Case Number: EWC/20/2019
11 December 2019

CENTRAL ARBITRATION COMMITTEE
TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 1999 AS AMENDED BY THE 2010 REGULATIONS
DECISION ON COMPLAINTS UNDER REGULATIONS 21 & 24

The Parties:

Frank Mueller and others

and

Vesuvius Plc

Introduction

1. On 11 January 2019 Mr. Frank Mueller, as chairman of the Vesuvius Plc European Works Council (the Complainants/the EWC), submitted a complaint against Vesuvius plc (the Employer) to the Central Arbitration Committee (CAC) pursuant to the Transnational Information and Consultation of Employees Regulations 1999, as amended by the 2010 Regulations (the Regulations or TICER).

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to consider the complaint. The Panel consisted of Mr Charles Wynn-Evans as Chair and, as Members, Mr David Coats and Mr Roger Roberts. The Case Manager appointed to support the Panel was Miss Sharmin Khan.

3. The Employer is an international ceramic engineering company headquartered in

London. It operates a European Works Council Agreement (the Agreement) under Article 6 of Council Directive 2009/38/EC (the Directive) and Regulation 17 of TICER.

4. An issue is treated under the Agreement as "Transnational" – a concept which is defined at page 40 of the Agreement - if it directly concerns at least 20 of the Employer's employees in each of two of its undertakings situated in two different countries in the European Economic Area. Other relevant provisions of the Agreement are set out at Appendix 3 to this decision. To summarise:-

(a) clause 13 provides that the EWC shall be informed and consulted at the EWC Annual Meeting and at EWC Special Meetings in accordance with the provisions of the Agreement.

(b) clause 14 limits the scope of the EWC to "*issues which are Transnational as defined in Annex 1 and which are not excluded [by the Agreement]*."

(c) clause 14 also provides that "*the EWC will not replicate matters subject to local information and consultation procedures"* and will not deal with certain other subjects including "*local collective bargaining."*

(d) clause 15 provides that the Company is obliged to provide "*information to the EWC of an issue which falls within the scope of this Agreement….and with the relevant documentation which allows the EWC to undertake a detailed assessment of the possible impact and, where appropriate, to prepare for consultation with the Company*".

(e) where, as was the case in relation to the restructuring which led to this complaint, there is a "Special Meeting" of the EWC, clause 22 provides that "*the information provided to the EWC shall include the financial and economic implications of the proposed measures together with information on the impact on the employees*".

(f) Annex 6 of the Agreement entitles the EWC to request information concerning "*matters contemplated as being within the scope of the EWC Agreement and, in the case of a Special Event, to that Special Event*" in response to which the Company "*will endeavour to supply any information reasonably requested by the EWC Select Committee a week in advance of any meetings, translations allowing [and] this information will contain the financial and economic considerations of the proposed measures and will include information about the implications for employees that may be affected by this Special Event*".

5. The provisions of TICER relevant to this complaint are set out at Appendix 2 to this decision.

The complaint

6. The Complainants submitted that the Employer, as the representative agent of Vesuvius Plc Central Management ("Central Management") for the purpose of TICER, had failed to comply with its obligations under the Agreement and brought complaints under Regulations 21 and 24 of TICER. More particularly, the Complainants complained that the Employer had failed to comply with the terms of the Agreement and had withheld information to which the EWC was entitled and which it had requested. On 16 July 2018 a "Special Event Meeting"

had taken place under the provisions of the Agreement concerning proposed closures by the Employer of production sites in three European countries. At this Special Meeting the EWC had requested financial information concerning the total restructuring costs to be incurred in relation to the restructuring in question. However, the Employer had refused to provide the information and denied that the EWC was entitled to this information. Several attempts had been made to resolve the issue including third party mediation but had been unsuccessful. The EWC therefore submitted its complaint to the CAC requesting that an order be made for the Employer to provide the information sought.

7. It was agreed with the parties at the outset of the hearing that the issues for the Panel to consider were:

(a) what was the EWC's request?

(b) was the information requested "transnational" in scope for the purposes of the Agreement?

(c) was the request outside the scope of the Agreement?

(d) was the withholding of the information requested justified under the Agreement and Regulation 24 of TICER?

Summary of the Employer's response to the complaint

8. The Employer submitted its response to the CAC on 24 January 2019 disputing the complaint. The Employer accepted there was an Agreement in place under Regulation 17 of TICER and agreed that the Agreement required the provision of certain information to be provided to the EWC. The Employer stated that in summary, clauses 14, 15, 22 and paragraphs 2 and 3 of Annex 6 of the Agreement established that there was an obligation on the Employer to provide the EWC with:

a) information relevant to transnational matters, but excluding matters subject to local information and consultation procedures;

b) relevant documentation which allowed the EWC to undertake a detailed assessment of the possible impact and, where appropriate, to prepare for consultation with management;

c) financial and economic implications of the proposed measures together with information on the impact or implications on the affected employees and

d) documentation requested which was within the scope of the EWC Agreement and/or a Special Event.

9. The Employer agreed that there was a Special Meeting on 16 July 2018 about the restructuring of Vesuvius Plc's Advanced Refractories and Foundry business across Europe and that this was a transnational matter that related to a "Special Event" as defined in the Agreement. The Employer explained that a business review was undertaken in May 2018 establishing that there had been severe underutilisation of some of the manufacturing plants

across Europe. A previous study carried out by external consultants had shown that other plants had improved efficiency. The Employer had formulated a proposal to address this issue which included transferring some product lines and other operations to a smaller number of more efficient "flagship" plants. The Employer stated that transnational consultation with the EWC had begun at the same time as local information and consultation in each affected country as was required by the Agreement.

10. The Employer stated that two informal meetings had taken place with the EWC Select Committee between May 2018 and the end of June 2018. In the first informal meeting, the Employer informed the EWC about the review and that closures were likely and shared certain information. In the second informal meeting the Employer shared, on a strictly confidential basis, financial information relating to the cost savings that the contemplated measures would deliver as well as the rationale for the review. At the Special Meeting on 16 July 2018 the Employer provided more detail by way of a slide show presentation about the proposals which included the figures for the potential incremental annual cash savings from each transfer together with the proposed investment costs to achieve the transfers. The predicted utilisation was detailed and the impact of the closure of the other plants was explained so that the EWC could assess the impact and prepare for the consultation. Timelines were proposed (subject to consultation) as was the number of workers likely to be affected at each plant. Information about the proposed process for supporting affected workers was also provided.

11. At the Special Meeting, the EWC had asked for the costs of restructuring including whether there was a central budget for redundancies arising out of the restructuring. The CEO had answered that, as redundancy costs would be dependent on local labour information and consultation discussions in each affected country, there was no fixed redundancy budget. He

also answered that the total provision for possible redundancy costs was confidential and that this information could not be disclosed to those on the other side of forthcoming negotiations without seriously harming the functioning of or being prejudicial to the Company. The EWC subsequently delivered its formal opinion on the Special Event dated 30 July 2018 stating:

"As management decided to withhold information on the planned restructuring costs, the EWC is unable to fulfil its role as provided by the EWC Agreement to undertake a detailed EWC assessment of the project. The EWC was not given the opportunity to understand the financial costs for the business neither to obtain clarity on the specific support redundant employees will be offered. The management deliberations on this matter provided at the meeting remained vague and superficial. The EWC wishes to remind management on their legal obligations under the EWC Agreement."

12. The Employer contended that it was not in breach of Regulation 21 of TICER because it was only required to provide such information to the EWC as was relevant to the issue on which the EWC was to be consulted and was within the scope of the Agreement. Such information had to be both relevant and necessary to enable the EWC to give its opinion. The Agreement specified the limits of the obligation to provide the EWC with information and this was not an unlimited right. Information was provided to the EWC in accordance with clauses 14, 15 and 22 of the Agreement. The amount of the restructuring costs and in particular the budget for its redundancy payments was not information which it was required to provide under the Agreement because:

a) there was no central redundancy budget because the costs of redundancy payments could only be ascertained after the local redundancy consultations were concluded;

b) it was subject to local information and consultation and/or collective bargaining procedures thus specifically excluded from the EWC remit;

c) redundancy costs relating to a restructuring were not a transnational matter - the proposed investment costs of restructuring were provided with only the provision for redundancy payments made locally being withheld;

d) the redundancy costs requested were not necessary for the EWC to undertake a transnational assessment of the possible impact and prepare for consultation as they were subject to local procedures; and

e) once the local redundancy consultations had taken place and the applicable severance terms were agreed or determined locally, the Employer was able to and did provide the EWC with information about the number of redundancies and the basis for the calculation of the relevant redundancy costs for example by an e-mail dated 5 October 2018.

13. The Employer stated that it had tried to resolve the matter and had met with the EWC Select Committee on 4 August 2018 in accordance with the stage 1 meeting under the Agreement's Disputes Procedure to discuss the EWC's complaints. There was a dispute about the timing of the information and consultation which was resolved but the EWC maintained that it was entitled to the information it had requested on one-off restructuring and redundancy costs so the matter was taken to an independent mediator in December 2018 but was unsuccessful.

