Case Number: EWC/17/2017
12 February 2018

CENTRAL ARBITRATION COMMITTEE
TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 1999 AS AMENDED BY THE 2010 REGULATIONS
DECISION ON COMPLAINTS UNDER REGULATION 21, 21A, 23 & 24

The Parties:

Mr Hans-Peter Hinrichs and others

and

Oracle Corporation UK Ltd

Introduction

1. On 5 July 2017 Mr. Hans-Peter Hinrichs, an Oracle employee representative on behalf of the Oracle European Works Council (the Complainants) submitted a complaint 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 case. The Panel consisted of Professor Linda Dickens MBE as Chair and Mr Mike Cann and Ms Bronwyn McKenna. The Case Manager appointed to support the Panel was Nigel Cookson and for the purposes of this decision, Ms Maverlie Tavares.

The complaint

3. The Complainants submitted that Oracle Corporation UK Ltd, as representative agent of Oracle Central Management for the purpose of the Regulations, (the Employer) had failed

to comply with Regulations 21, 21A, 23 & 24 of TICER. They explained that Oracle had been operating a European Works Council (EWC) since 2007 under the Subsidiary Requirements of TICER after the three year period provided to central management and the special negotiating body (SNB) had expired without an agreement being reached.

4. On 27 March 2017 the EWC was informed by Central Management by way of a conference call of its intention to relocate activities currently located in various Member States to an Oracle location in a different Member State with up to 380 jobs at risk. Whilst the matters in dispute relate to the current reorganisation proposed by Central Management the Complainants stated they have also occurred in previous years, impacting the ability of the EWC members to fulfil their duties in an effective manner.

Complaint under Regulation 24(2)

5. The Complainants stated that Central Management had declined the request of the EWC to share financial data on the project. The EWC stated it could not undertake a detailed assessment of the subject matter without financial information being disclosed on the costs and the benefits including the business case of the proposed restructuring.

Complaint under Regulation 21

6. The Complainants submitted that Information provided by management must enable the EWC members to "acquaint themselves with and examine its subject matter (and to) undertake a detailed assessment of its possible impact." Such possible impacts may include impacts on the quality of services, on the retained organisation and employees, customer satisfaction and the sustainability of the business. Central Management had denied the EWCs competence to undertake such impact assessment suggesting the EWC may only assess the impact on redundant employees which was, according to Central Management, a local matter. Central Management had taken irreversible decisions by making a significant number of employees redundant (including one EWC member) and by relocating activities to another EEA Member State without any exchange of views or opinions with the EWC.

Complaint under Regulation 19E(c)

7. This Regulation required Central Management to ensure that European and local consultation in relation to the substantial changes in work organisation or contractual relations were linked so as to begin within a reasonable time of each other. However, a significant number of Oracle employees were made redundant at a time when the EWC consultation had not yet been concluded. Consultation could only be meaningful if no decisions were implemented when the EWC consultation had not been concluded. The EWC contended that management had failed to establish a link between European and local consultation and the timing of both processes had not started within a reasonable time of each other.

Complaint under Regulation 21A

8. Regulation 9(6) of the Subsidiary Requirements entitled the EWC Select Committee and the impacted country representatives to meet with Central Management in case of extraordinary circumstances. In particular, the cost of organising meetings and arranging for the accommodation and traveling expenses of members of the EWC and its select committee should be met by Central Management unless the Central Management and European Works Council, or select committee, otherwise agreed. The EWC believed that such a meeting should be face to face whereas management assumed a virtual "meeting" by conference call would suffice. The EWC believed that Central Management must also provide the "means required" to allow for a meeting in person of the Select Committee and the impacted country representatives.

Complaint under Regulation 24

9. Central Management had classified any information shared in relation to the proposed restructuring as “Confidential” and “Highly Restricted”. The EWC was made aware that data included in the presentation on 27 March 2017 was strictly confidential and sharing or discussing any information contained herein with anyone internal or external to Oracle was strictly prohibited. Any violations to this would, according to Central Management, result in immediate disciplinary action. The EWC believed it was not reasonable for the Central Management to impose such a requirement. The EWC was also of the view that management

must not hinder the EWC members communicating with their constituencies. Under the current restrictions the EWC was unable to fulfil its duties and employees have already left the company without any information received from the EWC.

Summary of the Employer's response to the complaint

10. By way of a response dated 27 July 2017 the Employer disputed the EWC's specific complaints and reserved its right to provide fully argued submissions in respect of each complaint in due course.

11. The Employer agreed with the EWC that it was the "representative agent" of the American central management of the Oracle corporate group for the purposes of TICER. It also agreed that the EWC has been established in accordance with the provisions of the schedule to TICER and that TICER governed Oracle's and the EWC's respective rights and obligations. The competence of the EWC was therefore limited by paragraph 6(2) of the schedule to TICER to those matters concerning all of its establishments or group undertakings situated within the European Economic Area (the "EEA") or concerning at least two of its establishments or group undertakings in different member states of the EEA.

12. The Employer agreed with the EWC that there was an ongoing reorganisation of its EMEA Systems Remote Support (SRS) and that this reorganisation constituted "exceptional circumstances affecting (its) employees' interests" as such term was used in paragraph 8(1) of the Subsidiary Requirements.

Complaint under Regulation 24(2)

13. The Employer considered that the EWC's complaint was not well founded as Regulation 18A and paragraph 8 of the Subsidiary Requirements only imposed the obligation to provide certain information about its reorganisation. It had already provided that information to the EWC. The further financial information requested was therefore not of a nature falling within the scope of the information in respect of which a complaint may be made under Regulation 24. Further and in the alternative, even if the further financial information requested did fall within the scope of Regulation 24, it was information that the Employer was

not required to disclose on the basis that it was such that its disclosure would seriously harm the functioning of, or would be prejudicial to, the Employer and its corporate group.

