bill projects is in stark contrast to other Whitehall officials, including legal advisers, who do not work exclusively on Bill projects throughout their government career. This distinction was confirmed by a GLD participant who expressed that as a legal adviser, working on a Bill project is "often something you might do for a few months but then you might not do for a few years. Whereas Parliamentary Counsel are drafting Bills day in day out".[778]

With regard to legislative drafting, OPC tends to "shy away slightly from taking people who are experienced legislative drafters elsewhere".[779] There is instead a preference to recruit at the junior level so that Counsel can be trained "up from scratch".[780] While most qualified lawyers are likely to have carried out some drafting in their careers, like the drafting of pleadings, this indicates a relative absence of drafting knowledge upon joining OPC. When asked how specialist knowledge is developed, Counsel participants emphasised the importance of the mentoring scheme outlined in chapter five.[781] Through observations and conversations with their mentors, Counsel gain the knowledge and skills needed to draft a Bill on their own.[782] They tend to stay in a training post for around four to six years, during which

[777] For example see Laws (n 166) 34.
[778] Interview with GLD 23 (10 December 2019).
[779] Interview with OPC 21 (15 August 2019).
[780] Interview with OPC 21 (15 August 2019).
[781] Interview with OPC 19 (6 September 2019).
[782] Interview with OPC 21 (15 August 2019).

they gradually learn how to navigate longer and more complex Bills themselves.[783] Among the skills learnt is the ability to get “the right balance” between the various drafting principles identified in chapter seven which include necessity, clarity, coherence, effectiveness, and accessibility.[784]

The mentoring scheme in OPC is an example of an apprenticeship scheme discussed in chapter three which allows individuals to learn practical knowledge or ‘know-how’ which is difficult to articulate in explicit rules.[785] Although OPC published a drafting manual in 2010, Counsel participants stressed that this was not intended to replace the mentoring scheme. Nevertheless, as some drafting matters are highly technical in nature, such as formulas, it was felt to be helpful to have accessible written explanations to serve as reminders.[786] Apart from the fact that the drafting manual does not articulate tacit insights that come from collaborating with mentors and from actually drafting Bill clauses, another factor contributing to a reluctance of its strict application is that it can hamper the creativity of Counsel and prevent them from proposing new, effective ways to express legislative provisions. On this point, a Counsel participant revealed that in the area of taxation, a drafter relied on their creativity to propose a new way of presenting tax calculations:

> So you need people to be quite creative as well and be able to think up new ways of doing things and sort of see a structure that works. So things that have happened in the office in the past, so somebody thought it would be a good idea rather than having a very narrative style to introduce steps, so a lot of the tax calculations now say, step one: calculate this amount, step two: calculate that. In the past, people had put it in tables so somebody must have invented that 100 years ago. So just thinking of different ways to do things.[787]

Counsel participants also provided further insight into the process of developing expertise on the parliamentary passage of a Bill to provide effective advice during this phase and in subsequent stages. More specifically, this expertise encompasses

[783] Interview with OPC 21 (15 August 2019).
[784] Interview with OPC 21 (15 August 2019).
[785] Nonaka, Toyama and Konno (n 412) 7; Priaulx and Weinel (n 410) 380.
[786] Interview with OPC 21 (15 August 2019).
[787] Interview with OPC 19 (6 September 2019).

more than just an awareness of the formal rules governing the Bill's passage, especially as these contain a significant degree of flexibility and discretion. Counsel must also understand how these rules are interpreted and applied in practice. Much of this tacit or 'unwritten' knowledge is developed through regular interactions with clerks from the Public Bill Offices in both the House of Commons and House of Lords. According to one Counsel participant, these clerks "are the people who sort of really understand best" how a Bill goes through Parliament and who "do all the sort of legwork" to facilitate this during the parliamentary stages.[788]

In summary, this section has highlighted several on-the-job experiences gained by Counsel which allow them to develop the expertise needed to carry out their work successfully, with this knowledge referred to as contributory expertise in chapter three.[789] Significant emphasis was placed on the mentoring scheme in OPC, hands-on experience of drafting Bill clauses, and regular conversations with clerks from the Public Bill Offices. While OPC has its own drafting manual, participants emphasised that this is insufficient to learn the "craft" of legislative drafting, indicating the importance of specialist tacit knowledge which cannot be easily articulated in written materials.[790] The following chapter will demonstrate the importance of Counsel balancing active participation in certain aspects of their work with the need to maintain an element of distance in other aspects, specifically for the purpose of approaching the policy intention of a Bill with a critical perspective. This was already indicated above in relation to legal advisers who partly attribute the success of their analytical role to their relative degree of separation from early policy initiation.

6.3. European Commission

The work carried out by Commission legal advisers during this phase includes the provision of legal advice to the lead Directorate-General. This advice takes place

[788] Interview with OPC 21 (15 August 2019).
[789] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.
[790] Interview with OPC 19 (6 September 2019). Collins and Evans, *Rethinking Expertise* (n 401) 35; Priaulx and Weinel (n 410) 380; Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 23, 24.

before the proposal is submitted to the formal coordination process (the ISC). As mentioned in previous chapters, the response of the Legal Service to the ISC can take one of three forms: positive opinion, positive opinion with comments, or negative opinion. With regard to legal revisers, their work involves the provision of advice to the lead DG on the drafting quality of the proposal before its submission to the ISC. Chapter two, as well as the analytical framework in chapter three, evidence that the limitations of the existing literature are especially profound for this chronological phase as studies typically consider the work of these lawyers during the next phase explored in chapter seven.[791] This discussion will help to overcome substantial gaps in knowledge through the presentation of empirical findings.

The work of legal advisers will be discussed first, highlighting that they provide legal advice in steering groups or directly to the lead DG. The political-professional behaviour of these lawyers will be discussed in chapter seven as it is important to delve into the veto power granted to them in the ISC to better understand how they approach the conflict. The section on expertise will draw attention to legal advisers' understanding of the policy intention and explain how a legal knowledge gap is fulfilled by DG officers, which is in fact comparable to a knowledge gap fulfilled by legal advisers in the UK Government. The discussion will then examine the work of legal revisers, discussing their role in offering early advice on the drafting quality of a legislative proposal. While their political-professional behaviour and expertise will be explored in chapter seven as the majority of their work takes place following the launch of the ISC, this chapter will explore why DG officers believe that legal revisers lack the necessary expertise to draft the legislation.

6.3.1. Legal advisers

Legal advisers are regularly involved during this chronological phase, before the legislative proposal is submitted to the ISC for formal assessment by the Commission Legal Service. While an empirical study discussed in chapter two acknowledged this early involvement, it did not offer much information beyond

[791] For the relevant part of the analytical framework, see table 2 in chapter three.

stating that legal advisers provide an initial assessment of whether the policy initiative is 'legally sound'.[792] Legal adviser participants explained that to a large extent, this early participation is intended to steer the lead DG away from decisions that could create legal problems at a later stage and consequently disrupt timings and political communications to stakeholders.[793] It also presents an opportunity for legal advisers to start developing their understanding of the policy intention prior to receiving the draft proposal through the ISC. This can address criticisms raised in the academic literature that revolve around the challenges of Commission lawyers uncovering the policy intention through an examination of draft proposals alone.[794]

The early participation of legal advisers takes one of two forms, either through their formal membership of Interservice Steering Groups or through informal requests made by the lead DG. Steering groups are established for politically sensitive initiatives and those included in the Commission's annual work programme.[795] They are chaired by the Secretariat-General and alongside the lead DG are made up of all other interested Commission DGs and the Commission Legal Service. Steering groups have been increasingly encouraged as part of the EU Better Law-Making agenda with the aim of enhancing the quality of impact assessments.[796] The increased use of steering groups has served a significant role in standardising the earlier involvement of legal advisers compared to previous years, even in cases where no steering group is needed.[797] This change is similar to the situation in the UK Government where lawyers also participate at an earlier stage compared to previous years. This chapter later indicates that this change also applies to

[792] Leino-Sandberg (n 193) 164.
[793] Interview with CLA 1 (26 April 2017).
[794] Robinson, 'Drafting of EU Acts: A View from the European Commission' (n 119) 191.
[795] European Commission, 'Better Regulation Toolbox' (2021) 51 <https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en> accessed 27 February 2023.
[796] See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making 2003 (OJ C321/1). This has since been replaced by the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making 2016 (OJ L 123/1).
[797] Interview with CLA 4 (27 April 2017).

Commission legal revisers on the basis that their earlier participation can improve the drafting quality of EU legislation.

Members of the steering group will attend regular meetings once the initiative has been politically validated. They will each provide their specialised input for various tasks including the preparation of an impact assessment report which identifies the policy problem, outlines the policy objectives, sets out numerous policy options and their uncertainties and risks, and specifies a preferred option whenever possible.[798] In this sense, the impact assessment report has clear parallels with the aforementioned policy instructions in the UK Government. Due to time pressures, legal advisers may not participate in the initial meetings but they will still read the impact assessment report to ensure the legal analysis of the various policy options is correct.[799] One legal adviser participant elaborated on this and emphasised that the lead DG may in fact ask legal advisers whether there are any other legally sound options that had not yet been considered:

> If we are really at an early stage and we are still doing the impact assessment, there it can really happen that we have a dialogue where they say ok, we have identified this or that option, which one do you think is viable? Or do you maybe have another option that we haven't even thought of? And then we are going to say what we think of the options they have proposed and possibly even propose other alternatives. That can happen.[800]

The participation of legal advisers can also be informally requested by the lead DG. During this early phase, the lead DG has considerable discretion in determining when to request legal advisers' participation and to select which questions to ask them.[801] Factors that influence how early the lead DG chooses to involve legal advisers include the length of the proposal, how technical the subject matter is, the

[798] For a recent example see 'Commission Staff Working Document: Impact Assessment Report' (2023) COM(2023) 94 final. The quality of the report is assessed by the Regulatory Scrutiny Board. For more on this independent body see European Commission, 'Regulatory Scrutiny Board' <https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en> accessed 23 February 2023.
[799] Interview with CLA 1 (26 April 2017); Interview with CLA 5 (27 April 2017).
[800] Interview with CLA 4 (27 April 2017).
[801] Interview with CLA 1 (26 April 2017).

political importance of the proposal, and the nature of the legal issues to be explored.[802] A primary motivation for involving legal advisers at an earlier stage than is formally required is to provide reassurance to the lead DG that the requirements of the ISC can be met, especially as the ISC only grants the Legal Service a period of ten or fifteen working days to issue a legal opinion depending on whether the proposal is more or less than twenty pages.[803] If legal advisers are not consulted early enough, they may have insufficient time to thoroughly review the legislative proposal which would effectively prevent them from issuing a positive opinion to the lead DG:

> If a DG was to consult me on a 200-page regulatory act, it would be impossible for me in the course of fifteen days to acquaint myself with the legislation, every article of that legislation, to give my drafting input on all that legislation…The result of that is that [DGs] have an incentive to consult the Legal Service early.[804]

Legal adviser participants revealed that their legal advice addresses similar matters irrespective of whether it is provided in steering groups or informal discussions with the lead DG. Their main objective is to provide steering advice on "major" or "high-level" legal issues which compromise the legality of a proposal.[805] The legal issues mentioned by participants included a breach of mandatory procedural requirements, infringement of the EU Treaties, and a lack of EU competence.[806] Most commonly discussed was the appropriateness of the legal basis which is closely linked to questions about EU competence. More specifically, each policy area is assigned a legal basis from the EU Treaties which determines the power to legislate in that area and the decision-making procedure to be used. Thus, an appropriate legal basis selected by the lead DG is essential to protect the rule of law as it ensures that

[802] Interview with CLA 1 (26 April 2017).
[803] European Commission, 'Revised Guide to Interservice Consultation and New Instant Statistics Module in CIS-Net' (2009) SEC (2009) 780 4.
[804] Interview with CLA 1 (26 April 2017).
[805] This includes a breach of Charter of Fundamental Rights of the European Union 2012 (C 326/391).
[806] Interview with CLA 1 (26 April 2017).

legislative action is founded on the EU Treaties which have been democratically approved by the Member States.[807]

Legal adviser participants emphasised the challenges of establishing whether the selected legal basis is appropriate, especially as there can be more than one. To guide their assessment, legal advisers rely on the centre of gravity test employed by the European Court of Justice (ECJ) which specifies that the legal basis must reflect the 'main or predominant purpose' of the proposal.[808] In situations where legal advisers conclude that the legal basis is incorrect and that the proposal belongs to a different policy area, the proposal may need to be re-assigned to another DG.[809] Despite their advice, a legal adviser participant revealed that it is common for "doubts" to remain over the correct legal basis.[810] While participants did not frame their advice in terms of legal risk, the prevalence of doubt indicates that legal advisers may perform a quasi-risk assessment where they reach a conclusion regarding the 'safest' legal basis if challenged by the court. More on this cautious assessment will be explained in chapter seven, including why it is necessary to prevent an erosion of trust among the Member States.[811]

6.3.1.1. Political-professional behaviour

The political-professional behaviour of legal advisers will be explored in chapter seven. While a significant amount of legal advice is already provided during this initial phase, it is important to delve into the veto power granted to the Legal Service in the ISC to acquire a better understanding of how legal advisers approach the political-professional conflict. In brief, chapter seven will reveal that legal advisers adopt a significant degree of professional autonomy when they refuse to compromise on certain "legal limits" or "red lines" even if this obstructs the political

[807] European Commission, 'Type of EU Law' <https://commission.europa.eu/law/law-making-process/types-eu-law_en> accessed 13 March 2023.
[808] Interview with CLA 7 (28 November 2017). See Case C-137/12 *European Commission v Council of the European Union* (EU:C:2013:675), paras 53 and 74.
[809] Interview with CLA 14 (27 November 2017).
[810] Interview with CLA 7 (28 November 2017).
[811] Interview with CLA 7 (28 November 2017).

preferences of the lead DG.[812] However, their behaviours are not completely detached from the interests of the lead DG as they are keen to work closely with them to find alternative legal solutions, demonstrating a degree of leniency and flexibility during this process. In addition, legal advisers adopt a proactive approach in which they seek to make their views known informally so that the lead DG can make the necessary changes before the ISC is finalised. By doing this, legal advisers demonstrate a cooperative approach where they aim to resolve the legal issues without having to resort to the issuing of a negative legal opinion.

6.3.1.2. Expertise

Legal advisers are required to have a law degree and a good command of at least two EU languages for an entry-level post.[813] In contrast to UK Government legal advisers, they are not required to have a practising legal certificate, although two of the participants mentioned that they had qualified to practice law prior to being recruited to the Legal Service. In spite of these entry requirements, participants placed more emphasis on the importance of on-the-job learning experiences, including their experiences in navigating the EU Treaties. As their advisory role carries on into the next phase, the knowledge needed to provide effective legal advice will be discussed there. Instead, this section will explore how legal advisers acquire an understanding of the policy intention which is especially useful if they need to propose legal alternatives to the lead DG. In spite of this understanding, these lawyers do not appear to serve a prominent role in policy matters. This has already been indicated above when it was revealed that legal advisers might not be present during initial steering group meetings. Moreover, in stark contrast to GLD legal advisers, the participants did not explicitly discuss any involvement in policy clarification or development.

As mentioned in chapter five, legal advisers work on legislative proposals in a particular field for around five to seven years. As a result, they “get to know” officers

[812] Interview with CLA 7 (28 November 2017).
[813] European Personnel Selection Office (n 188).

working in the relevant sector DG.[814] On this point, one legal adviser participant explained, “All of us working here of course have developed, or developed over time, relationships with the people in the DG, working practices and conventions with people in the DG.”[815] Through collaborating on proposals, the parties develop an understanding of each other’s preferences, including the types of issues legal advisers prefer to be consulted on at an early stage. With regard to an individual proposal, there is no “iron rule” on how interactions should take place but there is a preference for an initial meeting to ensure legal advisers acquire a comprehensive grasp of the policy by listening closely to the lead DG and asking questions.[816]

The value assigned to an initial meeting, as opposed to email correspondence or telephone conversations, signifies the importance of face-to-face interactions in the context of effective knowledge sharing.[817] This is crucial to ensure that legal advisers develop an accurate understanding of the policy objectives which, in turn, increases the effectiveness of their legal advice, especially when asked to propose alternative legal solutions that achieve these objectives.[818] One legal adviser participant elaborated on this and said, “in those areas in which the policy DG, the department of the Commission is more or less free to develop the policy, well then we will listen to them, we hear what they want to achieve so we can find a way of sort of legally correctly doing that”.[819] In stark contrast to GLD legal advisers working in the UK Government, none of the Commission legal advisers mentioned a role in clarifying the policy details alongside the lead DG. When asked about this role, a legal adviser participant said, “the policy choices are not up to us… our task is normally not to second guess their policy choices.”[820]

Although GLD legal advisers may not characterise their role as one of second guessing policy ideas either, but rather as one of uncovering the true policy intention,

[814] Interview with CLA 2 (27 April 2017).
[815] Interview with CLA 1 (26 April 2017).
[816] Interview with CLA 5 (27 April 2017).
[817] Collins and others (n 431) 101.
[818] Interview with CLA 4 (27 April 2017).
[819] Interview with CLA 4 (27 April 2017).
[820] Interview with CLA 4 (27 April 2017).

there are certain reasons which might explain why Commission legal advisers do not play a substantial role in helping to clarify and refine policy details. This includes the fact that policies are likely to be more developed when they reach Commission legal advisers than GLD legal advisers, even during these early stages. Given the supranational nature of the EU, there is considerable pressure for the Commission to adjust and formalise its policies to accommodate the preferences of Council and Parliament majorities, which is in particular contrast to national governments with a clear majority.[821] The second reason emerges from responses indicating that DG officers fulfil the legal knowledge gap addressed by GLD legal advisers in the UK Government.[822] More specifically, DG officers provide a "lawyer's eye" on the policy to ensure that its objectives are sufficiently defined to be converted into legislation.[823] DG officers also advise on how the policy aligns with the current legal framework in the area, especially as they acquire a comprehensive understanding of this framework due to their involvement in formulating new proposals and helping to assess the implementation of existing legal structures too.[824] As mentioned in chapter five, DG officers who assume greater legal responsibilities may be assigned the title of 'legal officer' or similar but this is not always the case.

Ultimately, while this section remained relatively brief, it highlighted some interesting empirical findings regarding the ability of legal advisers to acquire an understanding of the proposal's underlying policy intention through meetings with DG officers. These meetings are especially important because unlike the common law approach of the UK Government where legal advisers are actively involved in policy formulation, Commission legal advisers do not routinely participate during those early stages and are therefore dependent on interactions with DG officers to acquire

[821] Hartlapp, Metz and Rauh (n 190) 23.
[822] Generally, responses did not specify that this role was performed by DG legal officers only. This coincides with chapter five which identified that in areas that are highly legal in nature (e.g., migration), most of the preparatory work for a legislative proposal will be carried out by DG legal officers, or policy officers with a legal background. In more technical areas (e.g., agriculture), legal officers are likely to be assisting policy officers who possess a more technical expertise. The latter are often referred to as 'technical experts' by participants.
[823] Interview with DG 9 (27 November 2017).
[824] Interview with DG 9 (27 November 2017).

the necessary policy knowledge.[825] This section also explained how DG officers fill in a considerable knowledge gap during this phase, facilitated by their experiences of formulating proposals and evaluating the implementation of existing legislative structures. Chapter seven will nevertheless demonstrate that these officers lack the expertise required to confidently evaluate the legality of proposals, which is where the expertise of Commission legal advisers truly stands out.