14. The Employer asserted that the EWC was frustrated by the limits of transnational information and consultation under the Directive and TICER and that it understood that the EWC sought to play a more interventionist role at local and national level when there was a transnational event and to obtain information relevant to local redundancy consultation and negotiation. The Employer maintained that there was no breach of the Agreement and that the information sought by the EWC was outside the transnational scope of the EWC Directive and that therefore the complaint under Regulation 21 should be dismissed.

15. The Employer also contended that, if it was wrong about the limitations of the Agreement and the EWC Directive in respect of Regulation 21 of TICER, then it was entitled to rely on Regulation 24 of TICER. Under Regulation 24 of TICER the Employer was not required to disclose any information or document when the nature of the information or document was such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking or group of undertakings concerned.

16. The EWC was seeking information as to the costs of restructuring and the amount in any central redundancy budget. The Employer reiterated that the total provision "that Vesuvius makes" for possible redundancy costs had to be kept confidential as severance and redundancy payments were consulted upon or negotiated locally. If it had disclosed the maximum provision to the other side, its ability to negotiate over severance payments would have been severely prejudiced. If the redundancy provision in respect of each relevant country had been disclosed transnationally, the representatives of the employees affected in each country would have demanded the same payment as that to be made in the most favourable jurisdiction and/or each negotiation would have begun with the Employer's disclosed maximum thus seriously

prejudicing the Employer's negotiation position in the local negotiation processes. The Employer contended that on this basis there was no obligation to disclose the information sought by the EWC under Regulation 24 and that the CAC should also dismiss this aspect of the complaint.

17. On 8 February 2019, at the Panel's request, the Employer provided a copy of the EWC Agreement dated 27 June 2014 (as amended and updated on 3 July 2015 and 7 July 2017); a copy of the slides of the Presentation of the Employer's European Advanced Refractories and Foundry Manufacturing Reorganisation Proposals shown at the Special Meeting of 16 July 2018 and a copy of the Minutes of that meeting.

Summary of the Complainants' comments on the Employer's response

18. By letter to the CAC dated 14 February 2019 the Complainant submitted its comments on the Employer's response which provided further and better particulars of the complaint for the Panel together with their copy of the EWC Agreement dated 27 June 2014 (as amended and updated on 3 July 2015 and 7 July 2017).

19. The Complainants explained that, in compliance with the dispute resolution procedure at clauses 57-62 of the Agreement, the EWC decided to submit the complaint to the CAC. This was a result of a wider dispute between the EWC and Central Management. Initially the EWC did raise both the issue of the withholding of information and the issue of the timing of the Employer involving the EWC in restructuring projects. In its view, the Employer had on multiple previous occasions launched the information and consultation process in similar restructuring projects far too late for it to be meaningful and for the EWC to have any potential

advisory impact on the management decision. The Employer had acted no differently in respect of the restructuring which led to this complaint. The EWC was convinced that the decision to close the relevant factories in Spain, Poland and the UK as part of the restructuring in question were a fait accompli at the time the Special Meeting of 16 July 2018 took place. The Complainants contended that the Employer had on a number of occasions been in breach of the Agreement which at clause A stated that information and consultation must take place "before irreversible decisions are made". The Complainants disagreed with the Employer that the issue of the timing of information and consultation had been resolved. However, this aspect of the complaint was withdrawn because of the ambiguities of providing legal evidence of the EWC's maintained view that management had only informed the EWC at a time when the decision on the closures was irreversible. The EWC had aimed to resolve the dispute amicably with the Employer's Central Management including external mediation and the EWC did meet with the Employer's CEO to explore ways of improving the relationship but any attempt to resolve the dispute had failed. Consequently, the EWC members had decided by unanimous vote to file the complaint to the CAC.

20. The Complainants stated that Clause A of the Agreement defined the purpose of the EWC as providing,

"an avenue of Information and Consultation at a European level in which employees through their representatives will be informed and consulted by central management concerning the business challenges and opportunities affecting the Vesuvius Group companies on a transnational level so as to enable the EWC´s views to be taken into account before irreversible decisions are made."

As such the EWC was of the firm view that restructuring costs in the event of plant closures must be considered as an immanent part of a "business challenge affecting Vesuvius". Contrary to the case made by the Employer, the EWC's entitlements to information and consultation were not therefore limited to information and consultation on the social impact of planned measures on employees - the EWC was entitled to a genuine understanding and debate of the business. Therefore, it was the Complainants' case that the Employer's Central Management must provide the EWC (in accordance with clause 17 of the Agreement) on a regular basis, with a

"written report on the progress of the Vesuvius Group business including ... the Group's structure and strategy; the economic and financial situation (including country results where available); the probable development of the business and of production and sales;... investments; intended mergers acquisitions".

21. The Complainants' contention was that the EWC was – other than most local employee representative bodies - first and foremost an institution to understand and review the financial, economic and strategic evolution of the Employer.

22. Annex 6 (3) of the Agreement outlined the nature of the information to be provided to the EWC in case of a Special Event (triggered by plant closures and collective redundancies and relocations) as being the financial and economic considerations of the proposed measures and including information about implications for employees that may be affected by this Special Event. The EWC had significant financial and economic expertise to analyse financial data provided by the Employer. The EWC had arranged (amongst others) two comprehensive training events delivered by the Employer's senior accountant during which EWC members

were familiarised with the financial reporting system of Vesuvius and were taught that restructuring may lead to financial savings but must always be matched against the costs incurred which may have a significant impact on the Group´s results and the Groups ability to achieve its targets. The EWC had been constantly made aware by the Employer's Central Management about the importance of cost savings for Vesuvius. Cost saving initiatives formed part of management deliberation via-a-vis the EWC over the years in various forms, including transnational relocations, the creation of a Shared Service Centre in Poland, the introduction of Lean Management, hiring freezes, travel restrictions and– most recently - costs incurred by the EWC itself. In short cost avoidance and cost-reduction played a fundamental role for Central Management considerations and the Employer must therefore share their cost provisions on restructuring with the EWC.

23. Clause 17 of the Agreement obliged the Employer to provide information to the EWC as follows:-

"The provision of information to the EWC of an issue which falls within the scope of this Agreement shall take place at a time, in a manner which may be oral and, if available, in writing and with the relevant documentation which allows the EWC to undertake a detailed assessment of the possible impact and, where appropriate, and to prepare for consultation with Management."

The possible impact of a restructuring was not limited to just the directly affected employees but also to the retained employees. The Complainants contended that the CAC's decision in Oracle - CAC EWC/17/2017 (at paragraphs 6 and 82) was consistent with the EWC's position

on this point. Vesuvius employees had experienced the impacts of a reduced cashflow on recruitment, salary and wages in times of restructuring.

24. The Employer had argued that the EWC was not entitled to understand the restructuring costs the detail of which had been sought because these would be consulted and/or negotiated at local level. However, the Complainants pointed out that the information requested by the EWC about total restructuring costs was not subject to any local information and consultation or negotiations process and was not provided to any of the local employee representatives. The Employer had withheld the requested information at both European and local/country level. The EWC could not therefore have replicated any information sharing with local employee representatives.

25. In response to the Employer's argument that it could not disclose restructuring costs as these would result from local consultation and negotiations and that accurate figures would only be available at the end of the process, the Complainants agreed that data to be shared with the EWC would often be of a preliminary nature and that actual end results would be subject to the final implementation of the subject matter. The EWC had, therefore, always asked for the estimated figures and not the final restructuring cost. In its view, the fact that only estimated restructuring costs were in the possession of Central Management at the time of the EWC consultation did not justify the withholding of such estimates. The Agreement was clear on this. Information and consultation was to a significant extent forward-looking and based on management projections and forecasts. Clause 17 of the Agreement stated that "*information must also include projections. Information must be, for example shared on "the probable development of the business and of production and sales; the situation and probable trend of employment……,intended mergers acquisitions and disposals …"*

26. The Complainants refuted the Employer's allegation that the EWC had "*long sought to be able to play a more interventionist role at local and national level*". This statement was in its view absolutely unfounded. The EWC's position was that it had never participated or interfered into local information and consultation procedures and was fully aware of the prerogatives of local information and consultation procedures. It had never aimed to replicate local procedures. The Employer had also assumed that the EWC had unreasonably aimed to "*obtain information relevant to local redundancy consultation and negotiation*" and that this formed "*the basis of the EWC complaint*". This statement implied that information provided must be irrelevant and without any added value for local consultation. This view of Central Management was unfounded and without any substance within the Regulations or the Agreement. The fact that the EWC must not replicate local consultation did not mean that information provided to the EWC must not be relevant for local consultation.

27. Furthermore recital 20 of the Directive defines as one of its objectives "*reinforcing the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue...*", contrary to the Employer's view that European and local consultation must be perceived as entirely separate processes. An understanding of the overall restructuring costs in question would have helped the EWC to assure local employee representatives that reasonable financial provisions were made. The information would have also helped the EWC to benchmark provisions against market data and previous restructurings.