Complaint under Regulation 21

14. The Regulations only imposed obligations on the Employer to provide certain information about transnational matters within the competence of the EWC. Information had already been provided to the EWC and the additional matters in respect of which it sought information were outside its competence. For example, customer satisfaction was a matter affecting third parties and neither the Employer's establishments nor group undertakings. Information about it was therefore not information to which the EWC was entitled. Further, the Employer was not under an obligation to provide information other than in respect of the way in which the exceptional circumstances affect its employees' interests "to a considerable extent".

15. Therefore, even if the Employer had not already provided the information that it was legally required to provide, which was denied, any additional information that the Panel ordered to be disclosed should be limited only to information about how the reorganisation was affecting employees rather than other parties interests to a considerable extent.

16. The Employer argued that it fully complied with its obligations by informing the EWC about the existence of exceptional circumstances potentially affecting employees' interests on 21 March 2017. It then arranged an exceptional circumstances information and consultation meeting for 27 March 2017; held an exceptional information and consultation meeting by way of a conference call held on 27 March 2017 and indicating its readiness to provide a reasoned response to any opinion that the EWC chose to provide. However, no such opinion was expressed by the EWC.

Complaint under Regulation 19E(c)

17. The Employer commenced its information and consultation procedure in March 2017 within a reasonable time of the commencement of its information and consultation procedures with national employee representation bodies.

18. The substance of the complaint appeared to be that the Employer had not concluded its information and consultation process with the EWC prior to commencing its other information and consultation processes. The Employer denied that any such obligation was imposed on it by TICER. The Employer had in fact already complied with all of its obligations to inform and consult with the EWC by way of holding an information and consultation meeting with the EWC on 27 March 2017.

Complaint under Regulation 21A

19. The Regulations did not include any requirement that such a meeting be held in any particular format and paragraph 9(6) of the Subsidiary Requirements upon which the EWC relied merely provided that the members of the EWC were provided with such ”resources as enable them to perform their duties in an appropriate manner”. The meeting was conducted in a way that allowed members of the EWC to perform their duties in an appropriate manner.

20. The holding of the exceptional information and consultation meeting by way of a conference call allowed employees to perform their duties in an appropriate manner that saved time, allowed better participation levels, reduced costs and minimised the Employer's environmental impact. It was also consistent with how the EWC regularly held meetings without management and the members of the EWC had failed to provide any example of how conducting a meeting in such a way impacted on their ability to perform their duties in an appropriate manner. For the avoidance of doubt the Employer confirmed that it bore all the costs of hosting the meeting and that no member of the EWC had had to meet any cost in connection with the meeting.

Complaint under Regulation 24

21. The information provided to the EWC on 27 March 2017 was information that, if not held in confidence and instead widely disclosed, would, according to objective criteria, seriously harm the functioning of, or would be prejudicial to, the Employer and its corporate group. The highly competitive nature of the transition to cloud computing meant that organisational and operational cost advantages were eagerly sought and highly confidential to those companies that succeeded in obtaining them. The need for management expressly to

state that information was being provided on terms of confidence also derived from members of the EWC and other employee representatives having previously seriously harmed the Employer by sharing information about redundancies in a country in advance of those redundancies having being announced locally.

22. Second, in respect of the claim that the Employer's requirement that information be held on terms of confidence had caused members of the EWC to breach Regulation 19C, the Employer submitted that this Regulation included express wording that the obligations of members of the EWC were "subject to regulation 23". The Employer had therefore not caused any member of the EWC to breach their obligations under Regulation 19C as no such obligation was imposed on the members of the EWC in respect of information that has been provided on terms requiring it to be held in confidence.

Complainants' comments on the Employer's response

23. In a letter dated 15 August 2017 the Complainants were invited to comment on the Employer's response as well as submitting the more detailed information on the nature of the dispute as referred to in the original complaint to the CAC. The comments and further and better particulars of the complaints were set out in a letter from the Complainants dated 24 August 2017 which was duly copied to the Employer. As the Complainants' relied upon these further and better particulars as part of its written submissions for the hearing they are not rehearsed here but are indicated, as far as they are material to the disposal of the complaints, in the paragraphs below.

The hearing

24. In order that the Panel could fully understand the area of dispute between the parties, to give any appropriate guidance on the legislation and to establish whether there was any way of assisting the parties to resolve the issues an informal meeting took place in London on 1 September 2017 with the full Panel and a Case Manager in attendance on behalf of the CAC.

25. The parties gave further and wider consideration to proposals which were introduced at the informal meeting and each side proposed to the other how the dispute might be resolved.

However the issues were not resolved and notice was served that a formal hearing before the full Panel would take place in order that the complaints be determined. The parties were informed that a hearing would take place on 15 December 2017 but this was subsequently postponed with the hearing then taking place in London on 11 January 2018. The parties were invited to supply the Panel with, and to exchange, written submissions ahead of the hearing. The names of those who attended the hearing are appended to this decision.

Preliminary issue

26. The Employer submitted that the Complainants could not bring a complaint to the CAC under Regulation 19C of TICER. It said this was because Regulation 19D detailed when a complaint could be made in respect of a breach of Regulation 19C. Regulation 19D provides that complaints may only be brought against the EWC by an employee. The Employer had no issue with the Complainants wanting to make a complaint under Regulation 23 of TICER but not for the aforementioned. The Complainants stated that they did not have the legal expertise of the Employer and wanted the complaint raised about the confidentiality of information to be heard under the appropriate paragraph in the Regulations. The Complainants did not mind if the complaint was heard under 19C or Regulation 23 of TICER.

