

**PROCEDURAL OFFICER DECISION
2019/1**

**APPLICATION BY
AMILCO LIMITED
IN RELATION TO
THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO
ALLEGED ANTI-COMPETITIVE AGREEMENTS AND CONDUCT IN THE
PHARMACEUTICAL SECTOR (FLUDROCORTISONE)**

The Application

1. Amilco Limited (Amilco) has requested a review of the decision by the Senior Responsible Officer (SRO) to place certain documents on the CMA case file with no further redaction for legal professional privilege (LPP) (the Application).

The SRO's Decision

2. The SRO for the CMA's investigation in relation to alleged anti-competitive agreements and conduct in the pharmaceutical sector (fludrocortisone) (the Investigation) decided on 14 May 2019 to uphold the decision of the CMA case team that certain documents should be placed on the CMA case file with no further redaction for LPP, as set out in paragraph 1 above (the SRO's Decision). The SRO's Decision was made taking account of internal advice from the CMA Legal Service and an opinion from [X] (Counsel) dated 10 May 2019 (Counsel's Opinion). Counsel's Opinion was provided to Ashurst, acting on behalf of Amilco (Amilco's legal advisers), on 15 May 2019.

The Procedural Officer's Process

3. The Application was made on 21 May 2019. The CMA case team provided me with a copy of Counsel's Opinion on 22 May 2019. The CMA case team provided me with a timeline, the draft instructions to Counsel and additional correspondence relevant to the Application on 3 June 2019.
4. I held a meeting with the CMA case team on 5 June 2019. I held a meeting with Amilco's legal advisers by telephone on 6 June 2019. Amilco's legal advisers sent a letter on 7 June 2019 clarifying an issue raised during the meeting. The CMA case team provided clarification on 12 and 13 June 2019 to issues raised during the meeting.
5. I have considered the representations and information provided in the meetings I held with Amilco's legal advisers and the CMA case team and the points of

clarification provided following these meetings, together with the information set out in the Application and the additional correspondence that I have seen. I have also taken account of the reasons in the SRO's Decision.

Summary of the Application and issues raised

6. The Application relates to two sets of documents:
 - i) documents containing text originating from [X]
 - ii) the transcript of an interview the CMA held with [X] (director of Amilco) on 6 December 2018 which contains discussion of two [X] (CD4).
7. The Application requests that these documents 'must not be placed on the case file without our client having the opportunity to redact the information that is covered by LPP.'
8. The Application requests a review of the SRO's Decision for the following reasons:
 - 'the Opinion on which it is [sic] based misconstrues Amilco's submissions on LPP, and is legally flawed; and
 - placing the [X] Documents and the transcript of CD4 on the case file without redaction for LPP would amount to a breach of our client's fundamental right to the protection of privileged information and would cause irremediable harm to our client's rights of defence.'
9. I have referred variously in this decision to the [X] Documents, the Disputed [X] Documents, the documents and the material. The precise identity of each of the documents which form the subject matter of the Application is not central to this decision. All of these terms may therefore be seen to cover the [X] Documents referred to above, as well as CD4. I have also referred to LPP, legal professional privilege and to privilege, without any distinction between these terms.

The role of the Procedural Officer

10. The first issue to consider on receipt of any application to the Procedural Officer is whether or not it relates to matters within the remit of the Procedural Officer.

The Procedural Officer's remit

11. The role of the Procedural Officer in a Competition Act 1998 (Competition Act) case is set out in the CMA Rules.¹ Rule 8(1) provides that:

‘Complaints about the procedures followed during the course of an investigation under the [Competition] Act may be made to a Procedural Officer. The Procedural Officer, who, other than in acting as Procedural Officer...must not have been involved in the investigation, is to consider a significant procedural complaint where that complaint has not been determined or settled by the relevant person overseeing the investigation to the satisfaction of the complainant.’

12. The CMA's view about the scope of complaints within the remit of the Procedural Officer is provided in the Guidance on the CMA's Investigation Procedures (the Guidance)² and also in the Procedural Officer content on the CMA's webpage.³ These each provide the same five bullet points setting out the issues to which, in the CMA's view, a procedural complaint may relate and which the Procedural Officer is able to review. These bullet points state that procedural complaints relate to the following:

- ‘deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections
- requests for confidentiality redactions of information in documents on the CMA's case file, in a Statement of Objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the CMA's case file
- issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing, and
- other significant procedural issues that may arise during the course of an investigation.’