28. The Complainants stated that it was factually wrong for the Employer to assert that it had declined the EWC's request for information on the restructuring costs on the grounds that

there was no central restructuring budget for such costs. In its submission to the CAC the Employer had stated that the EWC had requested information on a "central budget" for restructuring which did not exist and accordingly data could not be delivered. The EWC had never asked for a "central budget". It did, however, ask for the estimated restructuring costs as it understood any forecast was of a preliminary nature and that absolute costs would be dependent on the implementation process. It was surprising to the Complainants that the Employer had claimed to have no knowledge about the such estimated costs as it had admitted in its response to the complaint, in paragraph 14 of its submission to the CAC dated 24th January 2019, that a total provision for possible redundancy costs had been made albeit argued to be confidential. The Complainants' conclusion therefore was that the Employer was not any longer denying that the requested data was available but rather that it disputed the entitlement of the EWC to be provided with the requested data.

29. The Complainants also stated that it was factually wrong for the Employer to state in its response to the complaint to the CAC that the EWC had requested Central Management to share information on a central "redundancy" budget as the EWC neither asked for a redundancy budget nor for the estimated redundancy costs. The EWC had requested information on the overall restructuring costs which, in its view, was not limited to redundancy or severance payments - as the Employer's latest Annual Report demonstrated at page 30 of Vesuvius's Annual Report 2017, restructuring costs included, other than redundancy pay, other plant closure costs and consulting fees. At page 127 of Vesuvius Annual Report 2017, the Independent Auditors' Report for Vesuvius 2017, defined restructuring costs as *"costs related to the Group's rationalisation of its operational and support functions. The costs predominantly included redundancies and severance payments, professional adviser fees and other impairment charges for obsolete inventories and property, plant and equipment."*

30. The Complainants disagreed with the Employer's argument that restructuring costs were not relevant for the EWC. Restructuring costs constituted an important element of any company business evolution. Restructuring costs were non-recurring operating expenses, which showed up as a line item on the income statement and were used to calculate net income. Accordingly, as a listed company, the Employer had to report restructuring costs to the public on a regular basis. The Employer had recognised this obligation and reported restructuring costs as part of the Group Income Statement. For 2017 the Employer reported a total of £36.3 million restructuring costs whereas the restructuring costs for 2016 amounted to £28.5 million but the data for 2018 had neither been shared with the EWC nor with the public so far. The Vesuvius Independent Auditors´ Report 2017 stated, "*From our procedures we concluded that restructuring costs were appropriately recognised and classified within the financial statements*". It was noted by the EWC that restructuring costs were public information and formed a relevant part of the company reporting to investors and shareholders.

31. The Complainants contended that with reference to the annual reporting system of the Employer it was wrong of the Employer to submit that "*only the provisions for redundancy payments made locally was withheld*." Restructuring costs were not limited to redundancy pay but expanded to various other items as identified, for illustration in the Vesuvius Annual Report 2017: "*Restructuring Charges: The 2017 restructuring charges were £36.3m (2016: 7£28.5m). The Group-wide restructuring programme initiated in 2015 continued, resulting in charges of £36.3m (2016: £28.5m) reflecting redundancy costs of £22.8m (2016: £21.4m), plant closure costs of £0.5m (2016: £4.2m), consultancy fees of £6.8m (2016: £2.0m), an inventory/asset write-off of £5.5m (2016: £0.9m) and travel of £0.7m (2016: £nil).*" (p. 142. Annual Account 2017). Therefore the Complainants had concluded that not only were the

redundancy costs withheld but also the total estimated restructuring costs including the above were withheld.

32. The Complainants also refuted the Employer's claim that the EWC had requested the disclosure of the redundancy costs for each country. The EWC had never asked for a breakdown of redundancy costs per country but for the aggregated European restructuring costs. In response to what it saw as the Employer's assumption that a consequence of its disclosure of the redundancy provisions was that "*each country would demand the same as the country with the most favourable jurisdiction*" the Complainants considered this not to reflect reality and tended to portray the EWC members as rather naïve employee representatives when in fact, EWC members understood the social and economic diversity across Europe including social legislation, costs of living, and economical background. The EWC was aware that wages, salaries and severance pay offered by the Employer took advantage of this diversity. Although EWC members' details on the above terms and conditions have formed part of publicly available collective agreements for many years, there had never been an initiative by the EWC or local representatives to harmonise terms and conditions of employment.

33. The Complainants' response to the Employer's position in relation to the complaint made under Regulation 24 - that the "*disclosure of information about individual restructuring and redundancy costs would, on an objective basis, seriously harm the functioning of Vesuvius's local negotiation processes and would be prejudicial to the undertaking*" – was as follows. The Complainants noted that the EWC had never asked Central Management to disclose information about "*individual restructuring and redundancy costs.*" It had not even asked for the disclosure of information on the restructuring cost for a particular country but rather for the disclosure of information on the aggregated anticipated costs for the three relevant

countries, Poland, Spain and the United Kingdom. The requested information could not have harmed the functioning of Employer's local negotiation processes as Vesuvius did not enter into any negotiations on the subject matter at local level. Social dialogue in the countries concerned was, if at all, confined to information and consultation. No negotiations had taken place.

34. The Complainants noted that this was the first time in the course of the dispute that the Employer had relied on a right to withhold information under Regulation 24 of TICER. The Employer had not previously stated that the disclosure of the requested information would cause it serious harm. The Employer had not provided an explanation of the nature of the harm it relied upon in its submission to the CAC. In previous restructuring programmes, the Employer had provided information on restructuring costs to the EWC. For example, in relation to the closure of the Ostrava factory (Czech Republic) in 2016, Central Management had not taken the position that the disclosure of the information would cause harm to the business.

35. Clause 29 of the Agreement set out the provisions for withholding of information:

"There may be certain types of confidential information which are so sensitive that they cannot be disclosed to the EWC. This includes information the disclosure of which by the Company would be in breach of a legal obligation, or rules of a regulatory body or court order or where the disclosure of which would be likely to cause serious harm or prejudice to any Vesuvius Group company."

36. The Complainants argued that the information requested by the EWC did not fall within the scope of either the provisions of Regulation 24 of TICER or of Clause 29 of the Agreement. In its view, the right to withhold information must be justified by serious potential harm to the business or a breach of law. In this case the Employer had not expressed any concern that the provision of the relevant information to the EWC would cause harm to the Company from external parties but instead suspected its own redundant employees as being the presumed "serious harm" for the business. The EWC could not accept the view that open communication with employees within the boundaries of the Company would be harmful for Vesuvius. On the contrary, the EWC took the view that trust and openness formed the basis for any successful business. The Employer had stated that it had provided financial information on costs savings expected from the restructuring to the EWC Select Committee at a meeting on a "strictly confidential basis." The EWC had acknowledged the confidential classification but did not agree with the Employer that the actual restructuring costs fell into an even more sensitive category compared to the expected cost savings.

37. The Complainant argued that there was a proven record that the EWC Select Committee had always adhered to the principle of confidentiality of the information provided to it and that it was unjust of the Employer to assume a potential breach of confidentiality on this occasion. The Complainants explained that, until the arrival of the new Group CEO, Mr. van der Aa had, in his then role as the Group HR Director, on various occasions shared highly sensitive commercial information with the Select Committee. The information previously shared included information on planned acquisitions or business studies and recommendations of external consultancy firms. For example, the Employer had shared detailed information on restructuring costs with the EWC in relation to previous events such as the McKinsey study leading to the site closures in Avezzano and Cagliari as well as the creation of the Shared

Service Center in Poland (by a PowerPoint presentation of 7th July 2017). The EWC had not been made aware that the disclosure of the restructuring costs associated with those projects to the EWC had caused any harm to the Company.

38. The Complainants also raised concerns with regard to the language used in the Employer's submissions. The Employer referred to the dispute as a matter between "Vesuvius" and "the other party". The EWC suggested management should acknowledge that the EWC is not "the other party" but a relevant stakeholder inside the company. The EWC had not requested the disclosure of the information to the public or even competitors but internally to the elected employee representatives. The "us and them" approach implied in portraying employee representatives as the "other party" was inappropriate. There were multiple layers of employee representation within the Employer. None of the EWC country representatives directly represented one of the sites impacted by the closures. None of the EWC members were part of "the other party" being involved in any local information and consultation process on redundancies. There were various independent employee representative structures across Europe but there was no "other party" of which the EWC would be part of.