Summary of the Complainants' further submissions

27. At the hearing the Complainants began by explaining that they raised their complaints with the CAC to receive justice not as part of a learning exercise. Thousands of their colleagues had been made redundant over the last decade as a result of transnational restructuring without meaningful information and consultation, in line with the Directive. This had led to some of the EWC members resigning or being forced to leave the Employer. Given the time limit of six months for bringing claims, they were surprised by the vast amount of documentation that the Employer had put forward in its submission which did not relate to the current dispute but related to historical events out of the scope of the complaint. The Panel was asked to accept two additional documents relating to these earlier events which the Complainants said would provide a more accurate picture since they viewed the evidence provided by the Employer on the SNB process between 2004 and 2007 was far from reality. There had always been a conflict between the Oracle EWC and the Employer regarding proper consultation and communication

versus confidentiality. This was taking place during the SNB process and had remained over the past decade.

28. The Complainants requested that the Panel looked at the culture of the Employer. It said this would reveal their decision making. They explained that the Employer was co-founded in 1977 by Mr Larry Ellison, who gave up his CEO role in 2014 but still served as the Chairman of the Board and the Chief Technology Officer. Mr Ellison was known for his unique character and leadership which was both admired and feared within Oracle. His decisions and commands were to be executed with zero tolerance of deviation or any objections. The Complainants referred to a book written on him (The Difference between God and Larry Ellison) and in particular the conclusion on him: *"His rise to fame and fortune is a tale of entrepreneurial brilliance, ruthless tactics, and a constant stream of half-truths and outright fabrications for which the man and his company are notorious."* It was their view that this background had hindered the SNB/EWC process. The Complainants understood that this had constrained the European HR Managers who had no authority to deviate from the instructions from the US headquarters but must continue to conduct dialogue with their employee representatives in Europe. They also pointed out that the Employer had never shown interest in promoting social dialogue with the EWC beyond the bare minimum legal requirements.

29. The EWC was of the opinion that the Employer did not understand what consultation was, as related to various EU Directives and in relation to the guidance produced by Acas. The EWC did not recognise the meeting on 27 March 2017 to have had any meaningful dialogue prior to the decision making made by the Employer. As stated previously, it felt this behaviour had been taking place over the years. It added that they supported the model of consultation as described by Acas in its booklet 'Employee communications and consultation': *"to improve management performance and decision–making – allowing employees to express their views can help managers and supervisors arrive at sound decisions which can more readily be accepted by employees as a whole: this may be particularly important at times of emergency or where new practices or procedures are being introduced."*

30. The EWC was disappointed that the Employer had denied it the right to be consulted on management decisions. It said this was demonstrated further in the witness statement by Dianna Owen, which stated: *"Indeed, I understand that an exceptional information and*

consultation meeting shall not affect the prerogatives of central management. This is why when we limit the information we provide to the EWC to what it is legally entitled to … we limit information to information about the impact of the decision on affected employees and not about the business rationale for the decision." This has led the EWC to conclude that the Employer refused to inform the EWC about the business rationale for a decision.

31. The EWC argued that neither Recital 12 of Council Directive 2009/38/EC nor any Article of the Directive supported the views of the Employer on information and consultation. It stated the aim of the establishment of a EWC was as follows: *"Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed."* It argued that potential impact on employees was not limited to those at risk of being made redundant, but also to those at risk to changes to their work arrangements, the quality of service provided and the business model following the re-organisation. It also was of the belief that no other company interpreted this law in the manner of the Employer which had left the EWC unable to fulfil its functions.

32. The Employer had argued that it had suffered serious harm when it disclosed information on restructuring similar to the SRS reorganisation due to the action of employee representatives. It had given this as a reason for why it believed it was reasonable to require the information in connection with this to remain confidential. The EWC disagreed with these terms as there had not ever been an incident such as this where it was at fault. The EWC felt it was unfair that the Employer chose to punish it for the action of local representatives. It said if the Employer felt so strongly about this, there were remedies under the TICE Regulations which it could have used. In the Employer's summary report of the conference call which took place on 27 March 2017 it stated*: "Oracle has some reservations, based on past experience, about liaising with local works councils, but is aware of a duty to so for the delegates. Delegates should start to reach out to their local works councils when appropriate."* The EWC interpreted this as the Employer knowing that there was a legal obligation in a number of countries for EWC members to provide sensitive information to their local bodies as long as confidentiality rules applied to these bodies. Therefore the EWC should not be held liable for the actions of third parties. Also the information on SRS restructuring provided at the meeting

on 27 March 2017 was now common knowledge yet the Employer was still insisting that the EWC kept it confidential. The Employer had even confirmed in a letter dated 14 June 2017, that a number of employees had been made redundant yet the EWC was still prohibited from disclosing the information.

33. The EWC said the Employer had labelled information as confidential since the EWC began and this was well before any alleged breaches of confidentiality. The Employer would label the information "confidential" and "highly restricted" even if it only had the word "Oracle" on it. For the PowerPoint slides received on 21 March 2017, to be presented at the Annual EWC Meeting on 27 March 2017, the Employer informed the EWC members to note that: *"These materials are labelled Oracle Confidential – Highly Restricted and you are kindly reminded that these may not be shared with anyone, internal or external to Oracle outside of the EWC."* Another example given was on 11 December 2014 when Mr Vance Kearney wrote to the Danish EWC members: *"I feel it necessary to write to remind you of your legal obligations to keep any information given to you as an EWC Representative strictly confidential."* The EWC deems that the excessive use of these restrictions had made it impossible to communicate with its members effectively.