6.3.2. Legal revisers

From the academic literature discussed in chapter two, it was inferred that legal revisers might be involved during this phase, specifically because the literature identified the possibility of legal revisers engaging in 'constructive dialogue' with the lead DG.[826] Given the time constraints of the subsequent phase in chapter seven, it was predicted that such dialogue would likely take place prior to the ISC being launched. Participants confirmed that legal revisers are involved prior to the ISC, which is in contrast to previous practices. The earlier involvement of legal revisers was initially prompted by an EU initiative in the late 1990s aimed at improving the drafting quality of legislation. This specified that the three Legal Services (Commission, Council, Parliament) must be able to 'make drafting suggestions in good time'.[827] Despite this change, a legal reviser participant explained that their participation is still usually initiated only around "two weeks" prior to the ISC being launched.[828] The participant expressed, "Even if we are pre-consulted, we are pre-consulted like two weeks before they launch the formal consultation procedure. But of course it is better than not being pre-consulted at all."[829]

The 'early' involvement of legal revisers presents a notable distinction from that of legal advisers whose advice may be requested by the lead DG years before the ISC

[825] For a discussion about the lack of separation between policy formulation and legislative drafting in the European Commission see Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26).
[826] ibid 259.
[827] Interinstitutional Agreement on Common Guidelines 1998.
[828] Interview with CLR 3 (27 April 2017).
[829] Interview with CLR 3 (27 April 2017).

is launched.[830] A legal adviser participant nevertheless revealed that the lead DG, in consultation with the legal adviser, may ask that the legal reviser gets involved prior to the usual two weeks if it is a "major initiative" or if there are significant drafting omissions.[831] The primary advantage of involving legal revisers before the ISC, whether it is two weeks before or sooner, is that they no longer need to "cram everything in" within the ten to fifteen working days granted to them during the formal coordination process.[832] However, a legal reviser participant elaborated on this and argued that implementing a standardised involvement for legal revisers at an even earlier stage would ensure they had more time to secure the drafting quality of legislative proposals.[833] The same participant expressed:

> So in many cases, we actually bear the brunt of the drafting at a stage which is too late. We have to do work which should have been done already a couple of stages upstream…I have the impression that we could, we should be maybe pre-consulted earlier than we normally are.[834]

Given that the EU adopts a civil law drafting approach, a feature discussed already in chapters one and two, the legislative proposal is drafted by DG officers who have specialist knowledge in the subject area as opposed to specialist knowledge in legislative drafting. The legislative proposals received by legal revisers may therefore be of poor drafting quality.[835] Chapter seven will demonstrate that legal revisers attempt to improve the drafting quality of proposals by ensuring their compliance with EU drafting guidance, which covers matters such as style, formatting, and legislative language. This drafting approach is in stark contrast to the common law model adopted in the UK Government where the proposal is drafted by specialist drafting lawyers, namely Parliamentary Counsel, who are not expected to have any prior experience or knowledge in the particular area of law. The section below on

[830] Interview with CLR 3 (27 April 2017).
[831] Interview with CLA 4 (27 April 2017).
[832] Interview with CLA 4 (27 April 2017)
[833] Interview with CLR 3 (27 April 2017).
[834] Interview with CLR 3 (27 April 2017).
[835] Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (n 26) 265.

expertise will provide an opportunity to examine why DG officer participants believe that the drafting approach in the Commission is effective.

6.3.2.1. Political-professional behaviour

The political-professional behaviour of legal revisers will be explored in chapter seven as the majority of their work takes place once the ISC commences. In brief, chapter seven will reveal that legal revisers adopt behaviours associated with an autonomous professional role perception as they remain committed to the faithful adherence of EU drafting guidance irrespective of whether this challenges the political preferences of the lead DG.[836] In fact, among all the different types of lawyers interviewed for this thesis, it is legal revisers who perceive their role with the greatest degree of independence from political considerations. As chapter seven will argue, this emphasises the socialisation capacities of regular and sustained interactions with policy departments.[837] Nevertheless, chapter seven will also demonstrate that the ability of legal revisers to enforce their independence is limited as they do not have ultimate authority over the Legal Service opinion.

6.3.2.2. Expertise

Chapter seven will examine how legal revisers acquire the knowledge and skills needed to be sensitive with legislative texts. It will also emphasise the importance for legal revisers to develop an awareness of the legal terminology used in a particular subject area and will identify this as a key reason behind their exemption from the EU Civil Service mobility system. This discussion will elaborate on insights provided above concerning the civil law drafting approach of the Commission and identify why DG officers might be better suited than legal revisers to draft legislative proposals. This raises an interesting distinction with the UK Government as a lack of subject

[836] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 160–61.
[837] Trondal and others (n 320) 128.

knowledge was regarded as a defining characteristic of Parliamentary Counsel, the significance of which will be discussed further in chapter seven.

DG officer participants were in favour of proposals being drafted in the lead DG with minimal input from legal revisers, specifically because DG officers have a more nuanced understanding of how to write the legislation in a way that is "workable in the real world".[838] For example, one participant worked in a DG where much of the legislative output addressed the regulation of chemical materials.[839] They emphasised that their DG colleagues responsible for drafting had prior experience in the production and distribution of these materials and would therefore write legislative proposals in a way that others in the chemical industry would understand, reducing the likelihood for confusion or misinterpretation.[840] Even a participant working in a DG producing highly 'legal' output (e.g., employment) felt that they were better equipped to draft the proposal than legal revisers due to their extensive knowledge of case law, reports, and current legislation, as well as their significant engagement with Member State experts.[841] Similarly, another DG officer participant emphasised that legal revisers are more inclined to change the meaning of the proposal due to their lack of technical subject knowledge:

> [Legal revisers] also, they are not themselves technical, they don't have the technical knowledge so sometimes they simplify the language, or make it a very good legal language, but it changes the article, the purpose or the thing you want to regulate. So that could be a problem as well. It is quite often that they see the text looks very hard or technical so they change it to an easier language but then they change also the text itself and what it regulates.[842]

It is important to note that DG officers with a highly technical background, often referred to as technical experts, usually receive drafting assistance from DG officers

[838] Interview with DG 9 (27 November 2017).
[839] Interview with DG 9 (27 November 2017). The type of material being regulated has been changed to protect the participant's confidentiality.
[840] Interview with DG 9 (27 November 2017).
[841] Interview with DG 6 (15 December 2017). The sector in which the DG officer works was not mentioned to protect their confidentiality.
[842] Interview with DG 10 (13 December 2017).

with a more comprehensive understanding of legal principles to ensure "a really good final product in combination".[843] On this point, a DG officer participant revealed that technical experts may require guidance on how to understand and consequently define the "scope" of a legislative provision.[844] Moreover, while legal revisers do not have direct involvement in the drafting of proposals, they do retain some degree of indirect participation to assist DG officers. In addition to offering advice prior to the ISC which might shape the eventual drafting choices made, the quality team of the Legal Service also created an electronic tool called the Drafter's Assistance Package (DAP) aimed at providing assistance to DG officers. This is "essentially a hypertext manual" which provides links to EU drafting rules and guidance.[845] Legal revisers were also involved in shaping many of the drafting rules and guidance, including the Joint Practical Guide which was prepared by the three Legal Services.[846]

6.4. Conclusion

Through the presentation and analysis of empirical findings, this chapter has overcome significant knowledge gaps in the academic literature on the work of UK Government and European Commission lawyers during the analytical phase of converting the policy problem into a legal solution. An examination of the *what* and *when* dimensions of their work has captured a key research question, specifically: 'What are the functions of the lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?' This question will also be addressed in the following chapter which examines the lawyers' functions during the process of finalising the legal solution for the legislature. Given the qualitative focus of this thesis, the empirical findings in this chapter have provided rich, detailed insights which uncover the various actions, chronologies, judgments, and interactions that constitute the lawyers' functions.

[843] Interview with DG 9 (27 November 2017).
[844] Interview with DG 9 (27 November 2017).
[845] Interview with CLR 3 (27 April 2017).
[846] For example see European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 216).

These insights significantly advance our understanding of what is currently known about the work of UK Government and Commission lawyers which, in turn, helps to enrich the information presented in the analytical framework.[847] Furthermore, as argued in chapter three, an examination of the practices and lived experiences of bureaucrats addresses a limitation in the broader policy-making literature too.

This chapter also provided valuable insights into the *how* dimensions of UK Government and European Commission lawyers' work, with a specific focus on their political-professional behaviour and expertise. Chapter seven will develop this further by placing more emphasis on the lawyers whose behaviours and expertise was not explored extensively in this chapter. As mentioned in chapter three, and reiterated in the introductory section of this chapter, a set of sub-questions were developed to assist in answering the key research questions related to this dimension. While some of these questions must be addressed in the following chapter once all the relevant empirical findings have been presented, some initial insights can still be provided here. In terms of lawyers' political-professional behaviours, the sub-question asks whether lawyers in policy departments (i.e., ministries or sector DGs) are more likely to adopt a Weberian role perception than those in exclusive legal departments.

This chapter has demonstrated that GLD legal advisers adopt behaviours associated with a Weberian role perception where they do not consider it appropriate to challenge or obstruct political preferences unless an exceptionally high threshold is met.[848] In practice, such situations where a proposal is clearly unlawful are seldom encountered. The finding of a Weberian role perception is consistent with expectations outlined in chapter three which advanced that bureaucratic lawyers who attach strong affiliations to ministerial departments, often due to their location there, are likely to exhibit Weberian behaviours.[849] Moreover, in line with the neo-institutional perspective adopted in chapter three, participants did not solely refer to

[847] See tables 1 and 2 in chapter three.
[848] Moss (n 14) 1306; Cherkewich (n 6) 257.
[849] Egeberg, 'How Bureaucratic Structure Matters: An Organizational Perspective' (n 381); Trondal and others (n 320) 135; Christensen and Mandelkern (n 373) 241.

formal rules or hierarchies when describing the considerations influencing this behaviour.[850] In fact, although their political-professional behaviours aligned with the GLD legal risk guidance discussed above, greater emphasis was given to perspectives developed through their interactions with policy officials, including the ultimate authority of ministers and the complex interplay of various influences driving ministerial decisions.

Comparing the political-professional behaviours of GLD legal advisers to the behaviours exhibited by the remaining lawyers will provide a fuller response to this sub-question, especially as those lawyers are all situated in exclusive legal departments which, according to chapter three, is expected to encourage a greater degree of professional autonomy. The political-professional behaviours of the remaining lawyers will be analysed in chapter seven. This chapter has also offered valuable insights into the second sub-question outlined above, namely: 'What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?' In line with the realist notion of expertise in chapter three which emphasises the significance of tacit knowledge, participants highlighted the importance of on-the-job experiences.[851] These experiences took on various forms, such as interactions with lawyers and/or non-lawyers, hands-on experience of *doing* the work, and the process of observing and working alongside mentors. Chapter seven will provide additional examples of such socialisation experiences, including the experiences of legal advisers acting as representatives of the Commission before the ECJ.

Before proceeding to chapter seven, it is important to highlight some interesting UK/EU comparisons, including the fact that lawyers in both the UK Government and European Commission are involved at an earlier stage compared to previous years. The outcome in both bureaucracies is that lawyers are no longer 'fixed' to their traditional job roles but instead adopt a collaborative approach in which they move

[850] March and Olsen (n 340) 22; Helmke and Levitsky (n 342) 727; Peters (n 336).
[851] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399).

around the stages of the law-making process more freely than before. An additional comparison relates to the civil law drafting approach in the Commission where the proposal is drafted by DG officers who tend to have specialist knowledge in the subject area as opposed to specialist knowledge in legislative drafting. This differs from the common law approach in the UK Government where the drafting of a Bill is carried out by Parliamentary Counsel. Interestingly, DG officer participants voiced a reluctance to adopt an approach like the UK Government, emphasising that subject knowledge is integral to foresee the real-life implications of the legislative proposal.

Another interesting comparison relates to the fact that GLD legal advisers adopt a crucial role in policy clarification in the UK Government whereas their counterparts in the Commission Legal Service are largely absent from these discussions. The discussion above offered some explanations for this distinction, including the fact that DG officers fulfil a legal knowledge gap. Nevertheless, while Commission legal advisers are largely absent from the formulation of a policy, and are generally expected to pay more attention to the legal text designed to implement the policy, the findings revealed that legal advisers participate in early discussions with the lead DG where they can acquire a meaningful understanding of the policy. Chapter seven will identify further UK/EU comparisons, including the fact that Commission legal advisers must navigate and adhere to considerable legal constraints set by the EU Treaties. As indicated already, this stands in contrast to the notion of Parliamentary Sovereignty in the UK which is associated with a higher degree of legislative autonomy and flexibility.

Chapter Seven: Finalising the legal solution

7.1. Introduction

The final empirical chapter explores the work of UK Government and European Commission lawyers during the second analytical phase outlined in chapter three, specifically that of finalising the legal solution for the legislature. In the UK Government, this includes the stages between Parliamentary Counsel receiving the legal instructions and the point where the drafting of the Bill is completed for submission to the UK Parliament. In the European Commission, it includes the stages between the lead Directorate-General launching the Interservice Consultation and the Legal Service preparing and submitting its final legal opinion. Empirical findings will provide a detailed and comprehensive account of *what* functions lawyers perform during this phase. Similar to chapter six, this account will be presented chronologically, as told by participants, to acquire a realistic understanding of *when* they perform these functions too. These empirical findings, combined with those already presented in the previous chapter, address a key research question, specifically: 'What are the functions of the lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?'

This chapter will also present empirical findings on *how* these lawyers perform their functions, with a specific focus on their political-professional behaviour and expertise. Exploring these concepts, both of which were developed in chapter three, will capture a number of the sub-questions outlined in previous chapters, including: 'Are lawyers in policy departments (i.e., ministries or sector DGs) more likely to adopt a Weberian role perception when facing political-professional conflicts compared to those in exclusive legal departments, while lawyers in exclusive legal departments are more likely to adopt an autonomous professional role perception?' Chapter six established some groundwork for this sub-question by emphasising the Weberian role perceptions of GLD legal advisers situated in ministries. This chapter will explore the role perceptions of the remaining types of lawyers, all of whom are situated in exclusive legal departments. Overall, the analysis will demonstrate that

their behaviours have more distinct elements of professional autonomy compared to GLD legal advisers.

By exploring the role perceptions of lawyers situated in exclusive legal departments, this chapter also addresses an additional sub-question developed in chapter three, specifically: 'Do interactions across departmental boundaries encourage a supra-departmental affiliation where the lawyers perceive their roles in accordance with the 'bigger picture' of the organisation?' As explained in chapter three, a supra-departmental affiliation includes outward-looking behaviours that indicate a (partial) shift of affiliation away from the primary organisation in which a bureaucrat is located.[852] This suggests that lawyers' ideas of appropriate behaviour will not be solely shaped within the boundaries of their own departments, operating as an isolated silo. For lawyers situated in exclusive legal departments, who engage in regular interactions with policy departments (ministries or sector DGs), it is anticipated that a supra-departmental affiliation will enhance the likelihood of these lawyers assessing the appropriateness of their behaviours by also taking into account the political preferences of the policy departments too, rather than solely considering professional legal norms.

This chapter also addresses two sub-questions related to the analytical concept of expertise. One of these questions was partially captured in chapter six, specifically: 'What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?' Emphasis was placed on on-the-job experiences which enabled lawyers to acquire the necessary expertise, including interactions with lawyers and non-lawyers, practical experiences of *doing* the job, and working alongside mentors. This chapter will also address an additional sub-question developed in chapter three, namely: 'Do the lawyers rely on interpreters for a productive relationship with other groups, or might they adopt this interpreter role themselves?' As outlined in chapter three, the notion of interpretation is associated with the idea of interactional expertise.[853] Ultimately, interpreters

[852] Trondal and others (n 320) 126–28.
[853] Collins and Evans, *Rethinking Expertise* (n 401) 32.

acquire an understanding of the distinct practices of two groups by engaging in regular communication with each of them. Interpreters can then rely on this knowledge to adopt a go-between role where they bring the two groups 'into a productive relationship with one another'.[854]

A very similar structure to that of chapter six will be adopted. The work of UK Government lawyers will be explored first before proceeding to explore the work of European Commission lawyers. While each type of lawyer from the two bureaucracies will be discussed independently, some overlap is inevitable given their close collaboration during this process. The concluding section will summarise how the empirical findings presented in this chapter address the various sub-questions outlined in this introductory section. It will also identify some interesting comparisons between the work of UK Government and European Commission lawyers, including the fact that an interpreter role is adopted by legal advisers working in both of these bureaucracies. It is worth noting that a degree of overlap is inevitable with chapter six as some of the functions emerging in this phase are a continuation of those outlined in the previous chapter.

7.2. UK Government

In the previous phase explored in chapter six, GLD legal advisers serve a crucial role in clarifying the policy intention alongside departmental policy officials. They also provide legal advice to the lead ministerial department and prepare legal instructions for Parliamentary Counsel. While the involvement of Counsel in the previous phase is less extensive than that of legal advisers, chapter six acknowledged their role in providing forward-looking advice to the lead department on legislative drafting and procedural matters. The analytical framework in chapter three revealed that there is not much information available on what legal advisers do during this chronological phase, with the academic literature often overlooking their involvement once they deliver the legal instructions to Counsel.[855] There is more information available on

[854] Ribeiro (n 437) 562.
[855] See table 1.

the work of Counsel, particularly in analysing the policy intention and drafting the Bill provisions. However, this information is typically offered in first order accounts that do not benefit from a wide range of perspectives or the theoretical capacities of an 'outsider' researcher.[856] Moreover, the majority of this information does not delve into the accomplishment of this work within a bureaucratic context, including a careful analysis of the political-professional conflicts that may arise.

The following discussion will overcome these knowledge gaps through the presentation of empirical findings. The work of GLD legal advisers will be discussed first, including their crucial role in engaging with Counsel's intellectual analysis of the legal instructions and offering feedback on the draft clauses of the Bill. This chapter will also provide further information on the expertise of legal advisers, specifically how they adopt an interpreter role between policy officials and Counsel. The work of Counsel will then be explored, including their role in analysing both the policy intention and proposed legal solution. Considerable attention will also be drawn to their drafting function and their guardianship role. The discussion will then examine Counsel's political-professional behaviour, revealing that a high degree of professional autonomy is adopted when the conflict compromises this guardianship role. While the expertise of Counsel was considered in chapter six, this chapter will highlight why it is beneficial for them to lack subject specialism in the area of a Bill.