39. With regard to confidentiality, the Complainant made a number of points. Article 8 of the Directive stipulates that EWC Members "*are not authorised to reveal any information which has expressly been provided to them in confidence*". Accordingly, TICER Regulation 23 sets out that: EWC Members "*shall not disclose any information or document which is or has been in his possession by virtue of his position ... which the central management has entrusted to him on terms requiring it to be held in confidence*." Also the Agreement included at its Clause 29 specific provisions on confidential information:- "*Confidential Information. Where reasonable to do so, the Company may classify specific written or oral information*

supplied to the EWC members as confidential for objective reasons …The EWC and its duly appointed expert(s) must maintain strict confidentiality in respect of all such information." In the event that the Employer position on the sensitivity of the requested information was justified, the Complainants argued that Central Management should have exercised its right to share information with the EWC on a confidential basis. Clause 28 of the Agreement provided the framework for this option as follows:

"*Where reasonable to do so, the Company may classify specific written or oral information supplied to the EWC members as confidential for objective reasons. … The Company will, if requested to do so, provide an appropriate and specific explanation of why such information must remain confidential and will explain how long the relevant information*."

40. Finally, the Complainants referred the Panel to the CAC's decision dated 12 February 2017 in the case of the Oracle (EWC/17/2017) - in which the employer in question had, in the course of the dispute, eventually agreed to provide the EWC with the requested information on a confidential basis – where the Panel stated as follows at paragraph 87:

"In the Panel's opinion greater consideration should have been given earlier to adopting this approach of disclosure to EWC on a confidential basis, possibly for a specified appropriate period."

41. The CAC had concluded at paragraph 86 of that decision that withholding information for principle reasons

"…stands in contrast to the thrust and intent of the Directive and Regulations which is that relevant information should be given to EWC, with protections available where it is objectively reasonable for management to argue that its disclosure would prejudice or seriously harm the undertaking."

42. In conclusion, it was clear to the Complainants that the Employer's Central Management was frustrated about its obligations arising from the Agreement. Meanwhile the Employer had notified the EWC of its intention to terminate the current Agreement as a result of the dispute. New negotiations would be held and if no EWC agreement were reached in the relevant period no EWC agreement would be in operation for up to three years. Although it considered that termination in this way was unprecedented across its industry the EWC recognised the Employer´s right to terminate the Agreement. The EWC, however, was of the firm view that the Employer was bound to the Agreement for the period until its expiry date and the principle of "pacta sunt servanda" should be honoured.

Employer's further comments

43. By letter to the CAC dated 27 February 2019, the Employer submitted a further response to the Panel contesting certain of the points made by the Complainants. The Employer reiterated that it had provided the EWC with the restructuring costs of the restructuring of Vesuvius's Advanced Refractories and Foundry business across Europe, but that the only information it did not provide was the information relating to redundancy costs - or more accurately the potential range of redundancy costs - and in its view this was the point upon which the Panel's scrutiny should focus. The Employer also reiterated its position that it did provide the EWC with the information it was obliged to in accordance with the Agreement and

that it did so at annual meetings and at bi-annual Select Committee meetings. The Employer accepted that it did not share the potential range of redundancy costs with either the EWC or the legal employee representatives maintaining that it was under no obligation to do so as such disclosure would likely to be harmful to the interests of the business. The Employer asserted that the amount of the restructuring costs and in particular the potential range of redundancy payments was not information that was required to be provided under the Agreement. The Employer did not dispute that it shared relevant financial and economic information through the group income statement and the Independent Auditor's Report 2017 with the EWC as mentioned by the Complainant but in its view this information was different to the information sought by the EWC on redundancy costs. The Employer maintained that the EWC had sought for some time information on a country and where possible site basis. The Employer noted that the EWC had requested information about Germany in addition to information about Poland, Spain and the UK. The Employer also stated that, contrary to the Complainants' position, local level formal consultations had taken place where required. In respect of the closure of the Ostrava factory, the Employer argued that that situation was distinguishable from the current complaint because there was no works council, union or other type of employee representation in Ostrava at the time the factory in question was closed. The Employer did not disagree with the Complainants that it had shared information on restructuring costs for other closures in the past but in neither of the two examples used by the Complainants did it share redundancy costs. The Employer considered that its approach was consistent when approaching the provision of financial and economic information.

Clarifications

44. As the parties' submissions had only referred to the Special Meeting where according to the Minutes some discussion on restructuring costs had taken place, and because the nature of the EWC's request for information had been described in the submissions in various ways, by letter from the CAC dated 8 April 2019 the parties were asked on behalf of the Panel to clarify what they considered precisely to have been the EWC's request and what material had not been provided. Also with reference to the Employer's indication that it had provided information about numbers of redundancies and the basis for redundancy costs in October 2018, the Panel asked for clarification of what information remained outstanding from the EWC's request.

45. In its response dated 11 April 2019 the Employer stated that the Complainants had described their request for information using the phrases "restructuring costs" and "redundancy costs" interchangeably. However, in its view these terms had distinct meanings. It understood the EWC's specific request to be for the details of the Employer's budget for redundancy payments, and it was this information that was refused by the Employer and was the basis on which the complaint was made. The reasoning for declining to provide that information had already been submitted to the CAC in its response to the CAC (referred to above). The Employer's position was that following the e-mail dated 5 October 2018 from the Employer to the EWC, there was no outstanding information to provide. The Employer had provided the EWC with the specific information it had asked for once it was in a position to do so, that is to say once national consultations had been concluded in respect of the terms of any redundancy payments.

46. In its response dated 12 April 2019 the Complainants stated that, as recorded in the minutes of the Special Meeting of 16th July 2018, the EWC had requested information on the

costs of the restructuring. This was a request that the EWC had repeated on multiple occasions including Stage 1 and Stage 2 of the Dispute Resolution Procedure. The Complainants argued that the Employer had well understood the EWC´s request and was familiar with this kind of request during various restructuring consultations preceding the Special Event of 16th July 2018, as was noted in page 3 of the minutes where it was recorded that "*Mr André confirmed that ... any provision for restructuring costs would not be disclosed*". To further clarify for the Panel, the Complainants stated that the EWC had requested Central Management to disclose the provisions made for restructuring costs in relation to the three sites in Spain, UK and Poland at the time of the meeting on 16th July 2018. The Complainants stated that the EWC would accept from Central Management the disclosure of the aggregate total of the provision made at the time of the meeting. The EWC was not requesting a breakdown per country and/or restructuring item.

47. The Complainants confirmed that some data had been shared by the Employer in October 2018. However, this information was provided to the EWC three months after the Special Meeting and a time after the information and consultation with the EWC had formally expired. The information provided was therefore a) of limited use as the EWC was unable to consult and provide an opinion on the matter and b) insufficient to address the request for the total costs of the reorganisation. The Complainants acknowledged that TICER did not provide any remedies for a speedy dispute resolution at a time when the consultation was still ongoing and the requested information could still be used but the EWC's request was that the CAC declare that it was unlawful for Central Management to withhold the requested information. The EWC had faith that such a declaration would help the parties to engage in a more collaborative manner in relation to future events.

Hearing

48. After discussions at and subsequent to an informal meeting conducted by the Chair of the Panel had failed to resolve the complaint, on 19 August 2019 the CAC notified the parties that a formal hearing would be held before the full Panel on 30 September 2019 in London. The parties were invited to supply the Panel with, and to exchange, their written submissions in advance of the hearing. The names of those who attended the hearing on behalf of the parties are listed at Appendix 1 of this decision. A summary of the views of each party as expressed in their written submissions and as amplified at the hearing is as follows.

Summary of the Complainants' further submissions

49. The Complainants relied mainly on its previous written submissions to the Panel dated 14 February 2019 (as referred to above) and 25 June 2019 (as referred to above.) The Complainants raised one additional point which was to bring to the attention of the Panel the difficulty the EWC was experiencing when communicating with Central Management. To exemplify the challenges it was facing in this regard it provided to the Panel a copy of the EWC's regular Newsletter (from early August 2019). It had stated in that Newsletter "To the regret of the EWC the settlement period passed by without any management engagement with the EWC." However, this statement was responded to by the newly appointed Group Chief Human Resource Officer, (Ms Agnieszka Tomczak) who commented that this was an "*Incorrect Statement. These two week were never meant for any management engagement with the EWC but were clearly given for both parties to provide their response to the CAC. Which management did*." The reference to this exchange was not to comment on the misperception

but rather to urge the Panel to consider that communications had become problematic between the EWC and Central Management.

50. In its oral submissions, the Complainants stated that its request was for anticipated costs and that it understood the information would be of a preliminary nature - a forecast. The EWC would have accepted any such data on the basis that it was not final or actual. The Complainants rejected the Employer's contention that it could not have provided such data because it did not exist at that time. Any business would have to consider all aspects of the costs of a restructuring including a provision for redundancy costs. It was also misleading of the Employer to argue that the EWC did not ask for the information on the total costs of the restructuring. The Complainants explained to the Panel that there was a "*golden age*" of communication between the EWC and Central Management and the relationship with Mr van der Aa while he had been HR Director had been very collaborative. In previous years the EWC had been given this type of information. The Complainant clarified that it may not have been provided with copies but was allowed to view relevant documentation and figures in the presence of the Employer in meetings. This was the first time the Employer had not provided all the information and the first time that it had taken this position on the basis that it was concerned that the EWC would use this information to the detriment of the Employer. Providing an aggregate figure would not have been of any strategic benefit in negotiations over redundancy payments nor would it have been capable of use for local matters.