34. The Employer and the EWC have long been in dispute as to what constitutes an exceptional information and consultation meeting. The EWC considers it to be a physical meeting i.e. face to face. It explained that the EWC consisted of 25 representatives and when you factored in the number of management in attendance for the Employer, this made it over 30 participants. With such a large group you could not communicate effectively with each other over the phone. It said the hearing taking place today for their complaints was proof in itsself how important it was to have a face to face meeting, otherwise the CAC would have conducted proceedings over the phone. The EWC therefore argued that EWC information and consultation in relation to the dismissal of hundreds or even thousands of employees could not be conducted effectively over the phone. The use of technology was not opposed by the EWC but should be agreed between the parties. It believed telephone calls were more appropriate for initial announcements rather than proper consultation. A 50 minute conference call was not appropriate when the Employer was proposing the dismissal of 380 employees. The Complainants noted that an arrangement ('protocol') had been agreed in 2012 whereby Management had acknowledged the need for physical meetings in "evident cases".

35. When exceptional circumstances have been triggered the EWC considered that it was reasonable for a physical meeting to be held. It said TICE Regulations were precise on this and quoted Article 8 of the Schedule (Subsidiary Requirements), which said the Select Committee *"shall have the right to meet in an exceptional information and consultation meeting, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests."* The EWC added that the Regulations did not stipulate that it was required to persuade the Employer to do this or provide reasons for this. At no point had the EWC suggested a conference call would suffice for such a matter as this, as suggested by the Employer. It feared that if the CAC determined that telephone calls could be substituted for physical meetings, it would set a precedent and EWC meetings would be no more than chatrooms.

36. The Complainants drew attention to amendments to EU information and consultation directives as a result of the Seafarers Directive 2015/1794 in support of its understanding that the EU view was that priority should be given to physical meetings. Conference calls or web conferences may supplement or support information and consultation procedures but they did not provide for the same quality of dialogue. They may be second best options for certain individuals for particular reasons but not to replace proper meetings.

37. Questioned further by the Panel about a virtual meeting (conference call) instead of a physical meeting, the Complainants explained the type of meeting was not their main focus. Their interest lay in whether consultation was taking place. They stated that even if they had met physically on 27 March 2017, there was not the opportunity to consult. The participants spoke 18 languages so they were not all able to digest the information received and respond at that time.

38. The Complainants categorically denied the Employer's suggestion that the complaint submitted to the CAC was being used as leverage to force the Employer to negotiate a EWC agreement. They believed this dispute could have been avoided if the Employer had consulted in line with the EU Directive and TICE Regulations. They judged that the Employer's stance to not consult on decisions and their business rationale was an attempt by them to rewrite the Directive and Regulation to aid companies with headquarters outside of the EU. They said the

European Court of Justice had declared in the ruling regarding the EWC of Kuehne and Nagel[1] that "*the EU Representative Agent of Central Management had the full obligation to ensure that Global Multinational Companies headquartered outside of EEA are not exempt from adhering to European law."*

39. In concluding, the Complainants said they wanted the Panel to:

- Make a declaration that the PowerPoint slides provided at the meeting on 27 March 2017 was not confidential and there was a failure on the Employer's part to not release this. They added that they understood that this information was now common knowledge and would have agreed with the Employer restricting this for a limited period;

- Declare that the consultation process commenced too late in relation to the local consultation and that the Employer should have waited for the opinion of the EWC. It had made its decision to implement the proposal to dismiss and make employees redundant before the EWC consultation process had been completed.

- Declare that if the EWC requested a physical meeting formally, the Employer was obliged to grant this;

- Declare that the information requested by the EWC following the meeting on 27 March 2017 was justified and well founded. The Employer should disclose the business case and economic reasons for its decision.

Summary of the Employer's further submissions

40. The Employer commenced its oral submissions by stating that the Panel had to decide whether it had complied with the subsidiary requirements for the TICE Regulations. In the Complainants' submission they had stated that *"Oracle has never shown any genuine motivation to promote social dialogue significantly beyond the bare legal minimum."* The

[1] Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co. KG (C-440/00) CJEU

Employer said this statement showed that it had complied with the TICE Regulations as it was not required to go beyond the legal minimum.

41. The Employer had previously explained why it felt the complaints raised were unfounded and had re-iterated and developed this in its written submission (which the Panel had indicated had been read prior to the hearing, together with the witness statements). It wanted to indicate further evidence, in response to the Complainants' submission. First of all in its submission to the Panel the EWC stated that on 21-23 March 2017: *"No information is provided on the closure of SRS Centers and subsequent redundancies."* The EWC then raised questions surrounding customer success and the business forecast with the Employer. Further evidence that the EWC discussed the changes to be made to SRS could be found in the minutes post the meeting, which showed the Employer's response to these. The Employer did however acknowledge that it did not go into great detail when responding to the questions raised.

42. The Employer explained that slides provided at the EWC Annual Meeting were the same as those provided to Senior Management two weeks earlier. The material was highly sensitive and at both meetings the attendees were told this information was to be kept confidential. For this reason the Employer did not understand why the EWC was arguing that information about what was taking place and financial information was not of a confidential nature.

43. The EWC had commented in its submission to the Panel that on 28 April 2017: *"The employer refers to the EWC's initial questions, puts in question the legitimacy of various questions and refuses to hold an extraordinary meeting "unless the EWC can explain why and set out its exact scope and purpose.""* The Employer argued that it did not refuse to hold an extraordinary meeting with the EWC; the entitlement was to one meeting which took place on 27 March 2017 and the request made was for a follow up meeting.

44. The Employer referred to the email dated 13 January 2012 which discussed amongst other things the protocol for EWC meetings. Contrary to the interpretation of this protocol forwarded by EWC, the Employer argued that it did not state that the meetings had to be physical gatherings; rather the form was to be decided on a case by case basis. The Employer

stated that earlier meetings (detail of which was given) had been by telephone conference without objection being raised.

45. Evidence was provided by the Employer to show on 18 September 2015 an exceptional information and consultation meeting was held by conference call with the EWC, to discuss the possibility on 384 employees being made redundant. It said it was unclear what the trigger was that had led the EWC to complain that a physical meeting should now take place regarding a similar matter. The exceptional information and consultation meeting on 27 March 2017 took place in the same manner (by conference call) as previous meetings in the past 5 years. The Regulations were silent on how these meetings should be conducted.