7.2.1. Legal advisers

At the end of the previous phase, legal instructions are finalised and delivered to OPC. As revealed already in chapter six, legal instructions are often delivered to Counsel in "tranches" as opposed to a complete set.[857] On this point, another Counsel participant explained, "For a small Bill, kind of a two or three clause Bill, we might get literally one set of instructions… But much more usually, you will get instructions in chunks."[858] Receiving the instructions, whether in portions or as a

[856] Noordegraaf (n 1) 59.
[857] Interview with OPC 19 (6 September 2019).
[858] Interview with OPC 20 (1 August 2019).

whole, initiates a back-and-forth process between the two types of lawyers.[859] During this process, Counsel will subject the policy intention and proposed legal solution contained in the instructions to a thorough intellectual analysis, as discussed in more depth below, and legal advisers will respond to their queries, comments, or suggestions. One GLD participant highlighted a strong appreciation for Counsel's insights as they are "enormously helpful" at "stress-testing the underlying policy intentions" and uncovering shortcomings which legal advisers and policy officials failed to identify in the previous phase.[860] Given that the proposed legal solution may need to be refined or adjusted in accordance with Counsel's insights, legal advisers may have to reassess their legal advice, potentially carrying out an updated legal risk assessment. As mentioned in chapter six, any legal changes affecting the policy will need to be submitted to the minister for clearance.

Once Counsel have completed their analysis of the legal instructions, and any necessary adjustments are made to the legal solution by the lead department, Counsel are in a better position to start drafting the Bill provisions. Although legal advisers recognise the "specialist skill set" of Counsel and remain highly responsive to their drafting choices, they still provide feedback on the draft clauses prepared, communicating their own perspectives or conveying those of policy officials.[861] According to a GLD participant, "Parliamentary Counsel are drafting legislation day in day out and so we are always very receptive to any suggestions they might have. But then equally, we will test them".[862] A Counsel participant emphasised the importance of this feedback as it is only through this "back-and-forth process" between Counsel and the lead department that a "robust" Bill can eventually be produced:

> It is a very back and forth process. Absolutely. And indeed if you draft something first off and send it to the department and somebody writes back to you and say thank you very much, that's great, you just think well they clearly haven't read it. So what we really want is people to

[859] Interview with GLD 23 (10 December 2019).
[860] Interview with GLD 23 (10 December 2019).
[861] Interview with GLD 23 (10 December 2019).
[862] Interview with GLD 23 (10 December 2019).

> really engage with it and to challenge it. And to write back and say, I don't understand this, are you sure that's right, have you thought about that, I don't like this, I think this is really complicated, does it need to be this complicated? And it's through that back-and-forth process that you get a robust draft.[863]

This section has already indicated the interpreter role of legal advisers as the back-and-forth process is largely mediated by legal advisers who, in addition to expressing their own views on the draft clauses, will also convey the views of policy officials. According to one GLD participant, legal advisers "kind of act as a sort of, something of a go-between between Parliamentary Counsel and the policy officials."[864] A similar view was shared by a Counsel participant who revealed that legal advisers are their "primary connection" in the ministerial department.[865] In line with an existing academic claim, however, participants confirmed that has been a decline in the use of interpretation as the increased informality in Whitehall has encouraged "more human contact" between all three parties.[866] Despite this change, participants emphasised that interpretation still takes place as it is needed for the purpose of translating the technical terms used by Counsel in a way that policy officials can understand. Moreover, as highlighted below, interpretation is also required as it involves a component of mediation, even though the relationship between Counsel and policy officials is not characterised by significant conflict.

7.2.1.1. Political-professional behaviour

The political-professional behaviour of legal advisers was explored in chapter six as this conflict was closely connected to their legal risk advice which featured more extensively in the previous chapter. The key finding was that legal advisers adopt behaviours associated with the Weberian role perception where they do not find it appropriate to create obstacles for ministerial preferences unless they are "clearly

[863] Interview with OPC 19 (6 September 2019). As mentioned in chapter six, Counsel participants frequently discussed their communication with the 'department' in cases where they were referring to legal advisers.
[864] Interview with GLD 23 (10 December 2019).
[865] Interview with OPC 20 (1 August 2019).
[866] Interview with OPC 20 (1 August 2019). See Yong (n 5) 49.

unlawful".[867] While legal advisers are subject to clear guidelines detailing how they should manage instances of political-professional conflict, participants placed more emphasis on their regular interactions with departmental policy officials and how these shaped their ideas of appropriate behaviour. This corresponds with the neo-institutional perspective adopted in chapter three which advanced that rules guiding behaviour are not necessarily formalised but can form 'part of a code of appropriate behaviour' that bureaucrats learn through in-house socialisation.[868]

7.2.1.2. Expertise

Chapter six examined the expertise needed by legal advisers to perform their functions and emphasised the importance of on-the-job experiences in the UK Government to develop this, including interactions with lawyers and non-lawyers, hands-on experience of drafting secondary legislation, and the regular monitoring of instances of non-compliance. The focus of this section is on the go-between role adopted by legal advisers which has clear parallels with the notion of an 'interpreter' outlined in chapter three.[869] As indicated already, legal advisers interpret most of the communication between policy officials and Counsel, either by translating terms or acting as mediators. In line with theoretical insights in chapter three, the success of interpretation is based on the acquisition of interactional expertise which indicates a fluency in the practice languages of both groups.[870] As practice languages are laden with tacit knowledge, interpreters can learn a surprising amount about the meaning of words as they are used in the practices of both groups, but also about the nuances of the practices which cannot be easily articulated in written texts.[871]

[867] Interview with GLD 22 (10 December 2019).
[868] March and Olsen (n 340) 22.
[869] Ribeiro (n 437) 562.
[870] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 93. See also Collins (n 426) 274.
[871] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 24. See also Collins and Evans, *Rethinking Expertise* (n 401) 32.

Interactional expertise is acquired through linguistic socialisation in the respective domains of practice, with face-to-face conversations identified as the most effective means of linguistic socialisation, partially due to the sense of trust and rapport developed.[872] Chapter six has already revealed that legal advisers and policy officials engage in extensive conversations that regularly take place during in-person meetings, facilitated by their shared location in the ministerial department. While face-to-face interactions between legal advisers and Counsel do not always occur during the previous phase, a GLD participant expressed that "meetings between lawyer to lawyer" are more frequent during this phase as it is beneficial to explore ideas collectively stemming from the analysis performed by Counsel.[873] One GLD participant explicitly acknowledged that it is their interactions with "both sides" which allows them to assume the role of an interpreter and foster a productive dialogue between policy officials and Counsel.[874] A similar view was shared by a Counsel participant who explained that legal advisers are "very immersed" with both groups and "in an ideal world would have built up good relationships" with each of them.[875]

A central element of an interpreter's role is their capacity to translate information between the distinct groups so that it is accessible and understandable to both of them.[876] GLD participants placed more emphasis on translating the language used by Counsel for the benefit of policy officials rather than the other way around, possibly indicating that the language used by Counsel is more specialised as it carries drafting or legal nuances.[877] While some of this translation is expected to be facilitated by legal advisers' contributory expertise as they are likely to share with Counsel a fundamental grasp of legal principles based on their common backgrounds as government lawyers, responses emphasised the need to translate

[872] Collins and Evans, *Rethinking Expertise* (n 401) 32; Collins and others (n 431) 60.
[873] Interview with GLD 22 (10 December 2019).
[874] Interview with GLD 23 (10 December 2019).
[875] Interview with OPC 20 (1 August 2019).
[876] Ribeiro (n 437).
[877] Interview with GLD 22 (10 December 2019).

technical drafting language used specifically by Counsel. As expressed by one GLD participant:

> We perhaps have a better understanding of the jargon and some of the technical concepts that Parliamentary Counsel might discuss. So, we can sort of engage on that but then help sort of translate that into, in a way that hopefully [policy officials] will be able to understand and engage with.[878]

Beyond such translation, GLD participants highlighted that their interpreter role involves an "element of mediation".[879] While the relationship between policy officials and Counsel was not described as particularly tense, legal advisers still utilise insights gained from their interactions with each of the groups to help manage their respective expectations, alleviate possible tensions, and facilitate mutual agreements.[880] This reflects the idea of 'explanatory conversations' introduced in chapter three where interpreters go beyond linguistic interventions to communicate with either one or both of the groups, specifically to explain their respective differences.[881] One GLD participant explained that they forewarn policy officials that Counsel are required to "test the instructions and the underlying policy nearly to destruction" to fulfil their role.[882] This informs policy officials that Counsel are not creating difficulties based on personal views while simultaneously alerting policy officials to the fact that they may have to rethink the original policy ideas. Similarly, based on their experiences of working alongside policy officials, and their socialisation within the department more generally, legal advisers can explain to Counsel why some ideas will not be "workable" due to departmental priorities.[883]

According to a Counsel participant, "the system of working through departmental lawyers works very well" for enhancing comprehensibility and alleviating possible

[878] Interview with GLD 22 (10 December 2019).
[879] Quote attributed to GLD 22 (10 December 2019); Interview with GLD 23 (10 December 2019).
[880] Ribeiro (n 437) 570.
[881] Explanatory conversations were explored in chapter three. For more information see Ribeiro (n 437).
[882] Interview with GLD 22 (10 December 2019).
[883] Interview with GLD 22 (10 December 2019).

tensions but “occasionally” there are times where it does not work.[884] In such instances, the same participant revealed that it is helpful to get everyone around the table.[885] There were two primary reasons why direct communication between policy officials and Counsel might be advantageous, one of which is to help Counsel better “understand the policy drivers” of a Bill.[886] This is especially useful if the legal adviser assigned to the Bill has had “too much to do and they can’t really get to grips with the policy”.[887] Another reason is to foster a rapport between policy officials and Counsel which can consequently facilitate a mutual agreement being reached.[888] Expanding on this point, a Counsel participant identified that legal advisers sometimes have “trouble persuading the policy clients” of Counsel’s recommendations and a direct meeting can increase the likelihood of policy officials understanding and ultimately agreeing with Counsel.[889] This idea was reinforced by another Counsel participant who explained that meeting with the minister can be helpful to foster a sense of familiarity and demonstrate that Counsel are not being unnecessarily obstructive:

> And sometimes it is quite helpful to see the minister directly so rather than it being Chinese whispers which gets through as the drafter says you can’t do it, you actually go and say well it’s not that we can’t do it, it’s that doing that doesn’t actually produce the result you’re after. And usually that is quite a productive conversation just to cut through the many levels of administration and just, you know, have a direct discussion with the minister.[890]

Ultimately, this discussion has revealed the go-between role of legal advisers which has parallels with the idea of an interpreter introduced in chapter three.[891] More specifically, it emphasised the importance of legal advisers engaging in linguistic interventions by translating terminology for the benefit of policy officials, while also highlighting that legal advisers go beyond this to help policy officials and Counsel

[884] Interview with OPC 21 (15 August 2019).
[885] Interview with OPC 21 (15 August 2019).
[886] Interview with GLD 22 (10 December 2019).
[887] Interview with OPC 21 (15 August 2019).
[888] Collins and others (n 431) 60.
[889] Interview with OPC 21 (15 August 2019).
[890] Interview with OPC 19 (6 September 2019).
[891] Ribeiro (n 437) 562.

understand and become familiar with each other's practices. Interestingly, the discussion also revealed that there are limitations as to how effectively interpretation can lead to a mutual agreement between the ministerial department and Counsel. This finding appears to be grounded in the theoretical perspective outlined in chapter three which advances that direct face-to-face interactions serve a crucial role in building trust and transferring knowledge between parties, both of which are important factors in facilitating mutual agreements.[892]

7.2.2. Parliamentary Counsel

Once the PBL Committee reach a provisional view on the contents of the legislative programme, with chapter one providing more information on how this view is reached, it will grant the lead ministerial department authority to deliver the legal instructions to OPC. A Counsel participant revealed that this is a "quite a grey area".[893] The participant explained, "sometimes drafting authority comes through quite late and therefore if you know what the timetable is likely to be, then in practical terms you will have had to have started on the Bill before the formal drafting authority."[894] The legal instructions are ultimately sent to the relevant team leader in OPC who is responsible for assigning drafters to the Bill, although chapter six mentioned that drafters may have already been selected. Once Counsel receive the legal instructions, their primary task is to subject the policy intention and legal solution to a thorough analysis. As mentioned in chapter six, both policy officials and legal advisers would have already invested a considerable amount of time clarifying these details. Counsel participants frequently stressed the importance of their own analysis, identifying it is a prerequisite to writing the Bill:

> If you're trying to write the law and you're struggling, it's because you haven't done the analysis. And any drafter would tell you that, however experienced they are. When they come to put pen to paper, if they think they understand it and they just can't get it to work, it's

[892] Collins and others (n 431) 60.
[893] Interview with OPC 21 (15 August 2019).
[894] Interview with OPC 21 (15 August 2019).

> because [they] need to go back and do the analysis again…So that is the main thing. So I would say it is 80% analysis and 20% writing.[895]

While the literature in chapter two emphasised the importance of Counsel's analytical function, this discussion provides further insight into what this analytical function entails in practice, including the interactions it necessitates with the lead department.[896] Counsel participants explained that this function requires them to question what the minister intends to achieve and whether the proposed legal solution satisfies that.[897] This can be straightforward. For example, if the instructions state that a Bill needs to change the duration within which something needs to be done from fourteen to twenty-one days, Counsel are simply "just crossing out 14 and putting in 21".[898] However, in other situations, Counsel might struggle to identify what the policy intention is from the legal instructions, either because the subject matter is especially difficult or the policy is underdeveloped. A considerable amount of back-and-forth is then needed with the lead ministerial department, often communicated through legal advisers, to request further clarification. According to one Counsel participant, "we are saying to them, do you really want that? Is that really what you mean? Don't you mean this? And quite often they'll say oh yes, we do mean that [or] they might say no, this is definitely what we want to do".[899] The same participant explained that it is "not uncommon" during this back-and-forth to discover that the policy problem (the mischief) is not what the lead department anticipated:

> Because it's not uncommon for the analysis that goes on here to actually question what they think the issue is, what they think the legal consequences of the issue is, and quite often through discussion then with the department, we will come to a joint understanding that the issue is not that and that the real problem is actually this, and that's what needs to be addressed. And that's not uncommon.[900]

[895] Interview with OPC 19 (6 September 2019).
[896] Bowman (n 171) 70; Page (n 116).
[897] Interview with OPC 21 (15 August 2019).
[898] Interview with OPC 21 (15 August 2019).
[899] Interview with OPC 19 (6 September 2019).
[900] Interview with OPC 19 (6 September 2019).

Counsel may also identify omissions or issues with the legal solution. For example, if the lead department aims to criminalise a certain type of behaviour, they may have failed to consider whether certain categories of people are incapable of committing the criminal offence. Counsel's analysis might also raise issues that jeopardise the integrity of the statute book. Safeguarding the integrity of the statute book constitutes Counsel's guardianship function although participants admitted that this function can be hard to define.[901] When asked to elaborate on what might jeopardise the integrity of the statute book, Counsel participants specifically highlighted legislative proposals that are "improper or contrary to the rule of law".[902] The integrity of the statute book can also be compromised if the legislative language used has an adverse effect on the constitutional relationship between the three branches of government, including through the use of overly obscure language or the inclusion of legally unnecessary provisions. One Counsel participant highlighted how these responsibilities are relevant to their guardianship role:

> The drafter would regard themselves as having a role as sort of a guardian of the statute book because the constitutional position of the Parliament, the Government and the courts in the UK depends in part on the courts respecting that the law ought to be upheld, the statutory law, and if the law is rubbish or if it's jingoistic [and] not really there to amend the law, then that brings the law into disrepute and then what happens to the relationship with the courts, well the courts will be more likely to not follow the law, to interpret the law as something other than what the blackletter suggests, so we think it's very important that the sort of integrity of the law is maintained.[903]

If Counsel's analysis reveals that the policy ideas and legal solution contained in the legal instructions do not give effect to what is intended by the minister, or that certain omissions or problems exist, they will adopt a problem-solving approach to assist the lead department.[904] According to a Counsel participant, "in the sort of legal analysis, you have to be quite creative I think and problem-solving rather than just continually saying no, no, no… What the [lead] department wants is somebody who wants to roll

[901] Interview with OPC 19 (6 September 2019); Interview with OPC 21 (15 August 2019).
[902] Interview with OPC 20 (1 August 2019).
[903] Interview with OPC 19 (6 September 2019).
[904] Interview with OPC 19 (6 September 2019).

their sleeves up and find a way that does work rather than just saying no."[905] Although this challenges the purist view that Counsel's work should be confined to the wording of legislation, participants emphasised that Counsel are always mindful of acting in an advisory capacity and not "imposing" their views or "dictating" to the lead ministerial department what it must do.[906] On this point, they also emphasised that the lead department is best placed to formulate the policy as it has a better understanding of "how you make policy and how you make sure it's robust and how you consult on it, all of that."[907]

Once the ideas contained in the legal instructions have undergone rigorous stress-testing, Counsel are in a better position to start drafting the legislative clauses. The Good Law initiative launched by OPC in 2013 establishes various drafting principles, namely: necessity, clarity, coherence, effectiveness, and accessibility.[908] The vision of this initiative, which is to reduce excessive complexity for users of legislation, is a key priority for Counsel. According to one Counsel participant, "it absolutely is very much part of our primary objectives as drafters to produce law that is clear and easy to understand".[909] The same participant emphasised, "there are some amazing statistics about the extent to which people, non-lawyers, now access legislation. I don't know if you've looked at legislation.gov, the National Archives. Their figures around the number of unique hits they get every month is absolutely gobsmacking."[910] Participants nevertheless revealed a tension between drafting a proposal with the detail needed to achieve its intended objectives (effectiveness) while ensuring that it remains comprehensible (clarity, coherence, and accessibility).

[905] Interview with OPC 19 (6 September 2019).
[906] Interview with OPC 19 (6 September 2019). For a recognition of the purist view see The Hansard Society (n 142) 46; Bowman (n 113) 5; Stefanou (n 162); Page (n 116).
[907] Interview with OPC 19 (6 September 2019).
[908] Office of the Parliamentary Counsel, 'When Laws Become Too Complex: A Review into the Causes of Complex Legislation' (2013).
[909] Interview with OPC 20 (1 August 2019).
[910] Interview with OPC 20 (1 August 2019).

As indicated in chapter six, getting the "the right balance" between the drafting principles is a skill learnt over time.[911] The general consensus was that the principle of effectiveness should prevail if such tension emerges as the Bill is "pointless" if it does not actually perform its intended job.[912] However, Counsel must also consider the likely audience of the legislation to strike an appropriate balance. Without this, the legislation might not be comprehensible to its readers. One Counsel participant explained that it might be necessary to "take the risk that you might not cover one little thing which in an ideal world you would cover because if we have all these words on the page, there is the risk that it just won't make any sense at all" to its readers.[913] Counsel's drafting choices are also influenced by other considerations, including the language already used on the statute book. According to one Counsel participant, "if you now use something different, people will think it means something different. The courts might legitimately say well, why didn't you do the same as is over there?"[914] Furthermore, their drafting choices might also be influenced by the presentational and political interests of the minister, as explored further below.