51. The Complainants also informed the Panel that, at Ms Tomczak's first meeting with the EWC Select Committee on 24 March 2019, she had provided the EWC with a letter terminating the EWC Agreement. New negotiations were planned and would be conducted under duress in the sense that, in the event that the EWC did not agree on management's proposal, the EWC

would be dissolved on 7 June 2020 and a new EWC could then only potentially be established three years thereafter. Subsequently, on 13 September 2019 the Employer had provided the EWC with a draft agreement for negotiations in which management had removed any substantial EWC rights to financial information. The Complainants considered that this was because financial information was at the core of the current dispute and that the Employer was disgruntled about its obligations to share financial information under the existing Agreement. However, the EWC respected the Employer's right to terminate the Agreement, noting, however, that any new agreement would become applicable, if at all applicable after June 2020.

52. In their closing remarks to the Panel the Complainants confirmed that they were not seeking, as an outcome of this complaint, an award of a financial penalty against the Employer. In its view a Panel determination that its complaint was well-founded would assist the parties in the establishment of a future protocol and prevent similar disputes arising in the future.

Summary of the Employer's further submissions

53. The Employer provided a brief overview of its organisation explaining that Vesuvius Plc was an international ceramic engineering company that was headquartered in London. It operated across three business units: Steel Flow Control, Steel Advanced Refractories and Foundry. It had 59 production sites worldwide, 17 of which were located in Europe. At the time of the complaint, it employed 11,105 employees, 4,252 of whom were based across the European sites. The Employer operated a European Works Council Agreement under Article 6 of the Directive and Regulation 17 of TICER.

54. The Employer stated that it had at all times sought to maintain an open dialogue with the EWC by holding annual meetings with the EWC, as well as biannual meetings with the EWC's Select Committee. During biannual meetings, it released, amongst other things, the financial results of the Company. After the last such meeting the EWC Select Committee had the opportunity to ask questions and challenge the Company on the information they had been provided with. Separate to the annual and biannual meetings, the Employer and the EWC were also engaged in informal discussions regarding practical matters such as how to develop the relationship with countries without a EWC member, changes within the management team, and logistics of meetings.

55. The Employer noted that the Agreement contained certain information and consultation obligations that the Employer was obliged to comply with. Clause 14 of the Agreement provided that the EWC should be informed and consulted at the EWC Annual Meeting and Special Meetings about issues that were transnational, save for those that have been expressly excluded. To avoid duplication of effort, the EWC was excluded from information or consultation over matters subject to local information and consultation procedures. Within the Agreement, an issue was regarded as transnational if it directly concerned at least 20 of the Employer's employees in each of two of its undertakings situated in two different countries in the European Economic Area covered by the Agreement.

56. The Employer also referred to clause 15 of the Agreement that it was obliged to provide "*information to the EWC of an issue which falls within the scope of this Agreement…and with the relevant documentation which allows the EWC to undertake a detailed assessment of the possible impact and, where appropriate, to prepare for consultation with the Company*." Where, as in the present case, there was a Special Meeting of the EWC, clause 22 of the

Agreement provided that "*the information provided to the EWC shall include the financial and economic implications of the proposed measures together with information on the impact on the employees*". There were certain circumstances in which the EWC could request information, and these were set out in Annex 6, paras 2 and 3 of the Agreement as follows:

"The EWC Select Committee will be clear and concise regarding the information it requires to make informed judgements and will limit its request for information to those matters contemplated as being within the scope of the EWC Agreement and, in the case of a Special Event, to that Special Event"..

"In the case of a Special Event, Management will endeavour to supply any information reasonably requested by the EWC Select Committee a week in advance of any meetings, translations allowing. This information will contain the financial and economic considerations of the proposed measures and will include information about the implications for employees that may be affected by this Special Event".

57. The Employer summarised its position in relation to the events that had led to the EWC's complaint to the CAC as follows. It had conducted a global business review using McKinsey & Co which revealed severe underutilisation at a number of its European sites (some were below 50% utilisation). Therefore, in or around June 2018, it had recognised that efficiencies needed to be made. Mr Ryan van der Aa, who was Chief HR Officer of Vesuvius Plc at the time, held the two informal meetings with the EWC Select Committee after the business review. Mr van der Aa held these meetings in the spirit and principle of communication and consultation in accordance with Annex 6 of the Agreement and shared information on a strictly confidential basis and for information purposes only.

58. The Special Event Meeting on 16 July 2018 was held between the Employer and the EWC Select Committee, together with the EWC's adviser, and concerned the Employer's proposed restructuring of Vesuvius's Advanced Refractories and Foundry business, including the closure of production sites in Chesterfield (UK), Izurza (Spain) and Gliwice (Poland) (the Proposal). The Proposal would also affect employees across sites in Germany (with a mixture of redundancies and new jobs being created) and the Netherlands (by the creation of new jobs). The Special Event Meeting was chaired by Mr Van der Aa who opened the meeting by introducing the Company's Chief Executive Officer, Mr Patrick Andre. It was explained that the purpose of the meeting was to formally inform and consult with the EWC about the Proposal. During the Special Event Meeting, the EWC was shown a slide presentation that set out the financial and economic implications of the Proposal, including a slide detailing the projected annual cash savings of the Proposal as of 2020. The EWC's adviser asked the Company to share details about the costs of the restructure. As the physical restructuring costs were set out in the slides (figures taken in broad terms from the McKinsey review), it was clear to Mr Van der Aa that the EWC was asking for details of the likely redundancy payments associated with the restructuring. Mr Andre explained at the meeting that the total cost of the Proposal would depend upon the outcome of labour consultation and negotiations that were to take place at a local level and that the global figure for redundancy costs could not and would not be disclosed. The Company did not maintain a central budget for redundancy costs in relation to the Proposal and, consequently, the Central Management could not provide this information to the EWC. The EWC adviser went on to request that the Company share details of the redundancy costs and arrangements once the reorganisation had been completed, to which Mr Andre agreed.

59. Mr van der Aa stated (and confirmed in his oral submissions for the Panel) that the Company never had a central redundancy budget and did not assess redundancy as a global or transnational matter. The slide presentation shown to the EWC at the Special Event Meeting provided information on a similar basis to that which it had provided to the Employer's board of directors – namely high level information and details of a global restructuring project. Part of the global project was the Proposal – the European restructuring that was the subject of the Special Event. The practicalities of the global restructuring project (including the Proposal) were carried out at a local level by the business unit management, of which the board was provided with periodic updates at board meetings. The board meetings presented a forum at which the board could ask questions and request further information about the global restructuring activities, including, if they wished, details of estimated redundancy cost. The board did not make such a request. The board papers contained information about the overall financial impact of the Employer's global restructuring project (including those relating to plants in parts of the world irrelevant to the proceedings before the Panel). This information did not include specific details of the estimated redundancy costs. In considering the Employer's restructuring projects, the board's principal concern was the long-term financial implications and rewards at a global level. This meant that, the main driving factor for the Employer was to drive efficiency in the overall production and running costs of its manufacturing base. As such, the Employer was not focussing on the exceptional one-off redundancy costs that may be incurred, but rather whether the restructuring would be beneficial to the Employer in the long-term, with regards to year-on-year savings to production costs.

60. Mr van der Aa confirmed that redundancy processes, payment and associated costs were dealt with on a country by country basis and not on a transnational basis. This was because the processes in each country were different and costs had to be assessed and incurred in each

country. Those costs could not and were not calculated on an aggregate basis and were not viewed by the Employer on a transnational basis, but only on a national basis. When redundancy payments were eventually made to the affected employees, they were paid out by the relevant local entity, as opposed to centrally. As such, it would not be the case that higher payments in one country would result in lower payments in another, or vice versa.

61. In its opinion on the Employer's proposal delivered on 29 July 2018, the EWC asserted that the Employer withheld information on the restructuring costs and that the EWC "was not given the opportunity to understand the financial costs for the business neither to obtain clarity on the specific *support redundant employees will be offered*." The Employer responded on 2 August 2018 reminding the EWC that it had provided it with cash savings and information about the financial impact on the business resulting from the Proposal and also noting that "*a significant part of any restructuring costs is usually employee costs, and these are determined at local level after consultation with local works councils and trade unions*."

62. The EWC had alleged that the Employer had failed to provide financial information on the total restructuring costs. The EWC had also described their request for information in different terms, by referring to both "restructuring" and "redundancy" costs interchangeably. In light of the financial information already provided to the EWC, the Employer interpreted and maintained that, the EWC's complaint related and could only be related to the provision for the actual or potential redundancy costs arising out of the Employer's proposal. It was accepted that the proposal itself was a transnational issue and, therefore, its information and consultation obligations under the Agreement were engaged. The Employer reiterated that it had provided the EWC with information about the financial and economic implications of the

proposal at the Special Event Meeting. The EWC had asked for 'restructuring costs' and the written presentation set out the restructuring costs.