46. The Employer referred to the Acas Employee Communications and Consultation booklet which had been submitted as evidence by the Complainants. It noted that under the heading "The Process of Employee Communication" the booklet stated *"To be effective employee communications must be: as relevant, local and timely as possible. A variety of communication methods will be needed, both spoken and written, direct and indirect. The mix of methods will depend mainly on the size and structure of the organisation. When setting up communications processes, it is well worth considering what use might be made of new technology."* The Employer then highlighted what was meant by audio visual aids. It said *"video, film or tape/slide presentations are particular useful for explaining technical developments or financial performance."* The Employer then noted that under the heading "Methods of Consultation" it stated: *".....there is no single arrangements that will suit all working environments."* The Employer concluded that this, along with its earlier evidence on exceptional information and consultation meetings, demonstrated that they were not required to be physical meetings.

47. The Seafarers Directive (Directive (EU) 2015/1794 of the European Parliament and of the Council) had been raised by the Complainants. The Employer noted that Point 12 stated *"Having regard to the technological developments of recent years, in particular as regards communications technology, the information and consultation requirements should be updated and applied in the most appropriate manner, including by using new technologies for remote communication and by enhancing the availability of the internet and ensuring its reasonable*

use on board, in order to improve the implementation of the Directive." Although this was not part of UK law, the Employer asked that the Panel consider these observations.

48. The Employer was of the view that the meeting which took place on 27 March 2017 was an exceptional information and consultation meeting, and was of the opinion that the EWC agreed with this. The EWC communicated to the Employer on 11 May 2017 that there had been an *"I&C special meeting on March 27th."* The Employer only discovered that the EWC did not believe it was an exceptional information and consultation meeting when it received a letter from the EWC dated 23 May 2017. The EWC stated *"Please confirm that the conference call on 27th of March served for initial information to the EWC but is not to be considered as information and consultation meeting."* It said there was a comprehensive exchange of information between the Employer and the EWC. In previous correspondence regarding the aforementioned meeting, the EWC had written to the Employer and said *"We appreciate being informed and consulted at what appears to be an early stage in this proposal."*

49. The Employer was asked by the Panel to give its interpretation of what was meant by 'information and consultation' and its purpose. Ms Owen responded by explaining it was the process followed to share information. This usually took place via a conference call with the EWC and it would be given the opportunity to ask further questions. The Employer reviewed the opinions received from the EWC and responded. She said the Employer undertook information and consultation because it was a legal obligation. It was understood that the EWC would provide the Employer with its opinion on the information provided at the meeting on 27 March 2017 in April 2017. The Employer's understanding was that as part of the subsidiary requirements an opinion by the EWC should be given at the end of the meeting or in a reasonable time. It was the Employer's view that the information given at that meeting was sufficient for the EWC to give its opinion.

50. The Employer stated that it had good reason for being guarded in its disclosure of confidential information based on its experience of earlier leaks and use of information which it had described and evidenced. However it did offer to provide some financial information to the EWC in confidence on 11 September 2017. It said this was to re-establish good relations with them. It further noted that, given the passage of time, the confidentiality restriction placed on the information which the EWC had complained could be lifted.

51. The Employer was asked by the Panel to explain exactly what would have been harmful or prejudicial to it if the PowerPoint slides presented at the 27 March 2017 meeting had not been confidential at that time. The Employer explained that it concerned the impact this information would have on the affected employees and their colleagues in other Member States. It was not because a rival company could gain a commercial advantage if they saw the slides. The project for this reorganisation was expected to last between 12-18 months. Even though it had started inducting new employees in Romania in January 2017 it did not want the Belgian EWC to then ask for a consultation to begin in its Member State (under its EWC agreement it could request this immediately). The Employer said the letter from the EWC dated 23 May 2017 asked them to disclose information. It gave a reasoned response on 14 June 2017 as to why the PowerPoint slides were deemed to be confidential. The Employer said that even though the information on the PowerPoint slides did not have any commercial implications, if customers became aware that their local support centre was closing it could harm the business.

52. The Panel explored the Employer's view of EWC competence as it related to relevant information disclosure, inviting elaboration on its written submission regarding its understanding of the subsidiary requirements. The Employer argued that some types of information which had been sought by the EWC (for example on customer satisfaction and demand or the sustainability of the business) fell outside the EWC's competence because the concept of 'exceptional circumstances' in para 8(1) was inherently linked to there being circumstances "affecting the employees' interests to a considerable extent". Information requests about customer satisfaction or demand could be rejected as customers were not employees. The Employer noted differences between the scope of the annual EWC meeting (as set out in para 7(4)) and that in relation to an exceptional circumstances information and consultation meeting, stating that it only needed to inform and consult on the general sustainability of its business at an annual meeting under the requirement to inform and consult on the "economic and financial situation" as such term was used in para 7(3) of the Schedule. The drafting of paragraphs 6(2) and 8(2) of the Schedule were argued to support this conclusion.

53. The Employer then went on to the timing of transnational and national information and consultation processes. The EWC meeting took place on 27 March 2017 and the Polish employees were informed of the reorganisation on 28 March 2017. Some took voluntary severance. The Employer disagreed with the EWC when it argued that it could not give the

affected Polish employees the opportunity to leave their employment before the EWC had given its opinion on the restructuring proposal noting the absence of any such prohibition in TICER. The Employer considered that Regulation 19E was about the start of the information and consultation processes not the conclusion and did not require that it took no action before the EWC gave its opinion. In its written submission it was argued in the alternative that the EWC was responsible for its failure to deliver an opinion at the meeting or within a reasonable time and could not rely on its own failure.