Scope for the Procedural Officer to consider the Application

13. The Application states:

¹ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458.

² Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraph 15.4.

³ [CMA webpage](#).

‘The matter is within the scope of the Procedural Officer’s powers as it relates to a request for non-disclosure of certain documents on the CMA’s case file, and constitutes a significant procedural issue arising during the course of the investigation.’

14. The CMA case team argued at the meeting I held with them that the Application only falls within the Procedural Officer’s remit to the extent that it relates to the process for determining LPP. They argued that any underlying issues about the existence of LPP itself were substantive rather than procedural and therefore not within the Procedural Officer’s remit.

15. I have considered carefully the issues which have been presented as the subject matter of the Application. I note that at the meeting I held with Amilco’s legal advisers they confirmed that they were not seeking a determination of LPP (see paragraph 19 below).

16. I therefore consider that the Application falls within the Procedural Officer’s remit.

Background to the Application

Key Events

17. Set out below is a timeline of key events, based on the correspondence that I have seen. This provides a background to the Application and the issues which it raises.

- 27 November 2017: CMA case team sets out proposed method for filtering digital material obtained during an inspection carried out as part of the Investigation including material that is or may be protected by LPP.
- 14 March 2018: Amilco’s legal advisers note that certain documents have not been provided in response to a notice issued under section 26 of the Competition Act (section 26 notice) and explain that this is because they contain legal advice provided by various external legal counsel. Amilco’s legal advisers propose providing these documents with the legal advice redacted and seek confirmation from the CMA case team whether this is acceptable.
- 23 November 2018: CMA case team informs Amilco’s legal advisers that it has received documents from [X], another party to the Investigation, which included documents containing text from [X], a law firm that had acted for Amilco (the [X] Documents). The CMA case team asks Amilco’s legal

advisers to explain why these documents had not been provided in response to the section 26 notice.

- 30 November 2018: Amilco's legal advisers make representations explaining why 'the documents in question (and similar documents) are covered by legal privilege under UK law and therefore ought to have been protected from disclosure in full'.
- 12 December 2018: CMA case team informs Amilco's legal advisers of the proposed process to resolve the LPP status of the documents. This proposes the use of an independent counsel process to conduct a binding review. It takes account of the representations made in the letter of 30 November 2018. It notes that the review will be conducted on a subset of documents and invites Amilco's legal advisers to make a selection of three documents to be included in that review.
- 17 December 2018: Amilco's legal advisers maintain the position in relation to LPP set out in the letter of 30 November 2018 and note: 'It is a matter for the CMA to reach a view on whether the [redacted] Documents are all covered by legal privilege, including with regard to the advice given by Independent Counsel if it so wishes.'
- 30 January 2019: CMA case team informs Amilco's legal advisers that the proposed process was followed, adapted to take account of the fact that Amilco had decided not to participate. Independent Counsel provided advice that a sample set of documents were not covered by LPP and provided guidance on the principles that should be applied when assessing the other documents. The CMA Legal Service applied those principles and determined that the [redacted] Documents were not covered by LPP. These documents would therefore be moved to the case file, subject to appropriate redactions and removal of duplicates.
- 31 January 2019: Amilco's legal advisers object to the CMA's decision on the status of the [redacted] Documents and raise concerns about the process used by the CMA, noting that Counsel was not in a position to 'provide definitive advice', having reviewed only a small sample of documents and not having discussed the context with Amilco.
- 27 February 2019: Amilco's legal advisers re-state that LPP has not been waived over the [redacted] Documents.