63. When asked by the Panel for more detail on this point during the course of the hearing, the Employer referred the Panel to the relevant place in the slide show (a £4 million figure on slide 12) and stated that the figure included everything except redundancy costs. This included everything from the costs in transferring equipment to flagship plants to fees charged by advisory experts on taxes and consultant fees. What it did not include was figures relating to national redundancy payments made at local level. The Employer contended that this was really what the EWC wanted. Asking for "restructuring costs" was, in reality, a request for the likely level of redundancy payments. The Employer accepted that, if there was a global budget for anticipated redundancy costs or a global budget for restructuring, then that could be transnational in nature. However, the Employer opined that what the EWC was really looking for when asking about "restructuring costs" was redundancy costs for each of the countries involved in addition to the global restructuring figure that it already had. National restructuring costs (including redundancy costs) did not meet the definition of transnational. This was because these costs were not assessed or processed by the Employer at a transnational level. The Employer knew that there would be different redundancy processes and that costs would have to be determined in line with local redundancy procedures laid down by national laws and through local consultations. As such, by their nature, national restructuring costs only concerned individual countries. The level of redundancy payments in one country was of no direct concern to employees in another country. The Employer argued that it could only gather information about redundancy payments on a national basis. Mr van der Aa confirmed in his oral submissions that this information was not gathered or processed on an aggregate, transnational basis and so there was no transnational information that the Employer could share

with the EWC. At the time of the Special Event Meeting, the national consultations over redundancy payments had not begun. Therefore, the Employer did not know what the redundancy payments were going to be. Mr van der Aa knew that in some countries there could be extensive and lengthy disputes over the level of redundancy payments and therefore they could be very unpredictable.

64. The Employer contended that providing the information requested to the EWC would be a repetition of local procedures. If the Panel were to find that some information about redundancy costs did meet the definition of 'transnational', this issue was nevertheless excluded from the scope of the Company's information and consultation obligations. The EWC was not entitled to receive information about redundancy costs because those figures were subject to local information and consultation procedures and, therefore, excluded from the scope of the Agreement. The Employer believed that it was not necessary or appropriate to consult the EWC on potential redundancy payments as that issue was within the scope of national procedures. To consult with both bodies would present a serious problem for industrial relations for the Company. Not only would it be a duplication of time and resources to replicate consultation, but the two bodies could and quite probably would have provided contradictory opinions.

65. The Employer took the view that the intention of the EWC Agreement was to avoid the potential for contradictory opinions by restricting the EWC to information and consultation over matters than were not subject to national procedures – thus avoiding problematic repetition or duplication of effort and resources.

66. The Employer also made the point that on 5 October 2018 Mr van der Aa had voluntarily provided the EWC with an overview of the restructurings in the United Kingdom, Spain and Poland, which included details of the outcome of local consultations on redundancy payments, on a site by site basis. These local consultations have now concluded.

67. The Employer also maintained that it was not required to disclose (anticipated) redundancy costs because doing so would seriously harm the functioning of, or would be prejudicial to, the Employer. If it had disclosed the anticipated redundancy costs, the members of the EWC could have and would naturally have used the information for the benefit of the unions and representatives involved in the local consultation procedures as an indication of the Employer's expected outcome of local level negotiations. All the EWC members were either members of local works councils or local unions (with the exception of the United Kingdom). If the relevant trade unions knew in advance what the Employer had estimated for in each country for redundancy costs this would of course become their starting point for negotiations. This would severely prejudice the Employer 's ability to negotiate at local level with the relevant works council, union or employee representative body. The EWC might suggest that it did not want or need a country by country breakdown of redundancy costs, but as the Employer could only obtain this information on a national basis (as explained above) then it would have been an entirely artificial exercise to try to create a global figure from the data available to the Employer. Even doing so, there are some countries were redundancy costs are more predictable than others, so the EWC would have been able to analyse any artificial global figure to find out what estimated provision the Employer had made locally in those countries were the redundancy costs was unknown and subject to local processes.

68. Mr van der Aa confirmed that he had a good idea of what the EWC was trying to do – to secure information to advantage local unions so that higher payments could be secured for members. Local level consultations took place in Spain, the United Kingdom and Germany. Local level consultations were not required and did not take place in Poland (due to the number of job losses remaining below the threshold for formal consultation) or the Netherlands (because there were no job losses at that site). The 'prejudice' involved in seeing the other side's 'hand' in a financial negotiation was obvious.

69. In response to the EWC's contention that the Employer had in previous restructurings provided information on the redundancy costs - for example when the Employer closed a factory in Ostrava, Czech Republic - the Company argued that it had not been obliged, under the Agreement or otherwise, to provide that information. Rather, that information was provided as a gesture of goodwill, with a view to maintaining a positive relationship with the EWC; the Employer 's decision to share information about the redundancy costs in closure of the Ostrava factory (which can be distinguished to the present case) was underpinned by the fact that there was no employee representative body in place in Ostrava.

Points raised by the Panel

70. During the course of the hearing the Panel explored further certain particular aspects of the parties' submissions as summarised below.

71. The Panel sought further clarification from the Employer of its contending that the information was not disclosed to avoid potential harm to the Employer whilst also arguing that the information was not there to be disclosed because local negotiations had not taken place.

Mr van der Aa confirmed to the Panel that this contradiction arose as a result of an error in its written submission. The Employer was explicit in its submissions to the Panel at the hearing that it had made no provision for redundancy costs at the time of the Special Meeting and therefore did not have the information requested available to disclose at that time. When questioned further by the Panel on this point, the Employer took the position that, in the context of this particular restructuring proposal, the cost of redundancies was viewed as an inevitable cost of making efficiency changes. Its experience of previous restructuring projects showed that this element of costing was relatively insignificant compared to the cost "saving" figures. Therefore there was no provision made for a "redundancy budget". The Employer considered that the Special Event was actually a small part of a global restructuring. On this subject the Complainants expressed the view to the Panel that it would have been in the Employer's best interest to have the information requested to assist with its information and consultation duties in relation to redundancies.

72. The Panel also asked the parties to address the meaning of the term "*replicate*" as used in the Agreement to limit the information to be disclosed to the EWC and consultation to be conducted. Clause 14 of the Agreement provides that "*the EWC will not replicate matters subject to local information and consultation procedures.*" According to the Employer the purpose of this term in the Agreement was to ensure that there was no duplication of time and resources and no overlap between subjects of consultation. The link between local and EWC consultations was related to time i.e. they should start within the a reasonable time of each other which in its view did happen in this case. In this regard the Employer referred to Clause 20 of the Agreement which provides as follows:

"Management shall ensure that the information and consultation of the EWC will start wherever practicable simultaneously with the local and national consultation body; and if not practicable within a reasonable time of each other. EWC and local level consultation shall run concurrently in relation to a Special Event."

73. The Complainants considered that the EWC was entitled to ask management what type of support would be given to employees for example redeployment and re-training. However, this did not mean that it was entitled to absolute details as this was a local matter but was entitled to know what "kind" of support employees would be getting. In its view this could be imparted through ad hoc consultation as there was no specific regulation covering this subject. The Complainants agreed that the two processes - of EWC and local information and consultation - were supposed to run in parallel but considered that there was no "*firewall*" between them and participants in one process could know the general themes and concepts of the other process. The Complainants reiterated that it was not the EWC's intention to interfere with local bargaining but rather to understand the ability of the Employer to provide support to its employees - and not just those affected by job losses but also those staff that would be retained by the Employer.

74. When asked by the Panel why the Employer could not obtain the information requested once that request had been received, the Employer reiterated that there was no figure to provide. The figure would have been a small part of the global restructuring figures. In its view the EWC had a right to have the information about the "drivers" of a restructuring proposal but was not entitled to information that was more extensive than the information to which its board of directors was privy.

75. In its concluding remarks for the Panel, the Employer stated that it could not provide the EWC with figures it did not have at the time. There was a potential redundancy budget but this was going to be established through local negotiations and this was provided to the EWC when the negotiations had ended and the figures were obtainable for the EWC.

Considerations and Findings

A. General observations

76. We make the point before setting out our conclusions in detail that we have focused on the specific complaint made by the EWC and not on the clear and ongoing difficulties in the relationship between the EWC and the Employer both generally and in the conduct of the EWC Agreement in particular. We have not found the parties' extensive submissions on each other's motivations and conduct in relation to the restructuring in question, the handling of the information and consultation process in relation to this Special Event and their broader relationship, both prior to and during the hearing itself, to have been helpful to us in determining this complaint. The regrettable difficulties that have arisen in the operation of the Agreement and the relationship between the Employer and the CAC fall outside the scope of our decision and in our view do not add anything germane to our consideration of the merits of this particular complaint.

77. Likewise, we emphasise that we make no finding nor express any view concerning the ongoing relationship between the Employer and the EWC, the handling of this complaint through the dispute resolution mechanisms provided by the EWC, the parties' approach to the

informal meeting which was held to seek to resolve the complaint or indeed any future EWC agreement or its terms.