54. In its closing remarks the Employer stated that:

- The information on the slides of 27 March 2017 which had been labelled confidential, was no longer so.
- The financial information the EWC sought was now also available on a confidential basis;
- The conference call which took place on 27 March 2017 with the EWC was an exceptional information and consultation meeting.
- In respect of Regulation 19E, the consultation with the affected employees started in close proximity to the exceptional information and consultation meeting. The Employer had complied with the legislation. It is not stated in the Regulations that the EWC must give its opinion before it can conclude the matter;
- Under the subsidiary requirements the EWC was entitled to one meeting. This was given to it and provided it with the Employer's proposal on the reorganisation of SRS. The Employer provided the EWC with the information they had on the proposal at that time. It deemed that the questions, then answers it provided to the EWC constituted information and consultation. This was all done in writing and on the previous 11 occasions that this had happened, this method had been sufficient for the EWC.

The Law

55. The relevant provisions are those of the Transnational Information and Consultation of Employee Regulations 1999 (as amended). These are not set out here for reasons of space. This case involves a number of different complaints where the CAC has jurisdiction under TICER.

1. Regulation 21 – complaints about the operation of information and consultation (concerning exceptional information and consultation meetings).
2. Regulation 21A concerning failures of management.
3. Regulation 23(6) concerning the imposition of a confidentiality requirement.
4. Regulation 24(2) concerning withholding of information.

   These Regulations are set out in Appendix 2.

Considerations and Findings

56. Our view of the facts is that there was a management-initiated telephone/WebEx conference call on 27 March 2017 with EWC members. The topic of the conference call ("proposed changes in the SRS organisation") had been communicated by email on 21 March 2017 but no details were provided at that time. In response to a question concerning the scope of the reorganisation raised by EWC on 23 March 2017 following the AGM, Management (Mr Kearney) stated that more information would be shared during the meeting on 27 March 2017 but confirmed that "only SRS team are affected". On the 27 March 2017 a five slide PowerPoint presentation was made and there were a few questions/answers. The call was scheduled for one hour and lasted 50 minutes. The PowerPoint presentation was classified as confidential. Notes of the meeting were made available shortly after. On 31 March 2017 and subsequently the EWC submitted a number of questions relating to the SRS Reorganisation to which management responded. In early April, following discussion of "information workflow" with management, the EWC had indicated that it hoped to provide an opinion "asap – end of April?" However, having had its requests for certain information and for a meeting refused, and dissatisfied with other "procedural" aspects of the process, the EWC concluded it was not in a position to provide an Opinion and notified Management of this on 23 May 2017. There were more exchanges between the parties, including provision of some further information. On 28 June 2017 the EWC notified Management of its decision to complain to the CAC.

57. The Panel was presented with a very large amount of documentation. In addition to its initial response to the complaints and its submission for the hearing (including two witness statements), The Employer submitted a bundle of correspondence which ran to 209 pages; a bundle of evidence comprising 464 pages, together with a 178 page bundle of authorities. The EWC provided detailed submissions by way of its initial application, further elaboration and written submission together with other documents. As noted earlier, additional documents were referred to and tabled on the day by the EWC and a written copy of the EWC's lengthy opening statement at the hearing was provided also. Latitude was allowed by the Panel in this respect and we are grateful to the Employer for not raising any objection to this. The Employer also submitted a further document on the day of the hearing, having sought prior permission.

58. We cannot and shall not refer to every document or piece of correspondence and some points made in writing or orally may not have been included in the indicative summaries of the parties cases provided above. 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.

59. Some of the considerable amount of documentation reflects the fact the parties sought to contextualise the current dispute, going back to the failure to conclude a European Works Council Agreement, and to reference earlier dealings between them on which differing interpretations were placed. It reflects also the multiple complaints being made to the CAC in this case and the complexity of the TICE Regulations 1999 (as amended) especially so where the Subsidiary Requirements apply, as in this case.

60. We have taken care to keep within our jurisdiction. Put in everyday terms we consider the questions on which CAC determination is appropriately sought are:

1. Did the telephone conference of 27 March 2017 discharge management's legal obligations
2. Was it reasonable to classify the PowerPoint presentation of 27 March 2017 as confidential
3. Should information sought by EWC have been provided
4. Should management have waited until EWC had given its opinion before taking implementation action at national/local level.

Did the telephone conference of 27 March 2017 discharge management's legal obligations?

61. The parties are agreed that there were exceptional circumstances affecting the employees' interests to a considerable extent and therefore that Para 8 and 9 of the Schedule to TICER are relevant.

62. In its submission the Employer argued that it had complied with its legal obligations having held a telephone conference call on 27 March 2017. In its view this constituted the exceptional information and consultation meeting in respect of the SRS Reorganisation. It stated that the "EWC did not deliver an opinion to Oracle at the Meeting or within a reasonable time to which Oracle could provide a reasoned response. The Meeting therefore strictly concluded the exceptional information and consultation process as Oracle had fulfilled its obligation to hold an "exceptional information and consultation meeting" (as the term is under in paras 8(1) and 8(3) of the schedule to TICER) in respect of the SRS Reorganisation." Nonetheless it "continued to engage in information and consultation with the EWC after the Meeting in the spirit of social dialogue".

63. We do not consider that the telephone conference of 27 March 2017 discharged management's legal obligations. We find that it did not constitute an exceptional information and consultation meeting as provided in the Regulations and that no exceptional information and consultation meeting was held. The evidence points to the 27 March 2017 conference call being an information giving event. The fact of a proposed SRS reorganisation had been notified on 21 March 2017 but, as acknowledged by management, no detail had been provided. The 27 March 2017 conference call, along with subsequent provision of responses to EWC questions (which the EWC had been invited to submit prior to them issuing an opinion), prepared the way for - but was not followed by - an exceptional information and consultation meeting to be held at the request of the EWC, the offering of an opinion by the EWC and obtaining Management's reasoned response to it (para 8(1) and para 9 (7)).