- 1 March 2019: Amilco's legal advisers claim LPP in relation to the transcript of an interview with [REDACTED] (CD4) and request that it is redacted in full.
- 14 March 2019: CMA case team informs Amilco's legal advisers that the [REDACTED] and CD4 will be placed on the case file.
- 21 March 2019: Amilco's legal advisers ask the SRO to reconsider the CMA's position on the LPP status of the documents and the decision to place them on the case file. Amilco's legal advisers claim LPP in relation to the documents and state that the process followed by the CMA in reaching its decision not to recognise the LPP nature of the documents was flawed.
- 28 March 2019: SRO sets out proposed process to be followed 'in order to resolve Ashurst's procedural concerns' in determining the LPP nature of the documents, following a telephone discussion. The following process was proposed:
 - 'the CMA case team will send you a copy of all 192 [REDACTED] Documents identifying those that the CMA considers to be the 40 unique documents;⁴
 - Amilco will be given the opportunity to make LPP representations on any of these 40 unique documents;
 - The CMA will reconsider the previous determination. To do so, it will:
 - send Amilco's representations to [REDACTED] for [REDACTED] to provide advice to the CMA on the privileged nature of the documents on which Amilco made representations;
 - make a final determination on the LPP status of the [REDACTED] Documents, after consideration of your representations and [REDACTED] advice
 - The case team will inform you of the outcome of that determination.'
- 2 April 2019: CMA case team provides Amilco's legal advisers with a list of documents. CMA case team offers to send Amilco's legal advisers a copy of instructions the CMA will send to Counsel after receiving Amilco's representations on LPP. CMA case team declines to provide a copy of

⁴ This email noted the [REDACTED] Documents 'contain around 40 unique documents and 152 exact duplicates of those 40' and that 'a number of the 40 unique documents are near duplicates of each other that raise identical issues of potential LPP'. Amilco's legal advisers were asked 'to limit to the extent possible ...representations to a subset of the 40 unique documents (on any basis that you deem appropriate), where the advice of [REDACTED]...could inform the CMA's assessment of other unique documents by analogy.'

Counsel's previous advice on the basis that Counsel will be providing new advice.

- 10 April 2019: Amilco's legal advisers provide representations in relation to Amilco's claim for LPP and accept CMA's proposal to provide a copy of the instructions the CMA proposes sending to Counsel. Amilco's legal advisers raise queries in relation to some discrepancies in the documents provided.
- 12 April 2019: CMA case team addresses queries in relation to the nature of documents and provides successive drafts of the Supply and Distribution Agreement to Amilco's legal advisers.
- 16 April 2019: Amilco's legal advisers provide additional observations in support of Amilco's representations on LPP provided on 10 April.
- 30 April 2019: CMA Legal Service provides working draft of instructions to Counsel and invites Amilco's legal advisers to correct any factual inaccuracy and update LPP representations provided on 10 April.
- 2 May 2019: Exchange of correspondence between CMA Legal Service and Amilco's legal advisers. Amilco's legal advisers confirm that they have no comment on the draft instructions, noting 'as we consider this to be a matter for the CMA to decide'. CMA Legal Service notes Amilco's legal advisers have been provided with an opportunity to provide representations and update submissions of 10 and 16 April and decided not to do so.
- 7 May 2019: CMA Legal Service puts to Amilco's legal advisers a point of clarification raised by Counsel.
- 8 May 2019: Amilco's legal advisers provide response to point of clarification raised by Counsel.
- 10 May 2019: Counsel's Opinion provided to CMA.
- 14 May 2019: SRO's Decision.
- 15 May 2019: Counsel's Opinion provided to Amilco's legal advisers (following the provision of solicitor's undertakings in relation to disclosure).
- 21 May 2019: Amilco's legal advisers provide observations on Counsel's Opinion to the SRO.

Issues raised by the Application

Meeting with Amilco's legal advisers

18. As set out in the Application (see paragraphs 6-8 above), Amilco is seeking a review of the SRO's Decision arguing that the Counsel's Opinion on which it is based 'misconstrues Amilco's submissions on LPP, and is legally flawed'. In the Application, Amilco's legal advisers also state that placing the documents concerned on the case file without redaction for LPP would 'amount to a breach of our client's fundamental right to the protection of privileged information and would cause irreparable harm to our client's rights of defence.'
19. At the meeting with Amilco's legal advisers, they explained that the Application was not a request for the Procedural Officer to determine the LPP status of the [X] Documents. The concern was that the CMA process, set out by the SRO, turned on Counsel's Opinion. It was noted that 'something was seriously wrong' with Counsel's Opinion, which had a 'fundamental misunderstanding on its face'. This Counsel's Opinion had been relied upon by the CMA. This was a procedural issue, within the remit of the Procedural Officer. Amilco's legal advisers were not asking for a determination that Counsel had got the law wrong but suggesting that the concerns were sufficient for the case team to be asked to consider this again.
20. At the meeting with Amilco's legal advisers, they did also question whether or not the documents were in fact covered by LPP. Although they were not asking for a determination on the issue, they set out by reference to two specific documents the reasons why it was considered that the conclusions on LPP in Counsel's Opinion were 'surprising'. They considered that the correct question to be addressed was whether LPP documents exist where the privilege belongs to Amilco and if so, whether that privilege has been waived.
21. Points relating to both the process that the CMA had decided to adopt to determine the LPP status of the [X] Documents and to the status of the documents were covered in the meeting with Amilco's legal advisers. These points reflect arguments presented in the correspondence provided with the Application. These are set out under separate headings below.