78. We also record that we cannot and shall not refer to every document or piece of correspondence that was before us and some points made in writing or orally may not have been included in the indicative summaries of the parties cases set out in this decision. However, we wish to assure the parties that the Panel has carefully and fully considered all the evidence, engaging with all the material provided and with the oral submissions and elaborations at the hearing, in reaching the conclusions set out below. Having given careful consideration to all the submissions made to and evidence before us our conclusions are as follows.

B. The EWC's request

79. We are satisfied, not least on the basis of the notes of the Special Event meeting and the EWC's Opinion dated 29 July 2018, that the EWC sought from the Employer the total restructuring costs in relation to the relevant restructuring exercise across the relevant countries and that this request also sought – and the Employer understood the EWC's request to extend to – information on the likely level of redundancy costs associated with the restructuring. Even though it may have been the case that the terms restructuring and redundancy costs were both used, on the Employer's case interchangeably, in describing the EWC's request, we are satisfied that what the EWC sought – in terms of what was not provided and is now complained about - was a total for the likely costs of the restructuring including overall redundancy costs.

80. We are also satisfied that the EWC did not seek a breakdown for those likely redundancy costs split by each relevant country. It only sought a global overall figure. That this was the EWC's request is key to our findings in this decision.

81. We do not accept the Employer's contention that what the EWC was "really looking for" was redundancy costs for each of the relevant countries. The global restructuring figure that was provided to the EWC did not include a likely global total for redundancy costs and it was this missing financial element that the EWC sought. Whilst it is fair to say that the EWC had sought a dialogue with the Employer covering the wider - and potentially local rather than transnational - issue of the specific support redundant employees would be offered, the specific request to which this complaint relates was the request for likely overall redundancy costs. The EWC did not request redundancy costs for each country even if the Employer believed that was what the EWC wished to obtain. In our view, given the detail of the dialogue between the parties and the level of experience of EWC agreements on both sides, had the EWC sought redundancy costs for each of the relevant countries, it would have done so explicitly

C. Was the information requested transnational in nature?

82. Whilst not a feature of the Employer's arguments, for the avoidance of doubt, we reject any suggestion that the information sought by the EWC with regard to likely redundancy costs was not transnational in nature. The restructuring to which the request for redundancy costs related was clearly acknowledged by both parties to be and treated as transnational and falling within the scope of the Agreement. This conclusion is also supported by the reference in clause 17 of the Agreement to "collective redundancies" being transnational matters for the purposes of the EWC Annual Meeting.

83. Moreover, we do not accept that the request made by the EWC for overall restructuring costs constituted a request for information of a local rather than transnational nature. We are satisfied that the EWC sought, by way of its request for overall restructuring costs including redundancy costs, information enabling it to understand and respond to the financial detail of the proposed restructuring at a transnational level. We are bolstered in this conclusion by the acceptance of the Employer in its statement of case for the hearing that, if there was a global budget for anticipated redundancy costs or a global budget for restructuring, then that could be transnational in nature. Had the EWC's request sought information on likely redundancy costs split between the different countries affected then we accept that it would have been a request for information of a national rather than transnational nature falling outside the scope of the EWC agreement.

D. The reasonableness of the EWC's request

84. Under Annex 6(3) of the EWC agreement, management is obliged to endeavour to provide any information reasonably requested by the Select Committee in relation to a Special Event. As we have concluded, the information requested fell within the scope of the Agreement. The Employer did not specifically argue that the EWC's request was unreasonable although it did express the view – which we have rejected - that the EWC's request was really about the likely level of redundancy costs in respect of each country. For the avoidance of doubt, we accept that the EWC's request was reasonable as likely overall redundancy costs in our view inevitably form an integral part of the financial costs of a restructuring without provision of which the EWC will not have the "full picture" as to the commercial rationale for and financial costs of the restructuring exercise. That the level of such costs might only be a relatively small element of the overall costs of the restructuring does not alter this conclusion

as without this detail the EWC would not be able to appreciate the level and materiality of those overall likely redundancy costs.

85. Likewise, in terms of the reasonableness of the EWC's request, we accept that the EWC in this request did not seek to interfere with the normal local consultation arrangements which would address the detail of severance arrangements and related matters but wished to understand the overall costs of the proposed restructure anticipated in relation to the overall costs of the proposed restructuring in relation to which it would wish to make fully informed submissions to the Employer.

E. Was the EWC's request outside the scope of the Agreement?

86. As we have already noted, the Agreement provides at its clause 14 that the EWC will not "*replicate*" matters subject to local information and consultation procedures and will not deal with the specific issue of local collective bargaining. We are not satisfied that the EWC's request for likely overall redundancy costs was excluded from the scope of the Agreement on the basis either of replicating matters subject to local information and consultation procedures or by concerning local collective bargaining.

87. In our view, the EWC sought an overall likely redundancy cost figure so that it would be aware of the full financial costing of the proposed restructuring. Mindful that the meaning of replication is to reproduce or make an exact copy, in our view the EWC was not seeking to nor did its request replicate local information and consultation procedures which would have dealt with the specific arrangements to be applied in respect of each country separately under the particular arrangements and legal frameworks applying in the relevant jurisdiction. We find

support for this conclusion in our assessment that in any event the global redundancy costs figure that the EWC sought could not have been deployed in any meaningful way in negotiations of redundancy arrangements in local information consultation procedures which would address the specific context of the Employer's business and its staff in the particular country in question.

88. The Employer contended that in this context the use of the word "*replicate*" indicated that there should be no overlap between the transnational EWC process and local and national processes. As a matter of language we do not accept that submission since replication entails reproducing or copying exactly the relevant matter. Notwithstanding that point, we are satisfied that the EWC's request did not overlap with or replicate the separate local or national consultation processes that the Employer would be conducting in relation to the restructuring. The overall figure sought would assist in understanding the rationale and financial basis for the transnational restructuring proposal without engaging with the local or national process with which the EWC was not, and in which it did not seek to become, involved.

89. This analysis is in our view supported by Annex 6(3) of the Agreement which provides that the information that the Select Committee can request will or may contain "the financial and economic considerations of the proposed measures and will include information about implications for employees that may be affected by [the] Special Event". In our view this clearly anticipates that the Select Committee may ask for details of the financial and cost aspects of a proposed restructuring in their totality - and therefore can include anticipated redundancy costs, provided that the EWC (in our words for want of a better expression) "keeps its distance" from the local consultation processes explicitly excluded from the scope of the EWC agreement.

F. Was the Employer entitled to withhold the information requested?

90. We do not accept that the disclosure of the information in question would have seriously harmed the functioning or would have been prejudicial to the undertaking or group of undertakings concerned. As the request was for the overall global redundancy costs and not the potential redundancy costs split out by reference to each relevant country, we do not accept that this information would have prejudiced or impinged upon local negotiations as the Employer argued in seeking to contend that its disclosure could have harmed or been prejudicial to it. We do not accept that any deductions or inferences could be made from a figure for likely overall redundancy costs as to how redundancy payments were planned to be calculated in individual countries or for particular categories of worker. In our assessment, no advantage could be obtained by the EWC or local employee representatives in local negotiations from knowing the overall likely redundancy costs for the restructuring as a whole. Put another way, we do not accept that the disclosure of the information sought would seriously harm the functioning of or be prejudicial to the undertaking or group of undertakings concerned because the global overall restructuring cost figure incorporating the redundancy element would not, contrary to the Employer's submissions, provide the EWC with any additional or material advantage in negotiations given that a global figure would simply address the costs of the overall transnational restructuring and would not indicate any likely level of payment to redundant employees in individual countries. The information not disclosed could not in our assessment have been used in a way which would prejudice the Employer. On the contrary, the information formed part of the overall potential costing of the restructuring. In our view neither the clause 29 of the Agreement nor Regulation 24 of TICER engage to disentitle the EWC from receiving the information requested.

G. Confidentiality

91. Even if the Employer could have legitimate concerns with regard to the sharing of information with members of the EWC who represent countries affected by the proposed restructuring, we consider that the Employer could have supplied the information requested on a confidential basis to the Select Committee in order to address these concerns. We also consider that this would have been an appropriate step to take given the history of providing various types of confidential information to the Select Committee on a strictly confidential basis over a number of years and indeed the provision to the EWC in relation to this restructuring on a confidential basis of its likely cost savings. This is particularly the case given that the generic global nature of the request meant that the information sought would not in our assessment be of material relevance or any realistic value in any local information and consultation processes. We find further support for this conclusion in the general obligations of confidentiality imposed on the EWC and its members by Regulation 23 of TICER. In addition, the concern expressed by the Employer about disclosure of the relevant information to EWC members from the countries affected by the proposed restructuring are in our view misplaced. It is anticipated that those individuals will participate in Special Events pursuant to clause 21 of the Agreement which provides that "*those EWC members who are entitled to attend Special Meetings shall be the members of the EWC Select Committee and the EWC Members from those countries which are directly affected by the Special Event.*" Their participation in the process and access to the relevant knowledge is therefore anticipated by the Agreement whose provisions separately address the confidentiality which those members of the EWC must observe in relation to any information disclosed.