64. Our reading of TICER Schedule para 8 and of the Procedures (para 9) associated with an exceptional information and consultation meeting, is that a staged rather than an all-in-one

process is envisaged with information being provided prior to the exceptional information and consultation meeting which may be requested by the EWC having received the information.

65. Para 8 provides that the EWC "shall be informed". It then states "It shall have the right to meet in an exceptional information and consultation meeting, at its request, the central management…so as to be informed and consulted."

66. Our understanding of the Schedule is that information and consultation are seen as distinct, albeit interrelated, and that consultation takes place following provision of at least some substantive information. This is also our reading of Regulation 18A where the provision of information on the one hand and engaging in consultation on the other are set out as separate duties. Regulation 18A(2)and (3) concern information and 18A(4) and (5) concern consultation. Regulation 18A(3)(c) requires the content timing and manner of information being such to enable recipients "where appropriate to prepare for consultation". This indicates that 'information and consultation' it is not a single all-at-the-same-time event. The separation reflects Recitals 22 and 23 which define the two processes separately. The label "information and consultation meeting" is used but this does not necessarily imply these are not distinct - albeit interrelated – processes, nor that information is to be provided no earlier than at that meeting.

67. Further informing our view is the entitlement in the Schedule (Para 9(1)) for the EWC or select committee to meet before an exceptional I&C meeting "without the management concerned being present". We find it difficult to see that this has any meaning unless sufficient information has been provided (at a meeting or otherwise) for the EWC to engage with. Similarly, if information is not provided ahead of an exceptional I&C meeting, it is difficult to see how the EWC might seek expert assistance as provided for under para 9(4). We note the EWC expert was not a party to the 27 March 2017 conference call. One approach to a staged process would be for the "management report" which under para 8(3) forms the basis of the exceptional meeting, to be made available ahead of the meeting.

68. Para 9(7) states that the employer must conduct consultation as referred to in 8(1) in such a way so that members of EWC can, "if they so request (a) meet with central management

and (b) obtain a reasoned response from the central management to any opinion expressed by those representatives on the report….."

69. The conference call on 27 March 2017 was instigated by Management. It was not at the request of the EWC as provided for in 8(1). In May, after it had received further information, the EWC requested a physical meeting but this was refused as it was seen by management to be a request for an *additional* meeting beyond its legal obligations under the legislation which it regarded had been discharged by having the conference call on 27 March 2017. Management stated it would consider holding "an additional face to face meeting" with the EWC if it provided an explanation of why it was required for the EWC to discharge its duties and "set out its exact scope and purpose". The EWC felt it had yet to have a meeting *at its request* for the purposes of consultation. As this was its right under the Regulations it declined to further justify its request to have one.

70. As the Employer noted, the EWC members in correspondence did at times adopt the terminology management had applied to the 27 March 2017 conference call, referring to it as "special I&C meeting". However it is clear from the content of the correspondence between the EWC and Management (including for example the email accompanying the first list of questions sent by the EWC on 31 March 2017) and from other documents (e.g. workflow chart) that the 27 March 2017 conference call was seen by the EWC as the start of a process of information provision which would inform its opinion and consultation. We note that in some correspondence and documentation Management refer to "the exceptional circumstances information and consultation *process"* (emphasis added) and a proposed "holding statement" sent to the EWC on 19 May 2017 stated that "consultation at the EWC level is ongoing" (evidence bundle p422).

71. A key part of the argument made by EWC was that the 27 March 2017 telephone conference did not constitute a meeting since a 'meeting' needed to be a physical gathering, a face to face event. We have indicated above our view that the 27 March 2017 event failed to satisfy the requirements relating to an "exceptional information and consultation meeting" on grounds other than its form but, not least given the time spent arguing this issue, we consider form here.

72. There are indications in the Regulations that meetings are presumed to be face to face (for example mention of management meeting the accommodation and travelling expenses of EWC members in para 9(6) of the Schedule). However, taking into account the context and characteristics of the parties in this case and their established pattern of interaction, among other factors, we consider the use of modern technology to hold a virtual meeting was acceptable. Although, for other reasons discussed above, it did not satisfy the requirement of an exceptional information and consultation meeting, we find that the conference call of 27 March 2017 was a "meeting".

73. We wish to emphasise that we are not giving a general ruling. Much will depend on the particular circumstances and each case would need to be decided on its merits, weighing up a number of considerations. Such considerations, we suggest, would include: nature of the undertaking (for example a company in the high tech sector as compared with one in the extraction or manufacturing sectors); the nature, competence and experience of employees' representatives in using the technology; whether virtual communication is part of day- to- day interaction in the business; the usual or accepted form of interaction between the parties; whether a face to face meeting is particularly difficult to arrange; whether sufficient preparation has been undertaken (for example attention paid to difficulties which might arise with language etc); the number of people involved; whether a virtual meeting involves video or simply sound; and whether its primary purpose is information giving/Q&A as opposed to more complex interaction and dialogue or decision taking.

74. The Schedule (8(1)) provides that the holding of an exceptional information and consultation meeting is at the request of the EWC. It seems appropriate therefore that the EWC should express its view on the form of meeting it would like. Wherever possible it is preferable for the format of the meeting to be agreed as between the employee representatives and management. This would be in keeping with the duty imposed by Regulation 19 (1) of TICER that the central management and the European Works Council "work in a spirit of cooperation with due regard to their reciprocal rights and obligations".

75. As indicated in paragraph 8 above, the Complainants raised the issue of whether the "means required" had been provided in accordance with Regulation 19A of TICER and para

9(6) of the schedule. As this was intimately connected with their arguments for a physical meeting we see no need to deal with it separately.

Was it reasonable to classify the PowerPoint presentation of 27 March 2017 as confidential?