The CMA process and the nature of Counsel's Opinion

22. Amilco's legal advisers addressed the process the CMA had chosen to adopt and made the following comments:

- LPP was not a matter that could be determined other than by the courts. It was for the CMA to determine what it considered could be put on the case file. Legal advice was being taken for the benefit of the CMA.
- It was not considered appropriate for Amilco's legal advisers to join the process to determine the LPP nature of the documents and therefore endorse the outcome as if it were some form of arbitration. Since they did not want to be bound by any conclusions reached by Counsel, it was not appropriate to comment on the draft instructions, although they had agreed to make LPP representations to the CMA.
- Amilco's complaint arose in phases. Amilco had initially been told that documents would be placed on the CMA case file on the basis of a limited review of six documents. They had not been shown the details of this first review and had objected. The concerns had been listened to and after a discussion with the SRO, a second process had been followed and they had been provided with copies of various documents and the Counsel's Opinion that the CMA had received.

23. Amilco's legal advisers pointed out that the process turned on Counsel's Opinion and made the following comments:

- [X].
- Although they agreed with the principles on LPP that had been set out in Counsel's Opinion, there was a concern with the application of those principles to the facts which showed a 'fairly fundamental misunderstanding' or that Counsel had been 'addressing the wrong issue.' They noted that the point to be considered was a simple one: had the privilege of Amilco in the documents been waived in some way.
- They acknowledged that although they were given an opportunity to write to the case team and had made representations on LPP, they did not feel they were given a proper chance to engage and explain the context. If they had been able to do so, they considered that Counsel would have been less likely to have 'got the wrong end of the stick' and addressed the wrong question.
- They highlighted some concerns with the wording of the Opinion. Counsel referred for example to their acting 'on behalf of [X]', and to '[X]'s position on privilege' having been provided, as well as to 'submissions from Ashurst on behalf of CMA'. They were acting on behalf of Amilco.

- The conclusion that the CMA had reached on the basis of Counsel's Opinion that the documents were 'unlikely' to be covered by LPP was a tentative one for quite a significant step.

The [X] Documents and Counsel's Opinion

24. Amilco's legal advisers considered the nature of the documents that Counsel had been asked to review and the views that Counsel had reached on these and made the following comments:

- Two of the documents concerned were highlighted, noting that these contained legal advice and were marked as 'Confidential'. The advice provided would be privileged. The second issue was whether this privilege had been waived.
- The format of the documents and the ability to identify the author of comments in the drafts was important. When viewed in their proper format, the vast majority of comments were provided by lawyers. They noted as an example one comment in a draft where it appeared that the lawyer concerned was flagging an issue that needed to be looked at and indicated that further advice would be provided in due course.
- It appeared that the draft Supply and Distribution Agreement concerned was a document that the CMA case team considered central, at least on the basis of the interviews that had been held during the Investigation.

25. At the meeting I held with Amilco's legal advisers, they considered a query I raised about the fact that the CMA had received the documents concerned from another party who had not claimed that they were covered by privilege. Amilco's legal advisers noted that they had identified the existence of the documents during the Investigation and identified they were covered by LPP in March 2018. The CMA case team had not taken the matter further at that stage. As a matter of general practice, if as legal advisers they identified potential privilege belonging to a third party when responding to an information request, they would flag this to the authority concerned. This issue was followed up after the meeting in correspondence which stated:

'the fact that the Disputed [X] Documents were provided to the CMA by [X] does not affect the position that, having received those documents, the CMA is required to respect our client's right to protection of legal professional privilege.'