H. The existence or otherwise of the information requested

92. There was considerable debate between the parties about whether the information that the EWC sought with regard to likely overall redundancy costs had been available at the time of the EWC's request such that, if the information request did not exist at that time the Employer could not be expected to disclose it.

93. At the hearing Mr van der Aa maintained that the information requested about likely redundancy costs had not been available at that time. This position contrasted with the Employer's letter to the CAC of 24 January 2019 setting out its response to the complaint. In paragraph 14 of what was a very detailed and carefully drafted response, Mr van der Aa had stated (emphasis added) that there was "*no fixed redundancy budget*" but also that "*the total provision that Vesuvius **had made** for possible redundancy costs was confidential: clearly that information could not be disclosed to those on the other side of the forthcoming negotiations without seriously harming the functioning of, or being prejudicial to, the Company.*"

94. That a "*provision*", as distinct from a "*fixed redundancy budget*", had been made by the Employer in respect of possible redundancy costs at the time the EWC made its request for information as to restructuring costs, including redundancy costs, is also supported by the notes of the Special Event meeting held on 16 July 2018 which were before us in the bundle. On page 3 of those notes Mr Andre was recording as confirming on behalf of the Employer (emphasis again added) that "*the costs [of the restructuring] would be dependent on labour discussions in each affected country and that **any provision*** for *restructuring costs would not be disclosed*." We acknowledge that the use of the word "*any*" by Mr Andre, from whom we did not hear, is less definitive as evidence of a provision actually having been made than Mr

van der Aa's letter. Nonetheless Mr Andre's statement is consistent with a provision for possible redundancy costs, as distinct from a fixed redundancy budget, having been made at that time.

95. We found the suggestion that paragraph 14 of the Employer's response letter was a mistake problematic given that this letter was a detailed, comprehensive and detailed statement of the Employer's position, both generally in relation to the restructuring and this complaint and in relation to the specific issue of redundancy costs which was so central to the dispute between the parties. With the benefit of our industrial experience, we would find it very surprising if an assessment had not been carried out of the likely overall redundancy costs involved in the restructuring given the detailed financial analysis that would be conducted in devising the restructuring. In light of this, the discussions recorded at the relevant meeting and the Employer's response letter we do consider that a provision would have been made by way of an assessment of likely redundancy costs as part of the process of designing and implementing the restructuring. It was this overall detail that the EWC sought and which Mr Andre said would not be forthcoming.

96. That said, even if the likely redundancy costs requested had not been collated centrally at the time of the request, the information which the EWC had requested but which was not provided could in our assessment have been collated by the Employer reasonably quickly - especially given the relatively limited number of countries involved and the fact that the local redundancy consultation procedures were to commence concurrently with the EWC consultation process so that likely redundancy costs would need to be calculated in those jurisdictions in any event in reasonably short order. The request was therefore in our view one which fell within the parameters of Annex 6 of the Agreement and was one that the EWC could expect the Employer to comply with. In reaching this conclusion, we have considered in

particular that the specific complaint of the EWC was that it was "*not given the opportunity to understand the financial costs for the business neither to obtain clarity on the specific support redundant employees will be offered.*" Whilst we consider that the issue of support for redundant employees was a local issue outwith the scope of the Agreement, the request for information with regard to likely overall redundancy costs was a legitimate request for the purposes of the Agreement as a request for an intrinsic element of the financial aspects of the proposed restructuring.

I. Other submissions

97. Dealing with other specific contentions put to us, we do not accept that the Employer's argument that the EWC should not be provided with more information than that provided to the Employer's board of directors has any bearing on our decision. The issue here is compliance with the terms of the Agreement rather than the information provided to the board of directors which is a matter of corporate governance for the Employer. Likewise, we see do not accept the Employer's argument that the EWC's request was inappropriate as it required the Employer effectively to produce new information. In our view, even if the information had not been collated into a provision as such at the time of the request, in our assessment the request entailed the collation of reasonably easily available information. The Employer had, on the EWC's unchallenged account, agreed to the production of information in response to specific requests from the EWC on several previous occasions. As we have already noted, Article 6(3) of the Agreement specifically entitles the EWC to make a request for information provided that it is reasonable, which we consider this request to have been.

98. We do not consider that the Employer's position is assisted by relying on the supposed difficulties which could arise if the information to be provided to the EWC Special Event Committee concerned members of the EWC whose own sites or countries would be affected and the increased risks of disclosure that would present. For one thing the nature of the information requested – the aggregated redundancy costs – could not, for the reasons we have already identified, be put to any realistic use in local consultations concerning redundancies and in any event confidentiality arrangements could have been put in place or dialogue conducted with the EWC to agree an appropriate basis on which to disseminate the information requested. Moreover, under clause 21 of the Agreement, those EWC members are anticipated to be part of the transnational consultation process in relation to such a Special Event as this by virtue of its provision (emphasis added) that *"those EWC members who are entitled to attend Special Meetings shall be the members of the EWC Select Committee* ***and the EWC Members from those countries which are directly affected by the Special Event***."

99. The Employer repeatedly made the point that the redundancy costs associated with this particular restructuring exercise were undoubtedly small relative to other costs involved in the restructuring. Whilst that may well be the case, we do not consider it to be a relevant consideration given that the Agreement's purpose is ensure suitable transnational consultation with regard to issues concerning employees. There is no de minimis threshold which applies to transnational matters falling within the scope of the Agreement or indeed any other EWC agreement unless specifically negotiated and agreed in the relevant EWC agreement. Without disclosure of the information requested the EWC would not have the whole picture with regard to the likely financial costs of the restructuring or be in a position to understand whether or not the likely overall costs were indeed small in relative terms as the Employer contended.

100. The EWC referred to recital 21 of the Directive which provides that the objectives of clarifying the concept of information and consultation of employees is to *"reinfor[ce] the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue…*.". The EWC contended that understanding the overall costs of the restructure would have helped the EWC to ensure local employee representatives that reasonable financial provision were made. We do not accept that submission since the adequacy of the treatment of individual employees in different countries would be precisely the stuff of the local and national consultation process falling outside the scope of the EWC agreement and in any event the information sought was of a general nature which would not provide any insight into whether reasonable financial provision was being made.

101. For completeness, whilst it did not in the event form part of the EWC's complaint, we do agree with the Employer that information about the support redundant employees might receive was clearly a matter for local consultation and therefore fell outside the scope of the Agreement.

J. Conclusions

102. Our conclusions are therefore in summary that:-

(a) the EWC made a request for information as to the overall likely costs of the Employer's restructuring proposal and this request extended to the likely redundancy costs associated with that restructuring proposal on an overall basis and not split out by reference to each relevant country;

(b) this request related to a restructuring which was transnational in nature and was of itself a request for information of a transnational nature;

(c) confined as it was to the likely overall redundancy costs associated with the proposed restructuring, to request and be provided with the likely overall redundancy costs to which this complaint relates would not replicate local information and consultation procedures or concern local collective bargaining and therefore was not excluded from the scope of the relevant EWC agreement under its terms;

(d) it was reasonable for the EWC to request the information in question in order to understand fully the likely financial cost implications of the proposed restructuring for the purposes of consultation about the proposal on a transnational basis;

(e) the information requested was available for disclosure and could in any event have been collated reasonably promptly by the Employer and so should have been provided under the terms of the Agreement and its provisions concerning requests from the EWC;

(f) disclosure of the information requested, generic as it was in nature, could not have harmed or prejudiced the Employer such that the terms of the Agreement or Regulation 24 of TICER would justify its non-disclosure;

(g) even if the Employer had been able to substantiate a concern about disclosure of the information being damaging if released to members of the EWC from the relevant countries or indeed local representatives, the information requested could have been

disclosed on a confidential basis to the EWC as had been the practice in relation to confidential information on other occasions; and

(h) the EWC's complaint under Regulation 21 of TICER is therefore made out and the Employer's defence of its position based on Regulation 24 of TICER is not accepted.

Decision and Orders

103. In discussions with the parties about the orders sought in relation to this complaint, the Employer contended that the Panel should make an order that the Employer had not defaulted in its obligations. The EWC confirmed that it was not seeking any financial sanction. The EWC only sought a declaration that the Employer should have disclosed the information sought. We were not requested by the Complainants to make any orders for specific action to be taken (as opposed to decisions) in relation to the complaint. In any event in our view it would not in any event be appropriate for us to make any orders to be given for specific action to be taken in light of (a) the passage of time, (b) the stipulation in TICER that "no order of the CAC shall have the effect of suspending or altering the effect of any act done….by the central management or the local management" and (c) the fact that the Complainants solely seek a declaration.

104. We therefore find that the complaint under Regulation 21of TICER is well founded - the Employer should have disclosed to the EWC the information sought concerning overall likely redundancy costs - and make no order under Regulation 24 of TICER.

Panel

Mr Charles Wynn-Evans, Panel Chair

Mr David Coats

Mr Roger Roberts

11 December 2019