7.2.2.1. Political-professional behaviour

Chapter five predicted that a primary affiliation towards OPC is likely to encourage a considerable degree of professional autonomy where Counsel raise their professional views more persuasively than the ideal-typical Weberian bureaucrat. Counsel's behaviours are therefore likely to be guided by 'professional correctness and the power of the better argument'.[915] This prediction was largely based on the fact that OPC is physically separated from ministries, it constitutes an exclusive network of drafters led by a non-political administrator, and that drafters can circumvent political hierarchies on professional grounds.[916] This chapter has also revealed that Counsel adopt a guardianship role, with previous chapters highlighting

[911] Interview with OPC 21 (15 August 2019).
[912] Interview with OPC 19 (6 September 2019).
[913] Interview with OPC 20 (1 August 2019).
[914] Interview with OPC 19 (6 September 2019).
[915] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.
[916] Trondal and others (n 320) ch 8; Christensen and Mandelkern (n 373).

that professional autonomy is expected to be greater if a bureaucrat's knowledge is recognised as being central to the operation and legitimacy of the organisation.[917] Despite these indicators of professional autonomy, chapter five acknowledged that the *process*-specialisation of OPC, which is expected to lead to regular interactions with ministerial departments, could foster a supra-departmental affiliation where Counsel consider the appropriateness of their behaviours in accordance with the institutional norms of ministerial departments too.[918]

Responses highlighted that Counsel do not adopt a single approach to the political-professional conflict as their behaviours are dependent on the nature of the drafting issues raised.[919] For matters solely related to the presentation of a Bill's content, Counsel generally show deference to ministerial preferences. This was reflected when a Counsel participant said, "the minister is entitled to have a view on how the legislation is presented, you know, which bit goes first and up to a point the language used, you know, labels for things".[920] Another participant highlighted a situation where the minister wanted to insert their flagship provision at the start of the text.[921] While the participant acknowledged that this presentational choice could interrupt the flow of the readers, their response did not imply any signs of objection towards the minister's choice. Accepting presentational choices, even when they do not adhere to the highest drafting standards, was further observed when responses did not indicate any objections being raised when lead departments ask Counsel to change the order of where the "really controversial stuff" is located in the Bill.[922] According to a Counsel participant, "quite often they will want the really controversial stuff at the front so if you have a big row, you have the big row and get it over with".[923]

When elaborating on this approach, Counsel participants emphasised that decisions in the lead department are influenced by various considerations and pressures. One

[917] Trondal and others (n 320) 159.
[918] ibid 128.
[919] Purdy (n 14) 85–86, 114.
[920] Interview with OPC 19 (6 September 2019).
[921] Interview with OPC 20 (1 August 2019).
[922] Interview with OPC 20 (1 August 2019).
[923] Interview with OPC 20 (1 August 2019).

Counsel participant explained, “you have the minister who has political priorities, you’ve got the Bill manager who is immersed in the idea that you’ve got to get this thing through Parliament… I mean, a Bill isn’t a thing, it doesn’t live on its own. It’s very much part of its political and presentational landscape.”[924] Another Counsel participant expressed, “You know, there is no point in putting a Bill into Parliament that everyone hates just because the drafter thinks that’s the best way to do it.”[925] An appreciation of the various considerations influencing a Bill, which fosters a perception among Counsel that it would be inappropriate to expect the department to adhere to strict drafting standards at all costs, corresponds with the idea of a supra-departmental affiliation.[926] More specifically, Counsel’s perceptions of appropriate behaviour are not solely shaped within the boundaries of OPC as it if were operating as an isolated silo. Instead, they assess their behaviours by also taking into account the ‘bigger picture’ of the organisation, with specific reference made to the priorities of the minister and Bill manager in the lead department.[927]

As chapter five anticipated, there are nevertheless times when Counsel will adopt more professional autonomy. Chapter three has already explained that professional autonomy does not require a legislative drafter to withdraw from a Bill project but can be demonstrated through the act of educating ministers and/or their administration, or raising professional views persuasively through oral or written statements.[928] Responses demonstrated that Counsel are willing to raise their views persuasively if the conflict falls within the scope of what is portrayed to be their wider obligation towards the public.[929] If a proposal is aimed towards the public at large, a Counsel participant revealed that they will attempt to “persuade the department to sacrifice a very, very small element of certainty in favour of clarity”.[930] When asked about the types of proposals this applies to, the participant said, “criminal law and sort of

[924] Interview with OPC 20 (1 August 2019).
[925] Interview with OPC 19 (6 September 2019).
[926] Trondal and others (n 320) 126–28.
[927] ibid 128.
[928] Purdy (n 14) 85–86, 114; Nzerem (n 312) 133.
[929] Interview with OPC 20 (1 August 2019).
[930] Interview with OPC 21 (15 August 2019).

anything to do with contract and tort, it really ought to generally speaking be reasonably easy to express concepts in ways that people will understand".[931] Responses provided a further reason for why Counsel are willing to enforce a greater sense of professional autonomy to improve the accessibility of the statute book, specifically emphasising a distinction between themselves and officials in the lead department, including legal advisers:

> And I think [accessibility] is something that quite often the departments don't think about in that way because they are not immediately interacting with the end user of the legislation. And I find departmental lawyers, because they tend to be operating with professional stakeholders and with ministers and with policy officials, they are much more likely to forget who the end user of legislation is than we are.[932]

Beyond improving the accessibility of the statute book, Counsel are also willing to enforce a considerable extent of professional autonomy if the minister is asking them to draft a provision that falls "foul of the basic rule that you should only use legislation to change the law".[933] This is especially so if the proposed legislative provision would incur excessive costs, including for any corporate bodies affected by the statute. One of the Counsel participants revealed a situation where the minister leading the Bill requested that they draft a legislative provision which was solely intended to emphasise the importance of their policy:

> When it came back to me that the minister was very keen to have this provision as sort of signalling the importance of the policy I said okay, but I would like to meet with the minister directly to talk through my concerns at which point the policy officials sort of said, oh actually no, we can see it's a really bad idea.[934]

Although in this instance the lead ministerial department understood Counsel's concerns and amended their decision accordingly, I asked the participant whether they would have still drafted the provision if the minister had wanted to proceed with

[931] Interview with OPC 21 (15 August 2019).
[932] Interview with OPC 20 (1 August 2019).
[933] Interview with OPC 20 (1 August 2019).
[934] Interview with OPC 20 (1 August 2019). The details have been removed to protect the confidentiality of the participant.

their original decision. Their response was founded on the classic Weberian distinction between bureaucrats and politicians identified in chapter three which advances that bureaucrats should refrain from making autonomous decisions because unlike politicians, they are not democratically elected and therefore not accountable to the public.[935] The Counsel participant stressed, "Had I ended up meeting with the minister and the minister said, I want you to do this, I couldn't have said no. So I don't, absolutely not. We are civil servants on a level with all the other civil servants."[936] Thus, while professional autonomy is imposed, it does not necessarily lead to extreme behaviours, corresponding with the view in chapter three that political-professional behaviour should be viewed as a spectrum.[937] The same participant nevertheless emphasised that they would be willing to escalate a proposal to the Attorney General's Office (AGO) if they believed that the resulting Act would challenge the integrity of the statute book:

> On propriety and sort of constitutional grounds, we ultimately have the option of going to the Attorney General. So, if we are being asked to do something that we think is improper or contrary to the rule of law, we can ask the Attorney General's Office to intervene…So you know, if someone was asking us to do something that was quite clearly contrary to the Human Rights Act or to European law then yes, you would pick up the phone to the Attorney General's Office and say actually, we think you need to get involved in sort of negotiating an agreement about this.[938]

Despite a willingness to escalate the proposal to the Law Officers, one Counsel participant could not recall an occasion in the past ten years where a proposal had been formally escalated and went on to explain that ministers are generally "not trying to do outlandish things".[939] Most of the interactions between Counsel and the Law Officers are in fact relatively informal, with Counsel seeking the legal opinions of

[935] Gerth and Mills (n 285) 95; Tholen and Mastenbroek (n 5) 492–93. This notion was introduced in section 3.3.1.
[936] Interview with OPC 20 (1 August 2019).
[937] Moss (n 14) 1306.
[938] Interview with OPC 20 (1 August 2019). The Attorney General and the Solicitor General are the UK Law Officers. The Attorney General's Office provides support to the Law Officers.
[939] Interview with OPC 19 (6 September 2019).

the Law Officers without the need for formal escalation.[940] Responses also highlighted that many of the emerging issues on a legislative proposal are informally resolved through discussions between the lead ministerial department and Counsel. This cooperation is influenced by a strong sense of team spirit where both the lead department and Counsel are "on the same side" of wanting to give effect to the minister's policy "in the best possible state".[941] The same Counsel participant elaborated on this point:

> It doesn't really get to the point where they're saying, yes we have to do this and we're saying, no you can't do it. Because it's not really that sort of relationship. We are trying to give effect to the policy, that's what we are all trying to do. And we are trying to find a way to do that so that it produces rigorously analysed, robust legislation.[942]

This sense of team spirit between the lead ministerial department and Counsel is expected to be fostered through their face-to-face interactions, albeit via legal advisers who may not be formal members of the ministerial department but still attach a strong sense of affiliation and identification there.[943] An agreement between the parties is also facilitated by Counsel's *informal* authority which in this context relates to authority that is not formally prescribed by established rules or hierarchies. This authority stems from Counsel's unparalleled experience of Bill projects compared to other Whitehall officials. After drawing attention to this experience, a Counsel participant expressed, "we don't have any particular powers but what we do have I guess is a fair amount of clout… I mean, people do tend to take OPC advice fairly seriously".[944] In addition to Counsel's extensive knowledge on Bill projects, their informal authority is enhanced by the fact that they "hold the pen".[945] However, a Counsel participant stressed that this authority must be relied on "very carefully":

[940] Interview with OPC 19 (6 September 2019).
[941] Interview with OPC 19 (6 September 2019).
[942] Interview with OPC 19 (6 September 2019).
[943] Trondal and others (n 320) 135. For the strong departmental affiliation of legal advisers, see chapter 5 (section 5.2.1).
[944] Interview with OPC 20 (1 August 2019).
[945] Interview with OPC 21 (15 August 2019).

> I mean in practical terms, the fact that we hold the pen effectively does give us quite a lot of power, although it is power that you have to exercise very carefully. So to a certain extent we are able to say I can't draft that. However, that is a power you have to exercise very carefully because people will challenge you on it and if it's a very high political priority then you can't expect to say, I can't draft that and that be the end of it. You would expect people to come back and challenge that quite strongly.[946]

Ultimately, this discussion reveals that Counsel adopt a considerable sense of professional autonomy where they are willing to actively promote their drafting views, even if these do not align with the choices made by the ministerial department.[947] This becomes particularly clear when comparing their behaviours to those adopted by GLD legal advisers who are reluctant to intervene or challenge ministerial decisions unless an exceptionally high standard of unlawfulness is met.[948] However, Counsel do not adopt a consistent approach in all conflict situations as their behaviour is very much dependent on the nature of the drafting issues. For certain drafting matters, including presentational ones, Counsel are likely to show deference to departmental choices even when these do not adhere to the highest drafting standards. When justifying this, participants drew attention to various factors, including an awareness of various pressures within the lead department, their unelected status, and a shared sense of purpose with the lead department. The fact that these factors shape Counsel's political-professional behaviour indicates the emergence of a supra-departmental affiliation where the way they perceive their role is also guided by cross-departmental interactions, with a specific focus on their interactions with ministries.[949]

As chapter five anticipated given Counsel's primary affiliation to OPC, there are numerous circumstances where Counsel will assert their professional autonomy more strongly, especially if the political-professional conflict compromises their guardianship function of safeguarding the integrity of the statute book. Counsel

[946] Interview with OPC 21 (15 August 2019).
[947] Christensen (n 295) 310.
[948] Purdy (n 14) 85–86, 114.
[949] Trondal and others (n 320) 126–28.

demonstrate their professional autonomy by attempting to persuade the department to change its approach, asking to meet with the minister, or by displaying a willingness to escalate proposals to the Law Officers. Although formal escalation to the Law Officers is uncommon, it is important to note that Counsel acquire a significant sense of informal authority which reduces the need to resort to such formal measures. This informal authority is mainly attributed to their extensive knowledge gained from experiences working on Bill projects, a feature of Counsel already examined in chapter six. Ultimately, the effects of this informal authority demonstrate that a bureaucrat's recognised knowledge may in fact reduce the possibility of political-professional conflicts emerging in the first place.[950]

7.2.2.2. Expertise

Chapter six explored the knowledge and skills needed by Counsel to perform their work and highlighted the importance of OPC's mentoring scheme, Counsel's hands-on experience of working on Bill projects, and their regular conversations with parliamentary clerks. This section will briefly discuss the need for Counsel to uphold a level of distance from early policy discussions, and from the subject matter of the Bill, in order to perform their analytical function successfully. As emphasised already, this function is crucial to Counsel's work as it provides them with the capacity to stress-test the policy intention and associated legal solution which, in turn, serves as an essential prerequisite for them to draft the Bill clauses. The level of distance upheld by Counsel is interesting because while this thesis primarily emphasises the role of socialisation experiences in gaining expertise, there may be instances where a lack of socialisation is essential for actors to retain the objectivity and critical perspective needed to perform their work successfully.[951] This was briefly touched upon in the previous chapter as GLD legal advisers' limited involvement in the very early stages of policy initiation, especially in comparison to policy officials, is what

[950] ibid 159.
[951] Anne-Claire Pache and Filipe Santos, 'Embedded in Hybrid Contexts: How Individuals in Organizations Respond to Competing Institutional Logics' in Michael Lounsbury and Eva Boxenbaum (eds), *Institutional Logics in Action, Part B* (Emerald Group 2013).

enabled them to offer a fresh perspective and act as “a second pair of eyes on the policy”.[952]

Chapter six has already identified that Counsel are usually involved during the first phase for the provision of forward-looking advice. Nevertheless, Counsel participants revealed that they are mindful to not become ‘captive’ by the initial policy ideas as this could ultimately prevent them from bringing the degree of outside, critical perspective needed to analyse the legal instructions. Based on the socialisation capacities of face-to-face communication, a critical perspective is more likely to be preserved if Counsel do not participate in several departmental meetings prior to receiving legal instructions.[953] While Counsel may have preliminary meetings with the lead department prior to carrying out their analysis, these early meetings were not framed as being crucially focused on the policy or its formulation. While a certain degree of policy knowledge might have to be acquired during the early stages to provide forward-looking advice, a Counsel participant emphasised that the key objective of an early meeting is to establish a sense of rapport with the lead department, especially with legal advisers:

> [A face-to-face meeting prior to receiving legal instructions] tends to be dependent on people’s preferences. I always do because for me, one of the things that makes the biggest difference to the quality of the eventual product is if you have a good working relationship with the people instructing you. And I think particularly if you are being instructed by people who aren’t very experienced.[954]

On the topic of maintaining objectivity, Counsel participants also highlighted a characteristic of theirs already identified in chapter five, specifically the fact that Counsel draft Bills in a broad range of areas even while working in the same team.[955] From a practical perspective, this is because there are only three drafting teams in

[952] Interview with GLD 23 (10 December 2019).
[953] Collins and Evans, *Rethinking Expertise* (n 401) 32; Collins and others (n 431) 60.
[954] Interview with OPC 20 (1 August 2019). The sector has been changed to protect the participant’s confidentiality.
[955] An exception to this is in the area of taxation as some Counsel will be assigned to this area for around four to five years, particularly due to the complexity of this area, the length of the tax statute book, and the fact that the parliamentary procedure is different.

OPC yet over twenty ministerial departments, each with their own sectoral focus. However, aside from practical considerations, this was identified as a preferred approach as it enables Counsel to preserve a sense of "freshness" when they are assigned to a Bill which, in turn, helps them uncover omissions or problems in the policy ideas and proposed legal solutions.[956] On this point, a GLD participant acknowledged that Counsel's relative detachment from the subject area presents a key distinction between them and legal advisers who are co-located in a ministerial department for at least three to five years.[957] The same GLD participant also elaborated on how this makes Counsel excellent candidates for performing a high-quality analysis during this phase, including in comparison to legal advisers:

> You have to bear in mind that although we offer that second pair of eyes, we work in the area day in day out and so we may be prone to making assumptions because of our sort of, our specialist knowledge. And I suppose that is another benefit to having a non-specialist drafter. What I mean by non-specialist drafter is non-specialist in the subject matter. They can come in and say, I don't know anything about this so you have to explain that to me, you have to explain the substance, how that works in practice, and they can start testing how things work in practice in a way that you perhaps would be quick to assume because of your day-to-day job. And that can be really helpful so it becomes sort of secondary, like a third pair of eyes I suppose. So if we have been a second pair of eyes on the policy, they can be a third pair of eyes.[958]

A Counsel participant provided further insight into how this freshness encourages them to ask seemingly basic questions which prove to be the most "devastating" for the lead department:

> And Counsel may ask those 'stupid' questions which often turn out to be the most devastating questions because they are the ones that the department never ask themselves. You know, you tell me it works like this, but why does it work like that? And then when they actually look at it, they have no idea. They thought it was a legislative requirement, but it turns out there is nothing there. They have just always operated in the department on the basis that it worked like that and when

[956] Interview with GLD 23 (10 December 2019).
[957] Interview GLD 23 (10 December 2019).
[958] Interview GLD 23 (10 December 2019).

> somebody new comes in and says, I don't understand that and then they actually look at it, they discover that it's built in sand.[959]

Ultimately, while the previous chapter identified how Counsel developed knowledge and skills through various socialisation experiences, both within and outside of OPC, this section emphasises the importance of Counsel being relatively distanced from the knowledge available about the Bill's formation in the previous phase, including the underlying policy upon which it is founded. This distance enhances Counsel's ability to uncover omissions and problems in the policy ideas and legal solution which the lead ministerial department may have failed to recognise given their greater exposure and socialisation in the relevant area. As mentioned above, this relative distance is made possible by the fact that Counsel are less likely than policy officials and legal advisers to be extensively involved in early policy meetings which occur in the ministerial department. Moreover, Counsel typically work on a wide range of Bills and therefore lack subject specialism in a particular area, especially when compared to legal advisers who work in the same area for several years, not only on Bill projects but also as part of their broader advisory role.

7.3. European Commission

In the previous phase, legal advisers from the Commission Legal Service provide steering advice to the lead DG to identify issues which could compromise the legality of the proposal, with most emphasis placed on assessing the appropriateness of the legal basis. Chapter six also discussed the early involvement of legal revisers from the Commission Legal Service to help secure the drafting quality of the proposal before its submission to the ISC. The involvement of legal revisers in the previous phase occurs at a later point compared to legal advisers, with chapter six recognising the potential limitations this creates for EU drafting quality. This chapter demonstrates that the functions performed by both types of lawyers during this chronological phase are largely a continuation of those discussed in chapter six. This coincides with empirical findings presented in chapter six which emphasise that the

[959] Interview with OPC 19 (6 September 2019).

early involvement of lawyers is to offer them more time to complete the tasks formally required of them during the ISC.[960] One exception to this is legal revisers' linguistic assessment of translated texts as this cannot be performed earlier on, although this chapter will reveal that this task is not regularly undertaken by legal revisers anymore.

Chapter two emphasised that only a small number of studies have dedicated attention to Commission lawyers' work, with many of them lacking broad perspectives or valuable theoretical insights. The analytical framework also illustrated that there is considerable scope to improve our knowledge on various aspects of the lawyers' work, including the tasks, interactions, judgments, and chronologies that make up their work.[961] This chapter will help to overcome this knowledge gap through the presentation of empirical findings. The work of legal advisers will be explored first, specifically during the preparation of the Legal Service opinion. Their political-professional behaviours will then be explored, demonstrating that significant professional autonomy is adopted when the conflict relates to matters of EU competence. The discussion will then identify various on-the-job learning experiences gained by legal advisers, as well as examining their interpreter role. The work of legal revisers will then be explored, including their role in enhancing drafting quality. The discussion will then reveal that legal revisers perceive their role as highly autonomous, although their ability to enforce this is somewhat limited. Finally, the discussion will explore the on-the-job learning experiences gained by legal revisers, including their practical experience of revising proposals.