Meeting with the CMA case team

26. At the meeting with the CMA case team, the general process for establishing LPP was explained as well as the detail of the process followed in the Investigation. The following issues were covered:

- The CMA case team argued that the Application was substantive and in practice asked for a determination if the documents were privileged. This would not be a procedural matter and would not fall within the Procedural Officer's remit. They considered there had been no flaw in the process followed by the CMA.
- In each case, the CMA made a decision about what documents were included on the case file, taking account of LPP. Only the courts were able to determine the LPP status of any document.
- It was normal practice in considering LPP for independent counsel to provide advice. This was generally for the benefit of both parties concerned and the advice would normally be considered binding. This would not prevent a party from making a challenge in the courts (or to the Procedural Officer). This was an efficient process. There was however no formal set process for considering LPP and there was nothing set out in statute.
- In this Investigation, the situation was slightly different from what usually occurred since the documents over which LPP was claimed had been sent to the CMA. This had been done by another party. Generally, the process for assessing LPP would be carried out in relation to documents which the CMA had not seen.
- Lawyers acting for the party providing the documents had carried out a comprehensive review, including an assessment for LPP, before the documents were sent to the CMA.
- The CMA had carried out two processes for assessing the LPP status of the documents. There were a number of steps in each process, as reflected in the correspondence. The second process had included more documents and Counsel had considered all the agreed set of documents. As part of the steps in the second process, Amilco's legal advisers could make representations which were sent to Counsel. A point of clarification which had been raised by Counsel had been put back to Amilco's legal advisers and Counsel provided with the response. It had been open to Amilco's legal advisers to approach Counsel directly: they were aware of the identity of Counsel and the timing of

Counsel's review. The process had been handled by members of the CMA Legal Service who were not involved in the Investigation.

- Counsel had set out the principles. Counsel was clear about the importance that LPP should not be used as a cloak to cover anti-competitive agreements.
- The advice which was provided by Counsel at the end of the process did not need to be a piece of advocacy. It did not need to convince all parties that it was right before any documents were put on the case file. The CMA had carried out its own 'sense check'. This was an administrative process.
- This was considered to be a fair process which respected the rights of defence and was reasonable. The CMA had used considerable time, energy and resources in relation to documents provided by another party. Fairness should not be conflated with an outcome that Amilco's legal advisers were happy with.
- The CMA had not considered adopting any other process.
- The CMA needed to balance risks in putting documents on the case file. It also needed to take account of the rights of all parties to an investigation to see documents that relate to that investigation.
- The representations which had been received in relation to Counsel's Opinion had been put to Counsel who confirmed that they did not change the Opinion.

Observations on the Application

Legal Professional Privilege

27. Section 30 of the Competition Act provides that the CMA may not require anyone to produce or disclose a privileged communication. It defines a privileged communication to cover communications which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege.

28. I note that there are no explicit statutory processes under the Competition Act for handling documents which may be covered by legal professional privilege and for determining their status. There are however certain administrative procedures that the CMA normally follows for handling material during the course of an investigation that is or may be privileged and for identifying such material, as well as certain procedures adopted by enforcement authorities more generally. These are considered further below (see paragraphs 34-37 below).

29. Legal professional privilege is a fundamental right. This was highlighted in the correspondence that I have seen as part of the Application. As noted above (see paragraph 8), in the Application Amilco's legal advisers state that placing the documents on the CMA file without redaction for LPP would:

'amount to a breach of our client's fundamental right to the protection of privileged information and would cause irremediable harm to our client's rights of defence.'

30. It is not however the role of the Procedural Officer to provide a legal interpretation of the scope of legal professional privilege and I note that at the meeting with Amilco's legal advisers they made clear that this was not part of the Application.

31. I have not therefore considered the existence of any legal professional privilege which has been asserted in relation to the material which forms the subject of the Application.

32. I have nevertheless considered if a fair and reasonable process was adopted by the CMA in order to assess the status of this material.

33. I have also considered if the nature of the LPP rights claimed and the way in which the documents have been provided to the CMA in this case, mean that there are any additional steps that need to be considered or taken in order to protect and assess the claim to LPP.

Handling material which may be covered by legal professional privilege

34. The correspondence I have seen includes a letter which was sent to Amilco's legal advisers on 27 November 2017 setting out the proposed method the CMA would use to filter digital material which had been obtained during an inspection.

35. This set out the 'LPP filtering process' to be used once relevant material has been identified. It explains that a set of agreed key words will be applied to documents identified as relevant to the investigation, designed to 'eliminate material that is or may be protected by LPP'. It then sets out the key steps in the 'independent counsel' process for handling this material, if deemed necessary by the CMA taking account of the cost and additional probative value of the material. It states that independent counsel will be instructed by members of the CMA Legal Service who are not involved in the investigation with a view to reviewing the documents and identifying if they are subject to LPP. If independent counsel identifies that they are not subject to LPP, the documents will form part of the dataset for the investigation. As part of this process, the letter explains that instructions to independent counsel are disclosed to the lawyers of the party

concerned once they have been sent to independent counsel and that the lawyers have an opportunity to make representations to independent counsel on the LPP nature of the documents.

36. At the meeting with the CMA case team, it was explained that this type of process reflected normal practice in handling material which was potentially covered by LPP (see paragraph 26 above).

37. I am aware that The Bar Council has issued guidance to barristers instructed to act as Independent Counsel and advise on LPP (Bar Council Guidance).⁵ The Bar Council Guidance sets out counsel's role and notes 'you will be asked to consider the material and give an opinion as to whether or not its contents are privileged'.⁶ This guidance reflects the fact that this is a normal process used by UK enforcement agencies in dealing with material that has been taken as a part of a search process and that may be covered by LPP. I note from the instructions which I have seen with the correspondence that this guidance was provided to Counsel instructed to review the material.

The nature of the material involved

38. No arguments have been made as part of this Application about any difference in the approach to different types of documents, in light of the fact that the Application relates to the [§<] Documents and to the transcript of an interview with a witness which included discussion of the [§<] Documents (CD4). I have therefore not made any distinction in the approach and have considered the process as it has been applied to the documents as a whole.

39. I note the way in which issues about the protection of LPP arise in the circumstances of this Investigation. In this case, the material over which LPP is claimed came to the CMA from another party to the Investigation. A number of points arise from this.

40. First, it means that in this Investigation, the CMA already has possession of documents over which privilege is claimed. In other cases, an assessment may be made of privilege on the basis of principles alone, without the actual documents being seen by the CMA and with reliance placed on the advice provided by counsel who has reviewed the documents.

⁵ Guidance issued by The Ethics Committee of The General Council of the Bar in 2010, revised August 2017, headed: 'Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material'.

⁶ Bar Council Guidance, see footnote 5 above, paragraph 7.

41. Second, the material was provided to the CMA without any claim for LPP. I observe that the case team informed me in the meeting I held with them that [X] provided the material after its own assessment of the documents in order to identify any material that might be covered by LPP and therefore withheld. I note however that as pointed out by Amilco's legal advisers at the meeting I held with them and in correspondence after that meeting (see paragraph 25 above), the fact that the documents were provided by another party, does not affect any claim that Amilco might have to LPP, for that claim to be respected and for any arguments about waiver to be made. This point is emphasised in the letter which states:

'For the avoidance of doubt, the actions of [X] in providing the Disputed [X] Documents to the CMA do not constitute a waiver or loss of privilege that belongs to our client.'

42. The Application relates to documents which the CMA already possesses rather than documents over which a party is asserting LPP and is therefore not providing as part of an information request. In response to queries about certain of these documents, Amilco's legal advisers noted that these documents had not originally been provided in response to an information request because they were protected by LPP or were not in their possession (letter of 30 November 2018, see paragraph 17 above).

43. I consider that the fact that the documents are in the CMA's possession should not mean that any higher hurdle is required in relation to the assessment of LPP itself. It should instead simply reflect that the process needs to take into account that the CMA is able to review the documents and apply any principles to those documents directly. Care will also need to be taken in handling of the documents to ensure that should any material be found to contain LPP, this material has not been used as part of the Investigation.

44. The procedure followed by the CMA was therefore adapted to the fact that the CMA had access to the documents concerned. I note from the correspondence I have seen that these documents were not placed on the file or provided to the SRO while the assessment in relation to LPP was being made.