7.3.1. Legal advisers

The primary focus of legal advisers during this chronological phase is to prepare the Legal Service opinion for the legislative proposal received in the ISC. As identified

[960] This process is laid out in the Rules of Procedure of the Commission, art 12. For more on this procedure see Jordan and Schout (n 55).
[961] See section 3.2 in chapter three, particularly sub-sections 3.2.1-3.2.2.

already, there are three types of opinions available to the Legal Service.[962] A 'positive opinion' indicates that a proposal is in full compliance with EU law. A 'positive opinion with comments' indicates that a proposal is generally legally sound but the lead DG could adopt amendments proposed by the Legal Service to reduce litigation risks. Finally, a 'negative opinion' indicates major legal obstacles and operates as a veto by blocking the proposal from being adopted by written procedure. If a negative opinion is issued, the lead DG can still adopt the proposal through oral procedure with the authorisation of the President's Cabinet, but there is a preference to avoid this as challenging questions can emerge during oral debate. Moreover, one legal adviser participant revealed that the President's Cabinet will often request that the lead DG attempts to resolve its issues with the Legal Service before authorisation is granted for the oral procedure.[963]

While legal advisers are involved in the previous phase, usually for the purpose of identifying and resolving legal matters that could lead to a negative opinion, the previous chapter illustrated that there is significant variation in the extent of this early participation as it is often dependent on the discretion of the lead DG. It is therefore challenging to predict the exact nature and scope of their legal advice during this stage, with one participant emphasising that "there are all kinds of varieties of possibilities" regarding the amount of legal advice that remains to be provided.[964] Nevertheless, from a legal standpoint, a proposal is typically "already there" if legal advisers have had considerable involvement in the previous phase.[965] This was reiterated by a legal adviser participant who explained that for some proposals, the vast majority of legal advice is provided to the lead DG prior to the ISC:

[962] For 2018 statistics on the Legal Service opinion see European Commission, 'The Legal Service of the European Commission' (n 203). These statistics reveal the following distribution of the types of opinions issued in 2018: positive opinion (4,224), positive with amendments (4,064), and negative opinion (14). However, these statistics include opinions provided for a broad range of legal initiatives, including any documents which may have legal implications.
[963] Interview with CLA 1 (26 April 2017).
[964] Interview with CLA 4 (27 April 2017).
[965] Interview with CLA 7 (28 November 2017).

> Sometimes, it is necessary for the DG to sort of work hand-in-hand with the Legal Service already upstream. So in those cases, sometimes the Legal Service will already have agreed on a text in some kind of pre-consultation and when it then gets to the formal Interservice Consultation, one will only have to touch on a certain small number of things because basically the text has already been checked by us.[966]

Given that chapter six has already addressed the potential legal issues raised by legal advisers, either in this phase or the previous one, the focus of this discussion will be on the materials used in the preparation of the legal opinion and the essential collaboration between legal advisers and legal revisers. The preparation of the legal opinion ultimately requires the input of *both* legal advisers and legal revisers. Chapter five has already identified that a proposal will be distributed to the coordinators of the relevant thematic team and quality unit who must then assign it to the appropriate lawyers, with this selection usually determined by the subject matter addressed by the proposal. Comments made by legal advisers are inserted into a note which is usually around two pages long, with five pages being exceptional.[967] The legal reviser is required to send their drafting comments to the legal adviser as the latter is responsible for finalising and submitting the legal opinion. Legal revisers must do this a couple of days before the ISC deadline of ten to fifteen days to ensure that the legal adviser has sufficient time to review all of their drafting comments.[968]

Aside from this formalised interaction, it is “up to the lawyers themselves” to decide how and when to collaborate on a proposal during the coordination process.[969] In most cases, legal advisers will initiate communication once they are notified which legal reviser has been assigned to the proposal. Their decision to initiate this communication stems from their personal responsibility to ensure the timely

[966] Interview with CLA 4 (27 April 2017).
[967] Interview with CLA 5 (27 April 2017).
[968] Interview with CLA 1 (26 April 2017). As mentioned in chapters one and six, the deadline is either ten or fifteen working days depending on whether the proposal is more or less than twenty pages.
[969] Interview with CLR 3 (27 April 2017).

submission of the legal opinion to the lead DG. A legal adviser participant elaborated on this point:

> What we do is say okay, we know the [legal revisers], of course. I give them a call and say we have this, because there are strict deadlines. These can't be changed for the Interservice Consultation. Well, they can be changed by the DG who launched it if it's like really impossible. But normally they are not changed. Normally it's ten working days….So, as soon as the coordinator in the team decides it's for me, in the system my name is written. So I am also personally responsible to make sure it is replied to by a certain time.[970]

In addition to such collaboration being important in facilitating the timely submission of the proposal, responses indicated an additional benefit. More specifically, a legal reviser participant emphasised that their collaboration with legal advisers is essential to ensure the legal opinion strikes an appropriate balance between substantive and drafting matters.[971] In the absence of this, it might appear that the legal opinion focuses too heavily on either the "big issues" or on "the detail":

> It is very important that both [lawyers] work together otherwise the [opinion] might actually focus only on the big things and leave the drafting in a very poor state. On the contrary, if the [legal adviser] does not have the time and we are then left to bear the brunt of the revision here, of the legal review, then of course other people might get the impression that we concentrated too much on the detail, on the drafting, and maybe even omitted certain big things, maybe even just missed certain big issues that should have been dealt with.[972]

As mentioned above, comments made by legal advisers are inserted into a written note. Around 80% of the material used for this note is case law and if academic resources are used, these are usually for locating legal commentaries on specific cases.[973] Drafting comments made by legal revisers are typically encoded in a track change version of the legislative proposal.[974] The key sources used by legal revisers are EU drafting rules and guidance, such as the Joint Practical Guide discussed in

[970] Interview with CLA 2 (27 April 2017).
[971] Interview with CLR 3 (27 April 2017).
[972] Interview with CLR 3 (27 April 2017).
[973] Interview with CLA 5 (27 April 2017).
[974] Interview with CLR 3 (27 April 2017).

chapter six.[975] While the legal opinion incorporates comments made by both legal advisers and legal revisers, chapter five has already revealed that legal revisers do not have the authority to decide what is included in the final opinion as this decision lies with legal advisers.[976] Most legal adviser participants felt that their ability to decide the contents of the legal opinion was appropriate as they have a more "specialist" awareness of the legal subject area than legal revisers and are therefore in a better position to assess the substantive implications of drafting revisions.[977] Only one legal adviser participant acknowledged that it might not be "gratifying" for legal revisers.[978] However, despite this view, a legal reviser participant appeared to support legal advisers having the final say over the legal opinion, albeit for more strategic reasons than those voiced by legal advisers:

> Because we should, we are still one service and we should approach the DGs as one service, with one opinion, a unified opinion, and sometimes if the DGs, for instance, spot that there is a slight difference in opinion between the [legal advisers] and the quality team, they might actually want to exploit that difference to their advantage. So there are some good reasons for let's say, only having one single line.[979]

The authority held by legal advisers over the opinion is consistent with a broader finding where legal advisers tend to "stand in between" legal revisers and the DG, with most communication being conveyed through legal advisers.[980] While legal revisers may communicate directly with the lead DG, especially if they have informal contacts there, this can depend on the preferences of the legal adviser. According to a legal reviser participant, some legal advisers may encourage legal revisers to contact DG officers directly while others are more reluctant for this to take place.[981] The participant expressed, "it very much depends on the [legal adviser]. There are

[975] European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 216).
[976] Interview with CLA 2 (27 April 2017).
[977] Interview with CLA 1 (26 April 2017).
[978] Interview with CLA 7 (28 November 2017).
[979] Interview with CLR 3 (27 April 2017).
[980] Interview with CLR 3 (27 April 2017).
[981] Interview with CLR 3 (27 April 2017).

people who have absolutely no issue whatsoever. They will say, well why don't you call the DG directly? And there are other lawyers who are actually very upset if you do that."[982] Legal advisers' go-between role has clear parallels with the interpreter role adopted by legal advisers in the UK Government who tend to stand between policy officials and Counsel. The interpreter role of Commission legal advisers will be discussed in further detail below, highlighting why it might be necessary to mediate between legal revisers and DG officers.

7.3.1.1. Political-professional behaviour

Chapter five predicted that a strong affiliation to the Legal Service is expected to result in an autonomous professional role perception where legal advisers will defend their professional views even if these hinder the achievement of political objectives. Autonomous professional bureaucrats perceive their role as being guided by 'professional correctness and the power of the better argument'.[983] Predictions made in chapter five were largely based on the fact that the Legal Service is physically separated from sector DGs, constitutes an exclusive network of lawyers, and is able to circumvent political hierarchies.[984] In addition, chapter six identified that the knowledge of legal advisers is essential for ensuring that the Commission remains within competence limits, with the following discussion illustrating that this view is shared by DG officers. As advanced in chapter three, the professional autonomy of bureaucrats is expected to increase if their recognised knowledge is central to the legitimacy of the bureaucracy.[985] Nevertheless, despite these strong indicators of autonomy, chapter five expected that the *process*-specialisation of the Legal Service could foster a supra-departmental affiliation where legal advisers

[982] Interview with CLR 3 (27 April 2017).
[983] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.
[984] Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (n 368) 89–90; Trondal and others (n 320) 159, ch 8; Christensen and Mandelkern (n 373).
[985] Trondal and others (n 320) 159.

consider the appropriateness of their behaviours in accordance with the institutional norms of sector DGs too.[986]

Legal advisers exhibit the highest level of autonomy when the conflict is seen to compromise their guardianship role. More specifically, there are certain "red lines" or "legal limits" which legal advisers will not cross because doing so could jeopardise this role.[987] Participants did not provide a precise definition of their guardianship role but explained that it is intended to help the Commission fulfil its own role as guardian of the treaties.[988] At the core of this is the principle of conferral and the need to ensure that the Commission does not exceed its competence limits as defined in the treaties.[989] For this reason, legal advisers are unwilling to depart from their views on the appropriateness of a selected legal basis, even if this results in a negative opinion for the lead DG.[990] While it is common for "doubts" to persist regarding the suitability of a legal basis, a legal adviser participant suggested that a cautious interpretation is preferred because a declared competence breach by the ECJ not only carries legal consequences but can also undermine trust among the Member States.[991] The participant went on to compare the principle of conferral, and the effects of failing to adhere to it, to some national bureaucracies where legislation can be drafted "out of the blue" with significantly fewer legal constraints.[992]

Responses provided a greater understanding of *why* legal advisers perceive their role as one that carries a considerable sense of professional autonomy, especially in competence related matters. Although legal advisers develop an awareness of political considerations due to their interactions with DG officers, their physical separation in the Legal Service enables them to retain a sense of "detachment".[993] This view was reiterated by a DG officer participant who said that lawyers working in

[986] ibid 128.
[987] Interview with CLA 7 (28 November 2017).
[988] Interview with CLA 1 (26 April 2017).
[989] More information about the principle of conferral is provided in chapter one (section 1.3).
[990] Interview with CLA 14 (27 November 2017).
[991] Interview with CLA 7 (28 November 2017).
[992] Interview with CLA 7 (28 November 2017).
[993] Quote attributed to CLA 2 (27 April 2017); Interview with CLA 1 (26 April 2017).

the Legal Service are more “removed” from political considerations as they are not based in DGs where “law and politics meet”.[994] Legal adviser participants identified an additional organisational feature to explain their independence from political pressures, specifically mentioning the fact that they do not fall under DG hierarchies but instead report directly to directors within the Legal Service.[995] According to one legal adviser participant, “you have a special institutional space whereby you are not subject to the hierarchy of the DG, you are not subject to the Commissioner that the DG is subject to. You have a degree of freedom.”[996]

The Legal Service veto power was raised as an additional factor that increases the professional autonomy of Commission legal advisers, even in comparison to their counterparts in the Legal Services of the Parliament and Council. Accordingly, a participant from the Council Legal Service explained that working parties can simply choose to overrule their legal advice, “they say thank you but no thanks. They want to hear our advice, doesn’t mean they want to follow the advice.”[997] While the literature in chapter two argued that the effectiveness of the veto power has declined over the years, a legal adviser participant revealed that DGs are still very much aware that the Legal Service can “pull the handbrake” on a proposal if it has major legal issues.[998] There is therefore an incentive for the lead DG to listen to legal advisers to avoid a negative legal opinion that obstructs the proposal from being adopted by way of written procedure and which can also hamper their “sense of institutional pride”.[999] While the lead DG can choose to go to oral procedure if a negative opinion is issued, a DG officer participant emphasised that it is in their best interests to listen to legal advisers as their concerns about illegality are “true”.[1000]

Although legal advisers adopt a significant degree of professional autonomy, they still demonstrate a willingness to assist DG officers to find a suitable legal “solution”

[994] Interview with DG 9 (27 November 2017).
[995] Interview with CLA 1 (26 April 2017).
[996] Interview with CLA 1 (26 April 2017).
[997] Interview with CNLL 15 (8 December 2017).
[998] Interview with CLA 1 (26 April 2017). Leino-Sandberg (n 193) 183.
[999] Interview with CLA 5 (27 April 2017)
[1000] Interview with DG 6 (15 December 2017).

that matches the political will, albeit within the legal limits discussed above.[1001] This was reiterated by a DG officer participant who confirmed that legal advisers demonstrate a degree of "leniency" and "flexibility" once the major legal issues are addressed.[1002] Such a collaborative approach is also reflected in legal advisers when they encourage DGs to request their legal advice during the previous phase in chapter six so that they can raise their views informally without having to resort to formal mechanisms during the ISC.[1003] When elaborating on their cooperative approach, legal adviser participants emphasised the importance of their working relationships with the DGs and not wanting to be perceived as "the bad guys" as this could hinder the relationships moving forward.[1004] Legal adviser participants also acknowledged that through their interactions with the lead DG, they might develop an awareness of a "strong political need" to achieve a certain objective.[1005]

Ultimately, the discussion reveals that legal advisers demonstrate a strong sense of professional autonomy if they feel that a proposal undermines the Commission's capacity to uphold its role as guardian of the treaties.[1006] In such instances, they are willing to issue a negative legal opinion which 'blocks' the lead DG from proceeding with the written procedure. In accordance with insights in chapter three which emphasise the significance of 'organizational context' on role perceptions, responses suggested that certain organisational characteristics of the Legal Service help to shape the political-professional behaviours of legal advisers, specifically its internal hierarchical structures and its physical separation from sector DGs.[1007] Participants also drew attention to the Legal Service veto power. Although this is rarely enforced in practice, it still grants legal advisers a sense of informal authority during interactions with the lead DG. More specifically, the potential risks associated with this measure, both legal and reputational, means that DG officers are more inclined

[1001] Interview with DG 6 (15 December 2017).
[1002] Interview with DG 6 (15 December 2017).
[1003] Interview with CLA 7 (28 November 2017).
[1004] Interview with CLA 7 (28 November 2017).
[1005] Interview with CLA 4 (27 April 2017).
[1006] Christensen (n 295) 310.
[1007] Trondal, Murdoch and Geys (n 352) 90.

to listen to legal advisers even prior to the ISC. This sense of authority is further enhanced by legal advisers' recognised knowledge in which DG officers place substantial trust and confidence in their evaluations of legality.[1008]

There are nevertheless situations in which legal advisers exert less professional autonomy and are willing to accept reasonable legal arguments that are not regarded as 'the *best* view of the law.'[1009] This was largely motivated by a desire to maintain positive working relationships with DGs and an understanding that there might be "a strong political need" to achieve a particular objective.[1010] Thus, while legal advisers feel a sense of independence from political pressures, this is not to the extent of not wanting to assist DG officers to find a legal solution that helps to facilitate these objectives, provided the legal solution does not cross the "red lines" or "legal limits" mentioned above.[1011] In accordance with the idea of a supra-departmental affiliation, this implies that legal advisers' behaviours are not solely shaped by the professional legal norms of the Legal Service, as if it were operating as an isolated silo, but also through their interactions with DG officers.[1012] In other words, when assessing the appropriateness of their behaviours, legal advisers also take into account the political preferences of the sector DGs too.

7.3.1.2. Expertise

Chapter six identified that legal advisers gain an understanding of the underlying policy through their meetings with DG officers. It also highlighted that DG officers tend to fulfil a legal knowledge gap which is typically addressed by lawyers in the UK Government. However, as explained in chapter six, these DG officers lack the knowledge needed to evaluate the legality of proposals with confidence. This discussion will emphasise the ability of Commission legal advisers to do this effectively, drawing attention to their skills and knowledge in navigating the EU

[1008] Trondal and others (n 320) 159.
[1009] Moss (n 14) 1306. See also Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34.
[1010] Interview with CLA 4 (27 April 2017).
[1011] Interview with CLA 7 (28 November 2017).
[1012] Trondal and others (n 320) 126–28.