The Process

45. I note that two sets of processes were adopted for assessing LPP in this Investigation (see the Key Events set out in paragraph 17 above). I have considered primarily the second process, details of which were set out in the email from the SRO dated 28 March 2019 (the SRO's email).

46. I note that the decision to use an independent counsel process was not unusual. As set out above, this is a process used by the CMA early in any Competition Act investigation as part of the sift of material obtained during inspections. It is also a process recognised more generally as can be seen by the Bar Council Guidance (see paragraph 37 above).

47. I note the following points in relation to the process in this particular case:

- The steps in the process were clearly set out in the SRO's email, following a telephone conversation with Amilco's legal advisers.
- The SRO's email stated that a final determination of the LPP status of the documents would be taken at the end of the process.
- This determination of the LPP status would be made after considering representations made by Amilco's legal advisers and Counsel's Opinion.
- The SRO had not looked at the documents.
- Amilco's legal advisers were invited to confirm agreement to this process.
- Amilco's legal advisers were provided with the [redacted] Documents and able to make an appropriate selection of those which would be reviewed by Counsel.
- Amilco's legal advisers were provided with an opportunity to make representations on the LPP nature of the documents.
- Amilco's legal advisers were provided with the draft instructions to Counsel and given an opportunity to comment on those instructions and to make any changes to the representations on LPP which they had already made.
- The documents were not put on the CMA case file while the LPP status was determined.

48. I note also that as part of the process:

- A follow up point of clarification raised by Counsel was passed to Amilco's legal advisers and the response provided to Counsel.
- Counsel's Opinion was provided to Amilco's legal advisers. (This was after the SRO's Decision and is considered further in paragraph 61 below.)

49. I note that the determination of the LPP status of the documents was communicated to Amilco's legal advisers promptly after receipt of Counsel's Opinion. The SRO's Decision states how this was reached:

'Taking account of the Opinion, the CMA Legal Service advised me, as the SRO for this case, that the Disputed [X] Documents are unlikely to be covered by LPP.

In light of the internal advice and of the Opinion, I have decided that all Disputed [X] Documents should be placed on the case file, with no further redaction for LPP.'

50. I note also that the SRO's Decision stated that the documents would be moved to the case file on 23 May 2019, a date which was more than a week after the SRO's Decision was made.

51. Amilco's legal advisers declined to engage with the process by commenting on the instructions to Counsel, for the reasons explained at the meeting I held with them. This does not alter the fact that they were provided with the opportunity to do so. I note that at the meeting I held with them, they pointed out that there was no chance to engage with Counsel and provide a broader context to the representations to ensure that Counsel understood the factual situation (see paragraph 23 above). I have not seen anything in the correspondence which prevented them from doing so. The fact that they did not engage with Counsel was noted during my meeting with the CMA case team who pointed out that Amilco's legal advisers were aware of the identity of Counsel and the time of the review (see paragraph 26 above). I note also that Amilco's legal advisers did make representations on LPP (on 10 and 16 April 2019) and that these were provided to Counsel. In addition, Amilco's legal advisers responded to a follow up point of clarification raised by Counsel.

52. At the meeting I held with Amilco's legal advisers, they argued that the fact that the SRO Decision referred to it being 'unlikely' that the material was covered by LPP indicated a tentative determination for quite a significant step. I do not consider anything should be placed on this wording which may be seen to reflect that ultimately it is for the courts alone to determine the existence of LPP.

53. In light of all the points set out above, there is therefore nothing in the process which was adopted by the CMA to seek Counsel's advice on the [X] Documents over which LPP was claimed which was unfair or unreasonable.

54. The SRO's Decision was clearly set out and based on the outcome of this process and the advice received from the CMA Legal Service and Counsel's Opinion. The documents which were already in the possession of the CMA had not been put onto the CMA case file or seen by the SRO pending the outcome of this process.

Counsel's Opinion

55. As noted above, it is not the role of the Procedural Officer to consider whether or not LPP exists in the Disputed [§<] documents and Amilco's legal advisers made clear as part of the Application process that this was not what they were seeking. It is therefore not appropriate to review the substantive legal assessment which has been carried out by Counsel and set out in Counsel's Opinion. Amilco's legal advisers have however made a number of points in the Application, at the meeting I held with them and in their letter to the SRO dated 21 March 2019, to support the statement in the Application that Counsel's Opinion 'misconstrues Amilco's submissions on LPP, and is legally flawed.'

56. These included points about Counsel's potential confusion of the facts and misunderstandings about parties and their legal representation as well as concerns about the format of the documents which Counsel reviewed. Amilco's legal advisers noted for example that Counsel's Opinion refers to their acting 'on behalf of [§<]', and to '[§<]'s position on privilege' having been provided as well as to the statement by Counsel 'I have also been supplied with submissions from Ashurst on behalf of CMA.' Since Amilco's legal advisers were acting on behalf of Amilco only, they argued that these statements in Counsel's Opinion demonstrated that Counsel did not understand the background to the material being reviewed. They also expressed concern that Counsel needed to be able to see the documents in a format which enabled comments and track changes to be identified and noted a disjoint in Counsel's Opinion between the legal principles and the way in which these were applied to the facts.

57. I note the points which have been made about some errors in Counsel's Opinion, including the references to names noted above. The statement about the CMA may be ambiguous since it could however be read in two ways and the reference to 'on behalf of CMA' could refer to the identity of those supplying the submissions rather than the author of those submissions. I also note the representations that have been made about some disjoint between the legal principles set out at the start of Counsel's Opinion and the application to the facts.

58. Nevertheless, I note that the underlying purpose of the independent counsel process is to provide advice. It is for the CMA to determine how it handles the material concerned on the basis of that advice. This is highlighted in the Bar Council Guidance referred to above (see paragraph 37 above) which states:

‘The decision whether to inspect material over which a claim of privilege has been made, or which counsel has advised is privileged or contains privileged information (or, indeed, what to do with such material), is for the investigating agency; as counsel you can only provide your opinion.’⁷

59. Moreover, I note that the nature of LPP carries a risk for the CMA in relying on the advice provided as part of the independent counsel process and determining the documents which are put on the case file. This risk needs to be carefully weighed in relation to each document. In light of this, I note that although there are representations about how the argument in the Counsel’s Opinion might have been set out more clearly, it nevertheless can be seen to provide a reasonable basis for the CMA’s own assessment of the risks of placing the documents which Counsel reviewed on the CMA’s case file. I note also that, as set out above, the decision was made by the SRO on the basis of advice from the CMA Legal Service (see paragraph 49 above).

60. I have considered carefully the representations which were made by Amilco’s legal advisers about the nature and content of Counsel’s Opinion. As part of my consideration of the Application and the process which was followed by the CMA, I have reviewed the instructions which were prepared for Counsel as well as Counsel’s Opinion itself and the correspondence concerned, including the representations on LPP made by Amilco’s legal advisers and the follow up point raised by Counsel. I consider these suggest that although the factual situation was complicated, Counsel was well aware of the issues and the background, including the factual context on which advice was sought and the relationship between the various parties and individuals involved. I note that Counsel reviewed and commented on the documents. I note also that Counsel had already reviewed and commented on a smaller subset of the documents as part of the first process. I understand also that Counsel was provided with documents that enabled the author of track changes and comments to be identified. The fact that Counsel was able to identify comments being made by [X] is clear from the wording used in Counsel’s Opinion.

61. I observe also that the CMA case team told me that the concerns which had been raised by Amilco’s legal advisers on 21 May 2019 following receipt of Counsel’s Opinion were reviewed by the CMA Legal Service and sent to Counsel. They

⁷ Bar Council Guidance, see footnote 5 above, paragraph 9.

also told me that Counsel confirmed that these representations did not change [Counsel's] advice. I note that this took place after the SRO's Decision which is the subject of the Application. It is not therefore relevant to the SRO's Decision itself. It is nevertheless an aspect that I have taken into account in reviewing the Application as a whole. In particular, it is relevant to the request made by Amilco's legal advisers at the meeting I held with them that the case team should be asked to consider this again.

Decision

62. After careful consideration, in light of the reasons set out above, on 19 June I decided to reject the Application.

63. My decision was communicated to Amilco's legal advisers and to the CMA case team on that date.

FRANCES BARR
PROCEDURAL OFFICER

3 July 2019