Treaties. This discussion will also explore the interpreter role of legal advisers where they 'stand between' DG officers and legal revisers.[1013] This interpreter role has clear parallels with the interpreter role adopted by GLD legal advisers, although a greater degree of mediation is needed in the Commission. Interpretation requires the achievement of interactional expertise which represents a fluency in the practice languages of the two groups, crucially acquired through conversations with each of them.[1014] As practice languages are laden in tacit knowledge, interpreters learn to understand the meaning of words as they are used in the groups, and the norms and nuances of those groups which cannot be easily articulated in written text.[1015]

When advising on the legality of a proposal, legal adviser participants emphasised the need to determine whether there has been a breach of the EU Treaties, including the incorrect application of a legal basis. Legal advisers' extensive knowledge of the treaties is acquired over years of closely analysing them and drawing understanding from them, either as a result of informal questions asked by DG officers or from scrutinising legislative proposals.[1016] Their knowledge of the treaties tends to develop before they join the Commission Legal Service as there is an expectation that they will be recruited with prior experience working on legal issues in another Commission department or in another EU institution altogether.[1017] Beyond their own understanding of the treaties, responses emphasised that legal advisers must also make reliable judgments on how the ECJ is expected to interpret treaty provisions. In part, this knowledge is developed through their regular engagement with case law. In addition to reading case law, each thematic team has a weekly meeting where new and ongoing cases are discussed in depth.[1018] Furthermore, the reliability of their assessments is further enhanced by their own experiences of "going to Luxembourg

[1013] Ribeiro (n 437) 562.
[1014] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 93. See also Collins (n 426) 274.
[1015] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 24. See also Collins and Evans, *Rethinking Expertise* (n 401) 32.
[1016] Interview with DG 10 (13 December 2017).
[1017] Interview with CLA 4 (27 April 2017).
[1018] Interview with CLA 2 (27 April 2017).

and appearing before the European Court of Justice to represent the Commission".[1019]

Legal advisers must also go beyond the treaties and case law to develop an understanding of the existing legal framework, specifically in the area in which they are working. While legal databases and academic textbooks are a useful starting point, which is facilitated by the library in the Berlaymont, most emphasis was placed on interactions with DG officers who have significant knowledge of the legal landscape due to their responsibilities in formulating proposals and assessing the implementation of existing legislation.[1020] Chapter six identified that these interactions include face-to-face meetings, with chapter three already highlighting their effectiveness in tacit knowledge transfer.[1021] Through meetings with DG officers, legal advisers also gain insight into the meaning of technical terms included in proposals, such as scientific terms. While this technical understanding is not proficient, it is enough to help them navigate the proposal and grasp its overall objectives.[1022] One legal adviser participant explained:

> I get a good understanding of the terminology. I have meetings with the DG officers, they sometimes come here and we have a coffee together and they explain to us what this means… I therefore have a kind of understanding of the scientific terminology but I am not a scientist.[1023]

Although it is important for legal advisers to develop knowledge in their own specific legal area, they must also be aware of the "bigger picture" to recognise when a proposal impacts or belongs to another area of law.[1024] The benefit of this is closely tied to legal advisers' assessment of non-compliance as this broader understanding

[1019] Interview with CLA 2 (27 April 2017). While it does not form the focus of this thesis, the litigation role of these lawyers presents a key difference from GLD legal advisers who do not represent the UK Government before the courts. Chapter five explained that GLD has a separate litigation team.
[1020] Interview with CLA 5 (27 April 2017); Interview with CLA 1 (26 April 2017).
[1021] Interview with CLA 4 (27 April 2017).
[1022] Interview with CLA 5 (27 April 2017).
[1023] Interview with CLA 2 (27 April 2017). The domain was changed to protect the participants' confidentiality.
[1024] Interview with CLA 14 (27 November 2017).

helps them assess whether the selected legal basis accurately reflects the 'main or predominant purpose' of the proposal.[1025] This is especially so as DG officers can be so focused on their own area that they sometimes forget to look "right and left" to other areas which, in turn, can lead to the incorrect application of a legal basis.[1026] Legal advisers' ability to determine whether a proposal impacts or belongs to another area of law is facilitated by a rule in the Legal Service which requires them to make this assessment regularly.[1027] More specifically, upon receiving a proposal from the lead DG, legal advisers must evaluate whether it also falls within the scope of another thematic team as the legal opinion must then be signed by both team directors.[1028] By regularly making this evaluation, and interacting with other thematic teams when doing so, legal advisers develop a contextual awareness and "sensitivity" of how different areas of law interact and influence each other.[1029] This is complemented by the fact that legal advisers rotate to another thematic team every five years or so and will therefore gain firsthand experience in various areas.[1030]

This section also examines the go-between role of legal advisers where much of the communication between legal revisers and DG officers is handled by them, a feature of the process which has already been identified in this chapter. This go-between role has clear parallels with the notion of an interpreter outlined in chapter three.[1031] The success of this interpretation is based on the acquisition of interactional expertise which is developed through linguistic socialisation, with chapter three maintaining that face-to-face interactions with both groups are the most effective way of achieving this.[1032] The empirical analysis has already identified that legal advisers and DG officers interact with each other extensively, including during in-person

[1025] Interview with CLA 7 (28 November 2017). See Case C-137/12 *European Commission v Council of the European Union* (n 808), paras 53 and 74.
[1026] Interview with CLA 14 (27 November 2017).
[1027] Interview with CLA 4 (27 April 2017).
[1028] If it belongs to more than two teams, it must be signed at Director-General level.
[1029] Interview with CLA 4 (27 April 2017).
[1030] Interview with CLA 14 (27 November 2017).
[1031] Ribeiro (n 437) 562.
[1032] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 93. Collins and Evans, *Rethinking Expertise* (n 401) 32; See also Collins (n 426) 274.

meetings. It has also highlighted that legal advisers and legal revisers are in close interaction with each other, facilitated by their shared location in the Berlaymont. In fact, their interactions appear to have facilitated an exchange of knowledge to the point where each type of lawyer can "signal" potential issues belonging to the other lawyer's domain, albeit without actually performing each other's work.[1033] A legal adviser participant elaborated:

> Many times the legal revisers will draw my attention to what they think are substantive issues, so they act as an early warning system on substantive issues, or a second pair of eyes on substantive issues. I many times act as a second pair of eyes on drafting issues.[1034]

Central to legal advisers' interpretation is the ability to engage in 'buffering strategies' aimed at facilitating the communication and minimising the likelihood of disagreements arising between the groups.[1035] As outlined in chapter three, a possible buffering strategy is an interpreter's decision to not convey information between the groups.[1036] Through their substantial engagement with DG officers, legal advisers develop an awareness of political sensitivities which, in turn, enables them to appreciate whether certain drafting comments proposed by legal revisers could be regarded as unfavourable by the lead DG. Moreover, as legal advisers have a greater subject specialism in the area of law than legal revisers do, they can more readily identify whether certain drafting comments will present unintended consequences for the substantive content of the proposal. One legal adviser participant relied on both these reasons to justify their use of a buffering strategy in the process of deciding which drafting comments to include in the Legal Service opinion submitted to the ISC:

> Being a specialist in the field who knows the legislation in the specific field in a more specialised way than the legal revisers, I may, for example, not agree with a particular comment they have, or I might be aware of certain circumstances whereby I should not accept the drafting changes because there is sensitive political wording, for

[1033] Interview with CLR 3 (27 April 2017).
[1034] Interview with CLA 1 (26 April 2017).
[1035] Ribeiro (n 437) 562.
[1036] ibid 567–571.

> example, which I am aware of and which is regularly used and pre-agreed with the DG. So there might be reasons why I may not pick up comments the legal revisers give me.[1037]

Legal advisers' interpreter role also helps to reduce possible tensions arising from the distinct practices and priorities of the two groups.[1038] More specifically, through interactions with both groups, legal advisers become aware of a possible "culture clash".[1039] This largely stems from the fact that legal revisers often exhibit a reluctance to accommodate DG officers' demands if these compromise the "beauty" of the text.[1040] To help alleviate tensions, legal advisers will engage in 'explanatory conversations', intended to enhance an understanding between the groups of their different priorities.[1041] For example, a legal adviser participant highlighted an occasion where a legal reviser proposed the use of a recital as opposed to an enacting rule as the latter was not considered to be "neat enough".[1042] Instead of conveying the request to the lead DG and merely informing the legal reviser of its rejection, possibly leading to them feeling undervalued, the legal adviser chose to explain the policy reasons behind the DG's preferences to clarify why it would be unsuitable to communicate the request.[1043] Equally, by not conveying the request, which can be regarded as a buffering strategy in its own right, the legal adviser was likely to have prevented any potential frustration within the DG.

While the interpreter role of legal advisers is often successful in alleviating tensions between legal revisers and DG officers, responses indicated that there can be limits as to what it can offer. On this point, a legal reviser participant highlighted that direct communication between legal revisers and DG officers can help facilitate a mutual agreement as it allows legal revisers to emphasise the value of their drafting comments and reassure DG officers that their intention is not to be difficult. More specifically, during such meetings, legal revisers can stress to DGs that what they

[1037] Interview with CLA 1 (26 April 2017).
[1038] Ribeiro (n 437).
[1039] Quote attributed to CLA 5 (27 April 2017); Interview with CLA 14 (27 November 2017).
[1040] Interview with CLA 14 (27 April 2017).
[1041] Ribeiro (n 437) 570.
[1042] Interview with CLA 14 (27 November 2017).
[1043] Interview with CLA 14 (27 November 2017).

"are doing is not to make them angry, not to make them upset, but really to contribute to the quality of the text".[1044] This finding is similar to the aforementioned situation in the UK Government where bypassing legal advisers in favour of direct meetings between policy officials and Counsel can help foster an agreement. Both of these findings appear to be grounded in the theoretical view outlined in chapter three which advances that direct face-to-face interactions are effective in building trust and transferring knowledge between distinct groups which, in turn, is expected to increase the likelihood of shared understanding and mutual agreement.[1045]

In summary, the discussion has highlighted the knowledge needed by legal advisers to perform their work effectively, with this knowledge referred to as contributory expertise.[1046] Their expertise in treaty interpretation was identified, as well as their ability to make reliable judgments on the proposal's vulnerability before the ECJ. The discussion also discussed legal advisers' awareness of the broader legal framework. Their contributory expertise is largely gained through on-the-job experiences while working at the Legal Service, including the act of interpreting the treaties, reading and discussing case law with thematic team members, representing the Commission before the ECJ, and interacting with DG officers. Based on theoretical insights provided in chapter three, these experiences go beyond the accumulation of explicit knowledge that can be acquired from reading texts or manuals alone, and instead suggest the development of specialist tacit knowledge which is gained through in-house socialisation, specifically practical experiences and interactions while working at the Legal Service.[1047] The discussion also considered the interpreter role of legal advisers which includes a considerable extent of mediation.[1048]

[1044] Interview with CLR 3 (27 April 2017).
[1045] Collins and others (n 431) 60.
[1046] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.
[1047] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 92; Priaulx and Weinel (n 410) 380.
[1048] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400) 93. Collins and Evans, *Rethinking Expertise* (n 401) 32; See also Collins (n 426) 274.

7.3.2. Legal revisers

Chapter six emphasised that legal revisers are not directly involved in the initial drafting of legislative proposals as this is carried out within lead DGs. However, legal revisers still tend to participate before the ISC is launched, albeit for a limited duration, and so their work is likely to have commenced prior to this phase. The empirical analysis provided so far in this chapter and the previous one has examined the drafting resources used by legal revisers, their contribution towards the final legal opinion, their interactions with legal advisers, as well as their limited authority during the ISC compared to legal advisers. This section will examine how legal revisers ensure compliance with EU drafting guidance to help enhance the drafting quality of the legislative proposal. The importance of legal revisers in safeguarding and improving the drafting quality of Commission proposals was emphasised by a participant working as a lawyer in the Council Legal Service:

> I think for the quality of drafting it is very important also that the Commission comes out with a clear proposal because that's where it all starts and you are not going to yeah, make Shakespeare of something that arrives with bad quality, that's impossible. So yeah, it's important also that there is that quality check already before the text comes here.[1049]

When a legal reviser participant was asked to discuss the principles underpinning EU drafting guidance, and how these contribute to enhancing drafting quality, they explained that a key principle of the guidance revolves around the notion of clarity which is based on the idea that the proposal must be clear in communicating "who has the obligation, who is required to do what, who has what rights".[1050] Nevertheless, much like the drafting principles examined in relation to the UK Government, adhering to the guidance requires an appropriate balance between clarity and other drafting principles, including precision.[1051] Chapter six has already

[1049] Interview with CNLA 11 (11 December 2017).
[1050] Interview with CLR 3 (27 April 2017). European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 216) 11.
[1051] ibid 10.

touched upon the principle of precision, with some participants emphasising that legal revisers may face difficulties in upholding technical precision due to their lack of subject specialism, especially in comparison to DG officers. However, as the empirical analysis has revealed, there are measures in place to help to minimise this risk. More specifically, legal revisers are not actively involved in the initial drafting of the proposal, there is regular oversight by the lead DG, and legal advisers adopt an interpreter role where they can choose to not convey drafting revisions which might alter the meaning of the proposal and what it intends to regulate.

The drafting guidance also establishes presentational rules, such as the positioning of titles and preambles, and includes further instructions on matters like the content of titles and the purpose of citations.[1052] While some of the EU drafting guidance is publicly available, a proportion of it is subject to internal use only.[1053] When asked to elaborate on the reasons behind this, a legal reviser participant explained:

> We are really quite careful about that and there is a big discussion as to whether to make certain documents more available because of course, there is a concern that somebody may use it as a grounds for challenging certain things for the court. Even though I think that it would rarely offer a valid ground for challenging anything.[1054]

While legal revisers are expected to follow the same drafting guidance, with the exception of guidance specific to each unit as mentioned in chapter five, the same participant emphasised that distinct approaches and preferences typically arise due to the different backgrounds of legal revisers across the quality team.[1055] While the chapter will later highlight the role of socialisation processes *within* the Legal Service in shaping the behaviour of legal revisers, this suggests that their pre-recruitment

[1052] European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 216).
[1053] For publicly available drafting guidance see ibid.
[1054] Interview with CLR 3 (27 April 2017).
[1055] Interview with CLR 3 (27 April 2017).

experiences still have a notable impact.[1056] A legal reviser participant provided further insight into the types of differences that might arise:

> You can definitely see the different legal traditions, the different legal and cultural traditions in different Member States… Usually this plays out in terms of formality. For instance, how formal do you have to be when you cite a provision? Do you have to go from the biggest sub-divisions to the lowest or do you clearly go straight to the crux of the matter and say it's in article such and such? You know, it also, curiously enough, there are two schools of thought. Well there are many schools of thought but let's say we can generalise and say there are two in terms of how detailed our internal rules should be. Certain cultures like it very much if what they need to do is regulate to the tiniest detail. Other cultures are absolutely allergic to this so they want as few rules as possible.[1057]

In addition to ensuring compliance with the drafting guidance, legal revisers must also check that the proposal does not include any excessive ambiguities or complexities that could raise the chances of inaccurate translations at a later stage. In previous years, legal revisers used to examine the linguistic parallelism of the language versions before they were submitted to the Parliament and Council but they typically only do this at present if they anticipate that a proposal will create problems upon translation.[1058] This change of practice was initiated by EU law-making initiatives which shifted the focus towards earlier quality control.[1059] Part of the rationale for dedicating more resources to the earlier stages was to give legal revisers greater scope to review and amend the text which, in turn, could reduce the number of misunderstandings arising during the translation process. Thus, enhanced

[1056] Hooghe (n 354); Egeberg and Trondal (n 367) ch 4. As mentioned in chapter three, post-recruitment variables generally have a greater explanatory power than pre-recruitment experiences

[1057] Interview with CLR 3 (27 April 2017).

[1058] Translation is undertaken by the Commission's Translation DG.

[1059] Interinstitutional Agreement on Common Guidelines 1998. There is considerable literature on the criticisms surrounding the drafting quality of EU law. For example see Xanthaki, 'Emerging Trends in Legislation in Europe' (n 117). See also Xanthaki, 'European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation' (n 114).

early quality control acts as a preventative measure which intends to minimise the need for legal revisers to check the translated texts.

7.3.2.1. Political-professional behaviour

Chapter five predicted that a strong affiliation towards the Legal Service is likely to result in an autonomous professional role perception where legal revisers are willing to defend their professional drafting views even if these hinder or obstruct the attainment of political goals. This prediction was largely based on the fact that the Legal Service is physically separated from sector DGs and constitutes an exclusive network of lawyers led directly by a non-political administrator.[1060] While the Legal Service can circumvent political hierarchies using the veto power, which is expected to enhance professional autonomy further, this chapter has highlighted that legal revisers do not have ultimate authority over this power. Chapter five also argued that the *process*-specialisation of the Legal Service may encourage a supra-departmental affiliation where legal revisers perceive their role in accordance with the institutional norms of the DGs too.[1061] This is especially so if legal revisers engage in regular interactions with DG officers, leading to the development of a common purpose.[1062] However, based on the discussion above, these interactions are infrequent due to the interpreter role of legal advisers. In fact, legal reviser participants mentioned fewer interactions with policy departments than any of the other types of lawyers.

Overall, the empirical findings show that legal revisers adopt a significant sense of professional autonomy when carrying out their functions, a finding which has already been indicated above when discussing the "culture clash" between legal revisers and DG officers.[1063] More specifically, legal revisers are willing to resist requests made by the lead DG that undermine their ability to maintain or improve the proposal's

[1060] Egeberg, 'Bridging the Gap Between Theory and Practice: The Case of Administrative Policy' (n 368) 89–90; Trondal and others (n 320) 159, ch 8; Christensen and Mandelkern (n 373).
[1061] Trondal and others (n 320) 128.
[1062] Trondal, 'Is the European Commission a "Hothouse" for Supranationalism? Exploring Actor-Level Supranationalism' (n 388) 1118.
[1063] Quote attributed to CLA 5 (27 April 2017); Interview with CLA 14 (27 November 2017).

drafting quality.[1064] Responses revealed that this sense of professional autonomy is driven by a strong perception of independence from the preferences of DGs.[1065] A factor that significantly contributes to this perception of independence among legal revisers are their limited interactions DG officers, largely due to the go-between role adopted by legal advisers.[1066] This became evident when a legal reviser participant elaborated on the central role of interactions in shaping lawyers' political-professional behaviours by comparing their position to that of legal advisers:

> [Legal advisers] are in a lot of contact with the DGs who keep telling them, no, no, no, the Member States want this. This is something the Member States would never accept. Oh and this is too late and now it has to move fast. And now, you know, they are the ones who will find out first within the Legal Service of the pressures that the Commission is facing. And there are of course, there have to be cases where it might be very difficult to resist those pressures because after all, you are trying to find solutions which are practical and that means, in many cases, that you might have to bow to the political practicalities.[1067]

In addition to this strong sense of independence resulting from limited interactions with DG officers, responses indicated that the professional autonomy of legal revisers is further strengthened by the fact that they have a set of drafting rules to adhere to.[1068] This reliance on drafting rules is in contrast to the situation experienced by legal advisers who often have to establish a "yardstick" for determining the lawfulness of a proposal.[1069] As this demands a higher level of judgment, legal advisers might be more susceptible to being asked by DG officers to provide a broad interpretation of the law to advance certain policy objectives. A legal reviser participant elaborated on how the requirement to simply adhere to drafting rules provides them with a feeling of independence:

> I'm speaking only for myself, I'm almost proud. I'm very happy to be in a position where I do not need [to] consider policy at all. I have the

[1064] Crabbe (n 176).
[1065] Interview with CLR 3 (27 April 2017).
[1066] Interview with CLR 3 (27 April 2017).
[1067] Interview with CLR 3 (27 April 2017).
[1068] Interview with CLR 3 (27 April 2017).
[1069] Interview with CLA 4 (27 April 2017).

> privileged position of just having a set of drafting rules, you know, of course, stemming from general principles of law and that this is what I'm essentially bound by and this is what I am limited by. And of course it is a great position, it is a great privilege. I don't know if the [legal advisers] have the same privilege. Probably not.[1070]

Despite legal revisers' strong commitment to safeguard certain drafting standards irrespective of a lead DG's preferences, this chapter has already highlighted that they have a limited formal capacity to uphold these standards. Previous discussions have identified that legal advisers can engage in buffering strategies where they decide not to convey drafting comments made by legal revisers to DG officers. In addition, a negative Legal Service opinion would only exceptionally be issued on the basis of drafting comments alone. Although chapters three and five implied that an absence of formal authority could lead to a reduced sense of professional autonomy among bureaucrats, causing them to doubt the appropriateness of raising views that challenge political objectives, legal revisers do in fact retain a considerable degree of informal authority during the ISC. One legal adviser participant expressed, "So there might be reasons why I may not pick up comments the legal revisers give me but in general, as a member of the Legal Service, I will pick up all or nearly all of the comments the legal revisers give me."[1071] The overall influence of legal revisers was also confirmed by a legal reviser participant:

> It's hard to quantity [our impact] but to put it in very simple words, yes it happens quite often that you look into the Official Journal and you see your text, you see what you drafted, because the [legal adviser] told them, no this has to be redrafted… And then yes, it does appear in the Official Journal.[1072]

Ultimately, legal revisers adopt a strong sense of professional autonomy, reflected in a perception that their work remains independent from political pressures felt within DGs. Responses indicated that legal revisers' professional autonomy is enhanced as a result of their limited interactions with DG officers. This empirical finding, especially when compared to legal advisers who interact more regularly with DG officers,

[1070] Interview with CLR 3 (27 April 2017).
[1071] Interview with CLA 1 (26 April 2017).
[1072] Interview with CLR 3 (27 April 2017).

supports the theoretical view outlined in chapter three that the enactment of a supra-departmental affiliation is dependent on regular and sustained interactions with policy departments.[1073] To rephrase it from a neo-institutional perspective, as the socialisation of legal revisers is predominantly confined to the formal boundaries of the Legal Service, they have limited exposure to institutional norms from the DGs which, in turn, reduces the extent to which these norms shape their role perceptions and hence their ideas of appropriate behaviour.[1074] In addition to limited cross-departmental interactions, responses emphasised that legal revisers' independence is further enhanced by the fact that their actions are based on established standards that are less susceptible to, or influenced by, other considerations.

7.3.2.2. Expertise

Legal revisers are required to have a law degree, a perfect command of at least one EU language, and a thorough knowledge of at least two others.[1075] Despite these entry requirements, responses prioritised the relevance of experiences and interactions gained while working in the Legal Service. This indicates the importance of socialisation within the domain of practice to acquire the specialist tacit knowledge needed to perform the work successfully, referred to as contributory expertise.[1076] Chapter five has already identified organisational features that may shape legal revisers' in-house socialisation experiences, particularly their exemption from the EU Civil Service mobility system which is linked to the benefits of concentrating on and developing greater expertise in a specific subject area. The following discussion will demonstrate how on-the-job experiences enable legal revisers to perform their work successfully.

[1073] Trondal and others (n 320) 126–28.
[1074] March and Olsen (n 340) 22.
[1075] European Personnel Selection Office (n 188). In contrast to Parliamentary Counsel in the UK Government, Commission legal revisers are not required to have a practising legal certificate upon recruitment.
[1076] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399); Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.

Similar to Parliamentary Counsel, legal revisers are not expected to have any prior training in legal revision upon joining the Legal Service. However, a considerable proportion of legal revisers are recruited from the Translation Service of the ECJ which was described as "a good school in terms of how to really, how to be very sensitive with legal text, how to really pay attention to the detail of legal text".[1077] Similar to Commission legal advisers, this demonstrates that experience within the EU more broadly can serve as a useful foundation for developing the necessary skills. A legal reviser participant nevertheless emphasised that this experience "is not a precondition [and] there are other colleagues who do not have this background and still do a very, very good job."[1078] While the Commission provides training courses on legislative drafting, the legal reviser participant revealed that these are "too general" for legal revisers.[1079] The participant went on to say, "there are very few courses, very few training courses within the Commission that would be appropriate for us".[1080] Instead, they learn how to perform legal revision by working alongside more experienced colleagues from their unit until they "gain sufficient experience" to revise proposals themselves, eventually being able to train others.[1081]

Ultimately, the importance assigned to learning from more experienced colleagues illustrates the need for practical knowledge or 'know-how' which might be difficult to articulate in written materials.[1082] While legal revisers rely on drafting guidance to perform their work, responses acknowledged that some of this is "very basic" and hands-on experience is needed to learn how to apply it in practice, especially as it does not cover all potential situations or challenges that may arise.[1083] Furthermore, the publicly available Joint Practical Guide does not address the drafting intricacies

[1077] Interview with CLR 3 (27 April 2017).
[1078] Interview with CLR 3 (27 April 2017).
[1079] Interview with CLR 3 (27 April 2017).
[1080] Interview with CLR 3 (27 April 2017).
[1081] Interview with CLR 3 (27 April 2017). Almaeida and Moll (n 208) 263.
[1082] Nonaka, Toyama and Konno (n 412) 7; Priaulx and Weinel (n 410) 380.
[1083] Interview with CLR 3 (27 April 2017).

of individual subject areas.[1084] According to a legal reviser participant, this reflects the fact that "legal revisers are meant to have almost a universal expertise" which is not linked to an individual subject area.[1085] In practice, however, the participant highlighted the advantages of developing expertise in a particular subject area as this enables legal revisers to maintain the consistency of legal terminology used in the area.[1086] The participant elaborated further on this point:

> So the idea is that the drafting rules, the drafting conventions are always the same so we don't really have an expertise which is limited to a specific subject matter, in theory. However, in practice, of course, it helps a lot to be specialised or to know about a certain subject matter area…. Even within the [units], in the quality team, it does help to be specialised as I said, to have a bit more knowledge of a certain area, of the area that you work in because first, it helps you with the drafting. You know how similar things were expressed in a parallel legal act and well, undoubtedly it helps.[1087]

While legal revisers will eventually develop a familiarity with the legal language used in a specific subject area after having revised a sufficient number of proposals in that area, both this chapter and chapter six have suggested that this does not necessarily imply a technical understanding of the proposal or its real-life implications. Nevertheless, as mentioned above, there are structures and processes in place to safeguard the technical meaning of the proposal, including the interpreter role of legal advisers. Importantly, this discussion has identified the experiences gained by legal revisers which enable them to perform their work effectively, including interactions with experienced colleagues and their hands-on experience of revising proposals, preferably within the same subject area. This indicates that while legal revisers rely on drafting guidance, and attach significant value to this guidance, the explicit knowledge developed from reading written explanations alone is insufficient

[1084] Interview with CLR 3 (27 April 2017). European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 216).
[1085] Interview with CLR 3 (27 April 2017).
[1086] Interview with CLR 3 (27 April 2017).
[1087] Interview with CLR 3 (27 April 2017).

for them to acquire the knowledge and skills needed to revise legislative proposals effectively.[1088]

7.4. Conclusion

Through the presentation and analysis of empirical findings, this chapter has expanded our knowledge on the work of UK Government and European Commission lawyers during the phase of finalising the legal solution for introduction to the legislature. An examination of *what* lawyers do, and *when* they do this within the broader context of this chronological phase, has addressed a key research question, namely: 'What are the functions of the lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?'[1089] In addressing this research question using a qualitative methodology, this chapter has made several contributions to the current academic literature on the work of UK Government and European Commission lawyers by providing rich, detailed insights into the actions, judgments, pressures, and interactions that constitute their work. In accordance with claims made in chapter two, the significance of these contributions extend beyond the specific study of UK Government and European Commission lawyers as there is a wider shortage of academic literature on bureaucratic lawyers. Furthermore, as argued in chapter three, the empirical findings also make valuable contributions to the policy-making literature, including in public administration, which has been criticised for overlooking the working practices and lived experiences of bureaucratic actors.

In addition to the *what* and *when* dimensions of UK Government and European Commission lawyers' work, this chapter has also provided valuable insights into the *how* dimension of their work, with a specific focus on their political-professional behaviour and expertise. With regard to their political-professional behaviour, the

[1088] Interview with OPC 19 (6 September 2019). Collins and Evans, *Rethinking Expertise* (n 401) 35; Priaulx and Weinel (n 410) 380; Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 23, 24.
[1089] Chapter six has also addressed this research question, focusing on the previous phase of converting a policy problem into a legal solution.

empirical findings in this chapter have addressed two sub-questions that were developed in chapter three to capture a key research question, specifically: 'How do lawyers perceive their roles, and how does this influence their political-professional behaviour?' The first of these sub-questions asks whether lawyers in policy departments (i.e., ministries or sector DGs) are more likely to adopt a Weberian role perception than those situated in exclusive legal departments when faced with a political-professional conflict. Equally, it asks whether lawyers situated in exclusive legal departments are more likely to adopt an autonomous professional role perception than those situated in policy departments. These two ideal types of role perceptions were developed in chapter three, relying on insights from both the legal ethics and political science scholarship.

It is important to firstly reiterate the empirical findings presented in chapter six which identified that GLD legal advisers who are situated in ministerial departments adopt behaviours associated with a Weberian role perception where it is not considered appropriate to challenge or obstruct political preferences unless an exceptionally high legal threshold is met. These findings were consistent with expectations established in chapters three and five which argued that bureaucratic lawyers who attach strong affiliations to ministerial departments, typically as a result of their physical location there, are likely to exhibit Weberian behaviours.[1090] Ultimately, by comparing those findings with the ones provided in this chapter, a more complete answer to the sub-question can be achieved as this chapter analyses the behaviours of lawyers situated in exclusive legal departments, specifically OPC and the Legal Service. As highlighted in chapters three and five, these lawyers are expected to adopt a greater sense of professional autonomy than GLD legal advisers, especially if their 'own' departmental institutional environments prioritise legal professional norms and hierarchies (i.e., legal veto power, non-political hierarchies).

Importantly, the empirical findings in this chapter demonstrate that lawyers situated in exclusive legal departments are more likely to adopt strategies that correspond

[1090] Egeberg, 'How Bureaucratic Structure Matters: An Organizational Perspective' (n 381); Trondal and others (n 320) 135; Christensen and Mandelkern (n 373) 241.

with an autonomous professional role perception, especially in contrast to GLD legal advisers who are only willing to do so when an exceptionally high legal threshold is met. These strategies have clear parallels with those presented in chapter three, including an attempt to educate or negotiate with policy departments on the grounds of professional competence, a choice to raise professional legal views persuasively, or in most extreme cases, a decision to formalise or enforce professional opinions in writing which, in the UK Government, may also necessitate the additional step of escalating the proposal to the Law Officers.[1091] The intensity of the strategies employed is often proportionate to the seriousness of the conflict as perceived by the lawyers themselves, usually determined by the specific legal matter at hand. This was evidenced for both Parliamentary Counsel and Commission legal advisers who voiced a willingness to resort to formal measures able to circumvent political hierarchies if the conflict was felt to undermine their guardianship roles.

In accordance with a neo-institutional perspective, many of the reasons mentioned by participants to justify their professional autonomy were not based on written codes of conduct.[1092] Rather, participants highlighted a range of factors that ultimately shape their ideas of appropriate behaviour, such as organisational characteristics of their legal departments, their professional obligations towards the broader public, their legal guardianship responsibilities, and the potential of reputational risk. These findings demonstrate that rules of behaviour are not necessarily formalised in written text but can form 'part of a code of appropriate behaviour' that actors learn through socialisation within the organisation; in-house socialisation.[1093] This is interlinked, and leads us directly, to the second sub-question which relates to the analytical concept of political-professional behaviour, specifically: 'Do interactions across departmental boundaries encourage a supra-departmental affiliation where the lawyers perceive their roles in accordance with the 'bigger picture' of the organisation?'

[1091] Purdy (n 14) 85–86; Nzerem (n 312) 133.
[1092] March and Olsen (n 340) 22.
[1093] ibid.

The notion of a supra-departmental affiliation was developed in chapter three and rests on the idea that political-professional behaviours are likely to be shaped by interactions taking place *outside* exclusive legal departments too. As the legal departments outlined in this chapter are examples of *process*-organisations, the lawyers were expected to evaluate the appropriateness of their behaviours by also taking into account the political preferences of policy departments. The empirical findings confirmed this, with Parliamentary Counsel and Commission legal advisers deviating from 'professional correctness' at times to facilitate the political objectives of ministries or sector DGs.[1094] Through these interactions, lawyers developed a common purpose with the policy departments to deliver a legal solution and learnt to appreciate the range of pressures guiding a proposal. The effects of a supra-departmental affiliation became notably evident when comparing these behaviours to those exhibited by Commission legal revisers whose role perceptions were driven by the strongest sense of independence from political considerations, largely as a result of their infrequent interactions with DG officers. Nevertheless, the effects of a supra-departmental affiliation are not as strong as being physically located within a policy department, with Parliamentary Counsel and Commission legal advisers still demonstrating a higher degree of professional autonomy than GLD legal advisers.

This chapter also explored the analytical concept of expertise to address a key research question, namely: 'How do lawyers acquire the expertise needed to perform their work?' Chapter three developed two sub-questions to capture this key question, one of which has already been partially answered in chapter six, specifically: 'What types of socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?' In line with a realist notion of expertise which emphasises the importance of tacit knowledge acquired through in-house socialisation, participants seldom mentioned pre-recruitment experiences when discussing the knowledge needed to perform their functions.[1095] Instead, the

[1094] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.
[1095] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399).

empirical findings presented in this chapter and chapter six highlighted several ways in which UK Government and European Commission lawyers develop the knowledge and skills needed through experiences gained while working in their respective bureaucracies. These include, but are not limited to, mentoring schemes, interactions with both lawyers and non-lawyers, hands-on experiences of drafting or revising proposals, and experiences of representing the executive before the courts.

The second sub-question relating to the analytical concept of expertise is: 'Do the lawyers rely on interpreters for a productive relationship with other groups, or might they adopt this interpreter role themselves?' As explained in chapter three, this interpreter role is based on the notion of interactional expertise, acquired crucially through face-to-face interactions with the respective groups.[1096] The findings in this chapter reveal that GLD legal advisers adopt an interpreter role which is intended to facilitate a more productive relationship between Parliamentary Counsel and policy officials. In addition to engaging in linguistic interventions, largely for the benefit of policy officials, legal advisers also help the groups understand and become familiar with each other's practices. The empirical findings also highlight that Commission legal advisers adopt an interpreter role which includes a considerable degree of mediation to reduce the likelihood of tensions emerging between legal revisers and DG officers. Nevertheless, it is sometimes beneficial for Counsel and legal revisers to meet with policy departments directly as this can help foster the realisation of a mutual agreement. This finding appears to be grounded in the theoretical perspective that direct face-to-face interactions serve a crucial role in building trust and rapport between parties.[1097]

Finally, this concluding section seeks to draw attention to three key distinctions between UK Government and European Commission lawyers that relate to the analytical concepts of political-professional behaviour and expertise. First, UK Government lawyers often referred to their unelected status to justify deference

[1096] Collins and Evans, 'Studies of Expertise and Experience: A Sociological Perspective on Expertise' (n 400).
[1097] Collins and others (n 431) 60.

shown towards ministerial decisions. However, as European Commission lawyers are not working alongside elected officials, this classic Weberian view that bureaucrats should refrain from making autonomous decisions does not apply because unlike politicians, they are not democratically elected and therefore not accountable to the public.[1098] A further comparison relates to the fact that EU's supranational order was explicitly relied upon by Commission legal advisers to justify a cautious interpretation of the treaties, largely because a declared competence breach by the ECJ would likely undermine trust among the Member States. This is in contrast to the UK's notion of Parliamentary Sovereignty which is associated with a higher degree of legislative autonomy. Another key distinction relates to the expertise considered to be significant for legislative drafting. While Parliamentary Counsel emphasised the significance of maintaining distance from the subject area of a Bill to provide the level of critical perspective needed, participants from the European Commission stressed that those drafting the initial text must have technical expertise in the area to anticipate the real-life implications of the proposal.

[1098] Gerth and Mills (n 285) 95; Tholen and Mastenbroek (n 5) 492–93. This notion was introduced in section 3.3.1.

Chapter Eight: Conclusion

8.1. Introduction

Research into the work of bureaucratic lawyers is significantly overlooked in the academic literature despite their pivotal role in safeguarding legal values and the foundational principles of modern government. This limitation has already been acknowledged by scholars, with the study of bureaucratic lawyering referred to as a 'largely unexplored jungle' and bureaucratic lawyers described as 'the orphans of legal ethics'.[1099] Chapter two emphasised a missed opportunity in the socio-legal scholarship to provide a more comprehensive understanding of the work performed by these lawyers than what is currently available. In addition to recognising a general absence of literature on the work of bureaucratic lawyers, this thesis also identified substantial knowledge gaps on the work of UK Government and European Commission lawyers to justify its focus and to begin to carve out its contributions. Based on these gaps, which largely stem from the scarcity of studies and the methodological limitations present in some of the studies, it was argued that several aspects of these lawyers' work remain unanswered, including the various tasks, judgments, interactions, and chronologies that constitute their work. Also, as much of the existing literature overlooks the significance of the bureaucratic contexts in which these lawyers operate, a need to consider this organisational context and how it shapes the ways in which the lawyers perform their work was emphasised.

These gaps led to the formulation of three fundamental questions to define the concept of 'work' and to shape the development of a unique analytical framework in chapter three, namely: *What* functions do UK Government and European Commission lawyers perform, *when* do they perform these functions, and *how* do they perform these functions? The third question focuses on the importance of socialisation processes *within* the respective bureaucratic environments, specifically

[1099] Gavin Drewry (1981) as cited in Lewis and Mulcahy (n 65). While the first statement was produced in 1981, the article published in 2021 advances that 'little has changed' since; Hutchinson (n 15) 981.

interactions and experiences occurring inside the organisations, in shaping the lawyers' political-professional behaviours and expertise. In accordance with the socio-legal approach of this thesis, the framework itself integrated insights from legal ethics, political science, and STS and served as a valuable foundation for the remainder of the thesis. Following the development of the analytical framework, four key research questions were established to drive the empirical analysis in chapters five to seven. The qualitative method of semi-structured interviews was considered to be the most appropriate for answering these research questions, as well as for acquiring a comprehensive understanding of the perceptions and experiences of lawyers as they perform their work.

The core value of this thesis lies in making a valuable contribution to the socio-legal scholarship by utilising methodologies and theories from the social sciences to explore the 'work' of UK Government and European Commission lawyers. As emphasised in previous chapters, and reiterated above, there are several aspects of their 'work' which have been largely or entirely overlooked. Moreover, given the more general absence of literature on bureaucratic lawyers, particularly from an empirical standpoint, the significance of this contribution extends beyond the study of these specific bureaucratic lawyers. Furthermore, as emphasised in chapter three, the qualitative approach of this thesis contributes to addressing criticisms faced in the broader policy-making literature, including in the disciplines of public administration and public policy, that insufficient attention is given to the *actual* working practices and lived experiences of bureaucratic actors. The following discussion, which is framed around the four key research questions, will provide a more comprehensive and nuanced overview of how the empirical findings of this thesis significantly enhance our current knowledge base. The chapter will then outline the possible methodological limitations of the thesis and identify opportunities for future research.

8.2. Research Question 1

What are the organisational positions of UK Government and European Commission lawyers in their respective bureaucracies?

This research question was addressed in chapter five which unpacked the organisational positions of UK Government and European Commission lawyers using empirical findings. The significance of this contribution lies in providing a comprehensive and up-to-date analysis of the lawyers' organisational positions *and* affiliations which is challenging to locate in the academic literature. Several organisational features were examined, such as the location or 'co-location' of the lawyers within the broader organisation, hierarchical structures including mechanisms granted to them to circumvent political hierarchies, and the intra- or inter-departmental mobility systems they are subject to. Empirical findings were also used to uncover the *primary* organisational affiliations of the lawyers, specifically the part(s) of the organisation to which they attached their greatest sense of identification and loyalty. The primary affiliation of all the lawyers reflected their physical location, even if they were employed by another department, emphasising the effective socialisation capacities of face-to-face interactions.[1100]

In accordance with the analytical framework, particularly theoretical insights drawn from neo-institutionalism and empirical findings from the political science literature, bureaucrats' primary affiliations serve as a strong indicator for their role perceptions.[1101] On this basis, chapter five formulated a set of expectations about the lawyers' political-professional behaviours, relying on the two ideal-typical role perceptions constructed in chapter three which are grounded in principles from the disciplines of legal ethics and political science. For lawyers situated in exclusive legal departments, an *autonomous professional* role perception was anticipated where lawyers are likely to be guided by 'professional correctness and the power of the better argument'.[1102] For lawyers situated in policy departments, such as ministries or sector DGs, there was an expectation that a *Weberian* role perception would be adopted which is associated with a greater deference towards political objectives.

[1100] Egeberg and Trondal (n 367) 61–62.
[1101] Hooghe (n 354) 68–69; Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 441; Trondal and others (n 320) 31, 131.
[1102] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.

Importantly, chapter five recognised that the socialisation of bureaucratic lawyers is unlikely to be constrained by their formal departmental boundaries but rather by what is needed to find solutions to policy problems, especially given the *process*-specialisation of legal services.[1103] On this basis, lawyers situated in exclusive legal departments are likely to interact regularly with policy departments which could encourage some outward-looking behaviours that indicate a (partial) shift of affiliation away from their 'own' legal organisation; a *supra-departmental* affiliation.[1104] In the context of this thesis, this affiliation denotes that the role perceptions of lawyers are not *solely* shaped by their 'own' institutional environments, as if they were operating as isolated silos, but may also be shaped through their socialisation experiences with the respective policy departments. Thus, lawyers may be more inclined to acknowledge the significance of political considerations and pressures emerging within the policy departments, and take these into account when assessing the appropriateness of their behaviour in political-professional conflict situations.

In addressing this research question, a key finding in chapter five revealed the distinct organisational positions of GLD legal advisers who are physically located in ministries, in stark contrast to the remaining lawyers who are situated in exclusive legal departments. Consistent with expectations derived from theoretical and empirical insights, chapters six and seven demonstrated that GLD legal advisers most closely resemble the ideal Weberian bureaucrat. This finding indicates that organisational positions *do* matter in influencing lawyers' political-professional behaviours. Nevertheless, while primary organisational affiliations are indeed a strong indicator, findings revealed that the reality is more complex than it may initially appear as the intricacies of their political-professional behaviours are further shaped by various other factors. In addition to interactions *outside* their primary organisations, their behaviours are also guided by the specific legal issue at hand.

[1103] Gulick (1937) as cited in Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 436.
[1104] Trondal and others (n 320) 128.

8.3. Research Question 2

What are the functions of these lawyers in the process of converting a policy problem into a final legal solution for the legislature, and when are these functions performed?

In order to appreciate the significance of this research question, and to comprehend its contribution, it is important to reiterate the substantial knowledge gap on the work of UK Government and European Commission lawyers. Chapter two explored the existing academic literature on these lawyers, highlighting that it places most emphasis on the descriptive question of what these bureaucratic lawyers do. Even so, given the shortage of studies available, in addition to the fact that many of these studies only provided a few short statements about the respective lawyers' work, it was argued that many aspects of their work remained unanswered. These aspects included the various tasks, routines, judgments, interactions, understandings, and timelines that constituted the core of their work which, in turn, justified the qualitative methodological approach of this thesis. In addition, chapter two also revealed that some of the more informative studies were 'first order' accounts prepared by former lawyers which lacked the range of perceptions achieved from empirical research and the theoretical capacities of an 'outsider' researcher who may see and explain the social phenomena under investigation in ways which an 'insider' lawyer cannot. [1105]

As much of the literature consisted of partial insights and isolated statements, considerable efforts were made to put the pieces together and provide a more systematic outline of what these lawyers do (see tables 1 and 2). This process re-emphasised the need for a qualitative methodology able to achieve rich, detailed insights into the work of UK Government and European Commission lawyers. The research question was then answered in chapters six and seven, with each chapter focusing on a different phase of the law-making process. The significance of this contribution lies in the provision of a comprehensive and nuanced account of *what* these lawyers do and *when* they do this, as well as their lived experiences in

[1105] Noordegraaf (n 1) 59; Clark and others (n 126) 133.

performing this work. This offered fresh insights into several unanswered questions, including the actions, careful judgments, routines, understandings, interactions with lawyers and non-lawyers, and chronologies that make up their work. While these empirical findings were clearly presented in chapters six and seven, emphasising how they enrich our current understanding, this chapter reiterates some noteworthy findings that highlight certain similarities and distinctions between the work of UK Government and European Commission lawyers.

One of these findings reveals that both UK Government and European Commission lawyers are involved at an earlier stage compared to previous years. The outcome in both organisations is that the lawyers are no longer confined or 'fixed' to their traditional job roles but instead embrace a more collaborative approach where they move around the various stages more freely, including during earlier stages where their contribution is often aimed at reducing time constraints and challenges in the later stages. Another empirical finding demonstrates that GLD legal advisers adopt a crucial function in clarifying and developing the policy intention whereas this function is not undertaken by their counterparts in the European Commission. The analysis provided two possible reasons for this distinction, including the fact that the policy is likely to be more developed by the time it reaches Commission legal advisers because of the inherent pressures within the supranational order. A further reason is that this 'legal' knowledge gap is addressed by DG officers who have considerable experience in policy-related matters given their position in sector DGs and their regular involvement in formulating new proposals.

An additional empirical finding rests on differences emerging in common and civil law drafting approaches, a distinction emphasised in chapter one. In the common law approach of the UK Government, Bills are written by Parliamentary Counsel who are specialist drafting lawyers with rarely any specialist knowledge in the subject area. This general absence of subject specialist knowledge is preferred as it enables Counsel to retain a high degree of objectivity and creativity during the legislative drafting process. In stark contrast to this, in the predominantly civil law approach of the European Commission, the legislative drafting is not performed by bureaucratic

lawyers who possess drafting expertise but instead, it is carried out by technical experts in the relevant subject area. Preference is given to those with technical expertise on the basis that they are better equipped to assess the real-life implications of the proposal. It is typically only once the Commission proposal is drafted, or at least a majority of it is drafted, that it is sent to bureaucratic lawyers who are responsible for ensuring its legislative drafting quality.

8.4. Research Question 3

How do lawyers perceive their roles, and how does this influence their political-professional behaviour?

As indicated already, a review of the academic literature in chapter two led to the claim that there is an insufficient understanding of how the bureaucratic environment shapes the ways in which UK Government and European Commission lawyers perform their work. In other words, the question of *how* these lawyers perform their work in their own bureaucratic surroundings is largely underexplored. Chapter two recognised that this is in fact a broader limitation of the literature on bureaucratic lawyers as much of it adopts a highly normative standpoint which forms assumptions on how lawyers *should* behave in their bureaucratic contexts without uncovering how the lawyers *actually* behave. The value of addressing this question resides in situating UK Government and European Commission lawyers in their bureaucratic contexts, and thus avoiding a simplified portrayal of their work which can give rise to the assumption that it operates in isolation from its surroundings. In studying the lawyers within their respective bureaucratic contexts, this thesis takes a significant step in overcoming the knowledge gap on bureaucratic lawyers found in the socio-legal scholarship.

The unique analytical framework of this thesis developed two concepts intended to shape the empirical analysis of the *how* dimension, including the concept of political-professional behaviour which forms the focus of this research question. By combining insights from legal ethics and political science, the framework developed two ideal-typical role perceptions that encapsulate the conflicting aspects of political-

professional behaviour: a Weberian bureaucrat and an autonomous professional bureaucrat. In line with a neo-institutional perspective, the framework advanced that a lawyer's role perception is likely to be shaped by their socialisation experiences within the bureaucratic organisation. On this basis, as identified above, the organisational positions of UK Government and European Commission lawyers were unpacked to formulate a set of expectations about their political-professional behaviours, largely guided by their primary organisations where their socialisation is anticipated to be most intense. Nevertheless, the aforementioned notion of a supra-departmental affiliation was also developed to recognise that lawyers' behaviours are unlikely to be solely shaped by their 'own' departmental environments, as if these were operating as isolated silos within the broader organisation.

To help address research question 3 in both chapters six and seven, two sub-questions were established, one of which asked whether lawyers situated in policy departments are more likely to adopt a Weberian role perception compared to those situated in exclusive legal departments. Similarly but oppositely, it also asked whether lawyers situated in exclusive legal departments are more likely to adopt an autonomous professional role perception compared to those situated in policy departments. As highlighted already in this chapter, GLD legal advisers situated in ministerial departments exhibited the strongest degree of Weberian-type behaviours, providing an affirmative response to this question. The empirical findings revealed that, in contrast, lawyers situated in exclusive legal departments demonstrated behaviours more closely associated with an autonomous professional role perception. If possible, these lawyers would adopt strategies that exhibited their professional autonomy towards policy departments, such as raising their professional legal views persuasively or attempting to educate or negotiate with policy departments on the grounds of professional competence.

However, while these distinct role perceptions were observed, concluding with a simple statement to that effect would have been overly simplistic. As emphasised in chapter three, the two ideal-typical role perceptions represented accentuated forms of behaviour and in reality, bureaucratic lawyers are likely to incorporate elements of

each, albeit to varying degrees.[1106] The second sub-question was intended to encourage the idea that, while a bureaucratic lawyer's location is a significant indicator for their political-professional behaviour, it is likely that interactions *outside* those departments will also play a role in shaping their behaviours. Specifically, it asked whether lawyers' interactions across legal departmental boundaries, specifically with policy departments, encourage a supra-departmental affiliation where their professional autonomy is weakened to accommodate the political preferences emerging in the respective policy departments. The empirical findings revealed that through regular interactions with policy departments, bureaucratic lawyers adopt a supra-departmental affiliation where, in certain cases, they are willing to depart from the 'power of the better argument' to accommodate departmental preferences.[1107]

More specifically, through these interactions, the lawyers learnt to appreciate the variety of influences driving a proposal and therefore considered it inappropriate to expect the respective policy departments to adhere to strict legal standards at all costs. Furthermore, through these interactions, lawyers developed a shared sense of purpose with the policy departments which led them to assign importance on maintaining these working relationships and to reduce the possibility of tensions. This supra-departmental affiliation has its limits, however, as the lawyers were still willing to employ the strategies mentioned earlier to enforce their professional autonomy, with the most extreme strategies employed if a department's preferences were seen to challenge their own guardianship responsibilities. Importantly, the effects of such cross-boundary interactions became particularly evident when analysing Commission legal revisers who had the least amount of interactions with policy departments, specifically with the sector DGs. In contrast to Parliamentary Counsel and Commission legal advisers who had regular engagement with policy departments, these lawyers maintained a strong sense of independence throughout and expressly identified their relative distance from the DGs as a reason behind this.

[1106] van der Meer and others (n 318) 4.
[1107] Trondal, 'Balancing Roles of Representation in the European Commission' (n 320) 433–34; Trondal and others (n 320) 14.

The empirical findings also revealed that the socialisation capacities of cross-boundary interactions are not as strong as being physically located with the policy department as GLD legal advisers still demonstrated the highest degree of Weberian-type behaviours.

8.5. Research Question 4

How do lawyers acquire the expertise needed to perform their work?

As mentioned above, the unique analytical framework developed two concepts to guide the empirical analysis of the *how* dimension of UK Government and European Commission lawyers' work. While research question 3 captured the concept of political-professional behaviour, the analytical framework also introduced the concept of expertise. This concept was developed using a realist theory of expertise from the STS scholarship which emphasises the importance of socialisation in a domain of practice to acquire the specialist tacit knowledge needed to perform the work effectively.[1108] This theory also introduces the concept of interactional expertise which represents the ability to acquire the tacit knowledge of *another* group through linguistic socialisation, crucially developed through face-to-face interactions with those groups.[1109] Upon recognising that some bureaucratic lawyers may struggle to acquire interactional expertise in other groups' domains, which could in turn lead to misunderstandings or tensions, the analytical framework also introduced a concept of an 'interpreter'. As interpreters develop interactional expertise in two distinct groups, they are able to utilise this expertise to go 'backward and forward' between the respective groups to help broker a more effective dialogue between them than if they were collaborating directly.[1110]

Based on the above insights, chapter three developed two sub-questions to help address research question 4 in chapters six and seven, specifically: 'What types of

[1108] Collins and Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience' (n 399).
[1109] Collins and Evans, 'A Sociological/Philosophical Perspective on Expertise: The Acquisition of Expertise through Socialization' (n 404) 25.
[1110] Collins, Evans and Gorman (n 436) 662; Jenkins (n 436) 80.

socialisation experiences do the lawyers rely on to acquire the knowledge and skills needed to perform their work successfully?' and 'Do the lawyers rely on interpreters for a productive relationship with other groups, or might they adopt this interpreter role themselves?' In accordance with the realist notion of expertise, all of the lawyers emphasised the importance of experiences gained *inside* their bureaucratic organisations to develop the knowledge and skills needed to perform their work successfully. Consequently, qualifications or pre-recruitment experiences were seldom mentioned. Findings revealed a range of in-house learning experiences gained by the lawyers which included, but were not limited to, mentoring schemes, extensive interactions with both lawyers and non-lawyers, hands-on experiences of providing legal advice (e.g., answering questions from policy departments), hands-on experiences of drafting and revising proposals (e.g., striking an appropriate balance between drafting principles), and experiences of representing the executive branch before the courts.

In addressing the second sub-question related to the concept of expertise, the findings revealed that both GLD legal advisers and Commission legal advisers adopt an interpreter role. In the case of GLD legal advisers, this is intended to foster a more productive relationship between policy officials and Parliamentary Counsel. A central element of their interpreter role was to translate the language used by Parliamentary Counsel for the benefit of policy officials, indicating that the language used by Counsel carries considerable legal or drafting nuances. In addition, their interpreter role also included a degree of mediation which went beyond linguistic interventions. By engaging in 'explanatory conversations' intended to help each group understand the preferences and practices of the other, legal advisers were able to alleviate any possible tensions.[1111] In the case of Commission legal advisers, the interpreter role was partly intended to ensure that legal revisers did not communicate drafting revisions to DG officers which could be perceived unfavourably. Moreover, they would also engage in 'explanatory conversations' to

[1111] Explanatory conversations were explored in chapter three. For more information see Ribeiro (n 437).

help minimise the likelihood of conflicts emerging between the two groups. Interestingly, the findings revealed that it was sometimes advantageous for Parliamentary Counsel or legal revisers to meet with policy departments as this could help foster the realisation of a shared agreement, highlighting the significance of direct face-to-face interactions in building trust and rapport.[1112]

8.6. Possible limitations of the research

To engage in methodological reflexivity, it is essential to recognise any limitations in my research design.[1113] As highlighted in chapter four, I was aware that gaining access to interview lawyers from both the UK Government and European Commission could raise challenges. Due to their elite status, there were issues surrounding time pressures or an increased concern for maintaining confidentiality. Although access to UK Government lawyers was facilitated through a gatekeeper, this was not the case in the European Commission. While sixty-one actors from the European Commission were contacted, I was only able to secure ten interviews despite the steps outlined in chapter four. More specifically, to alleviate issues surrounding time pressures, I would offer multiple dates to participants and would explain that I was able to meet them at their workplace. Furthermore, to alleviate their concerns regarding confidentiality, the ethical handling of their data and the confidentiality of their contributions were all detailed in the initial contact made.

The most considerable limitation in my research design lies in the fact that I was only able to secure access to one legal reviser participant.[1114] While a total of six legal revisers were contacted, the participant responded on behalf of the group to represent their collective perspective. Securing access to more legal revisers would likely have provided a more comprehensive and nuanced picture of their work. As outlined in chapter four, efforts were made to minimise the impact which a limited sample size might have on the research quality of this thesis, not only in relation to

[1112] Collins and others (n 431) 60.
[1113] Clark and others (n 126) 363.
[1114] Table 4 in chapter four provides more information on participant recruitment.

legal revisers but more generally too. For example, triangulation was used to increase credibility and verify particular details provided by the participants.[1115] This included an engagement with official publications from both the UK Government and European Commission to help ensure that I had relevant and accurate information about the operational elements of the relevant processes. Moreover, another form of triangulation involves the inclusion of a broad range of participants, including some who do not form the immediate focus of the research.[1116] As indicated in tables 5 and 6 in chapter four, interviews were carried out with a wide range of participants extending beyond the immediate focus, including UK Parliament lawyers, and lawyers from the European Parliament and Council. These participants were able to offer insights into their working relationships with UK Government and European Commission lawyers, and provide some interesting observations on their similarities and differences.

A further limitation could stem from a possible reluctance among participants to share thoughts and experiences which they believed could reflect negatively on themselves or their workplaces. However, as mentioned in chapter four, I engaged in various methods to increase the likelihood of responses reflecting true feelings, behaviours, and experiences.[1117] At the start of each interview, I emphasised that there were no correct or expected responses to the interview questions. I also ensured that all the participants understood their right to withdraw at any time with no explanation, either at that point or after. This was in the hope that all the remaining participants were willing to be actively engaged and openly share their perspectives. In addition to their right to withdraw, I also reiterated the confidentiality of their contributions and the steps taken to ensure the ethical handling of their data. I also explained that they would be able to review their data extracts prior to the submission of the thesis, and ask me to amend or remove any of their extracts.

[1115] Shenton (n 499) 66; Loh (n 501) 5.
[1116] Shenton (n 499) 66.
[1117] ibid 66–67.

Overall, my intention was to create an environment where participants felt comfortable to provide honest insights.

8.7. Opportunities for further research

Some interesting themes emerged from the empirical data which were not examined as they did not constitute the immediate focus of this thesis, but nevertheless provide opportunities for further research. Some of the themes emerged due to my decision to include a broad range of participants. For example, a potentially interesting avenue to explore would be the political-professional behaviours of European Parliament lawyers and how these compare to those adopted by European Commission lawyers. More specifically, in contrast to their counterparts in the European Commission, these lawyers work alongside elected officials (MEPs). Thus, the classic Weberian distinction between bureaucrats and politicians where the former are expected to refrain from making autonomous choices because they are not democratically elected and hence not directly accountable to the public, applies to them.[1118] Empirical findings in this thesis identified that this classic distinction was used by UK Government lawyers to justify a deference shown towards certain political decisions. This implies that in contrast to their counterparts in the European Commission, European Parliament lawyers might also rationalise some of their deferential attitudes on the basis of upholding democratic legitimacy.

Another theme which emerged from the empirical data related to the drafting quality of EU legislation. Chapter one highlighted that the academic literature often compares the drafting quality of UK and EU legislation, with some scholars arguing that the EU should in fact draw inspiration from the UK.[1119] While the empirical findings in this thesis identified some challenges related to the drafting quality of Commission proposals, including the fact that legal revisers are not involved early enough, the empirical data collected from lawyer linguists in the European Parliament and Council raised some significant arguments as to why drafting quality

[1118] Gerth and Mills (n 285) 95; Tholen and Mastenbroek (n 5) 492–93.
[1119] For example see Xanthaki, 'Emerging Trends in Legislation in Europe' (n 117).

is difficult to achieve in the EU, especially in comparison to national bureaucracies. These reasons were all rooted in the supranational nature of the EU and encompassed several political, practical, and legal factors.

Finally, beyond the themes emerging from the empirical data collected for the purposes of this thesis, there is also scope to explore a further research opportunity, particularly since the COVID-19 pandemic. As many of the arguments made in this thesis are based on the socialisation capacities of face-to-face interactions, it would be valuable to explore whether virtual meeting platforms have similar effects. Based on academic insights provided in chapter three, there is an initial expectation that socialisation will be less successful through remote means, although empirical research indicates that this can nevertheless be enhanced through an 'initial period' of face-to-face interactions.[1120]

[1120] Collins and others (n 431) 91–92.

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