76. The test as to whether it was unreasonable for central management to impose a requirement that information or a document entrusted to a recipient is held in confidence is whether 'the disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking'. We find on the evidence that the blanket, unlimited confidentiality which Management placed on the PowerPoint presentation (which constituted its "management report") was not reasonable. We are not persuaded that disclosure would have been likely to prejudice or cause serious harm to the undertaking.

77. At the hearing management acknowledged that the information in the PowerPoint presentation was not such as to be commercially sensitive. It argued instead that potential serious harm could come from information being shared by EWC with national/local bodies at what was an early stage in that it could generate fears, uncertainties etc. among the work force which could seriously harm the functioning of the business. The Panel considers that there was an issue to be managed in terms of sequencing of information provision at transnational and national levels but in our view this does not provide adequate justification for classifying everything as confidential for an open-ended period. At best it might justify imposing a confidentiality restriction on relevant parts of the information provided to the EWC (which appears to be just one of the five slides) for a short specific period. Ideally the length of any period of confidentiality could be agreed between the parties.

78. Management acknowledged in its submission that confidentiality is a function of time as well as content. We note that soon after the EWC members were provided with the information in confidence on 27 March 2017, it became more generally known as the Employer started national level implementation in Poland the following day and then in other countries shortly thereafter. It is not reasonable for the confidentiality restriction to have been kept in

place. Certainly the information was known widely by 22 May 2017 when the EWC requested the confidentiality restriction be lifted and was refused.

Should information sought by the EWC have been provided?

79. Complaints here fall under Regulation 21 (that Reg. 18A not complied with) and Regulation 24(2) (whether non-disclosed information was of a kind that management was not required to disclose as, according to objective criteria, its disclosure would seriously harm the functioning of, or would be prejudicial to, the undertaking). Regulation 18A(3) states "the content of the information, the time when, and manner in which it is given, must be such as to enable the recipients to (a)Acquaint themselves with and examine its subject matter (b) Undertake a detailed assessment of its possible impact (c)Where appropriate, prepare for consultation."

80. The EWC argued that information necessary to enable it to do this was withheld and drew our attention to various questions asked of Management where information was refused. Management did provide some additional information in response to various questions asked by EWC at different points subsequent to the 27 March 2017 meeting but continued to refuse to supply some information. Various reasons were given for non-disclosure: a view that the subject matter was not within the competence of the EWC; information sought was not relevant to the EWC's assessment of the possible impact on affected employees and/or certain financial information was commercially sensitive and withheld in accordance with Regulation 24(1) of TICER. Following the informal meeting which the Panel held with the parties it was stated that some information requested was not in the Employer's possession.

81. We look first at the question of whether the information sought by the EWC was relevant to its remit. As noted, the EWC argued that the Employer failed to provide information which was necessary to enable it to undertake the roles set out in Reg. 18A(3) and in particular Regulation 18A(3)(b) which relates to undertaking a detailed assessment of possible impact. Management's position is that "possible impact" relates only to possible impact on affected employees. It argued that those affected are those employees being made redundant in the organisation.

82. There are boundaries to be drawn but in the Panel's view Management's interpretation is too narrow. We agree with the Employer's interpretation that information provision needs to relate to the interests of *employees* affected to a considerable extent by Management's decision but in our view this is wider than those being made redundant. Employees who are potentially impacted by a transnational reorganisation are not simply those who may lose their jobs. We concur with the view of the EWC expressed in its submission that such restructuring decisions also may affect to a considerable extent the interests of retained employees and those whose work potentially is impacted by changes in work organisation or working methods etc. connected with the SRS reorganisation. We make this as a general point; we were not given particular examples or detail of categories of employees who might be so affected.

83. The Regulations are clear that it is not the role of the EWC to seek to reverse management decision or any action taken. Certain of the "procedural questions" raised by the EWC imply that this might have been the purpose behind some information requests (for example question II). This reading is present in various Management refusals and appears to underpin its refusal to provide information about "the business rationale for the decision" (for example as stated by Ms Owen).

84. What appears to us to have been lost in the exchanges between the parties is a distinction between, on the one hand, seeking financial detail of the business case for reorganisation in order to challenge or seek to reverse managerial decision and, on the other hand, seeking information necessary to understand the rationale or thinking behind a proposed action in order to represent the interests of those employees affected by it and provide an opinion which "will be useful in the decision-making process" (Recital 23).

85. The CAC has jurisdiction under 24(3) to declare whether the disclosure of a document or information in question would not, according to objective criteria, seriously harm the functioning of, or be prejudicial to the Employer and to order disclosure if appropriate. However we lack sufficient detail to do so in this case in relation to the further information requests.

86. The evidence provided makes clear that the default position of the Employer is (a) not to disclose and (b) to classify as confidential anything it feels it has to disclose in order to

comply with the minimum legal obligations. This 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.

87. We note that on 11 September 2017 (following the complaint to the CAC and in an effort to resolve the dispute) the Employer offered to provide on a confidential basis to the EWC some of the financial information which had been requested but refused. 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.

88. We were informed that the Employer's reluctance to disclose information to EWC even on a confidential basis reflects past experience where information on previous restructuring, which had been provided to the EWC and then passed on legitimately to national level employee representatives, had been shared more widely and resulted in what the Employer regarded as serious harm. This was a disputed area between the parties and it is not the Panel's task to adjudicate on these past events. The Panel is satisfied on the evidence, however, that any breach of confidentiality was not by a past or current EWC member. The evidence further shows that, following the events claimed of, steps were taken by the EWC to minimise the risk of this happening in future. While its view of past events may help explain the Employer's caution in providing information it is not of itself a legitimate justification for withholding information to which EWC is entitled.

Does Management have to wait until EWC has given its opinion before taking action at national/local level.

89. We do not accept the argument of the Complainants that the requirement to link national and transnational information and consultation processes requires that the Opinion of EWC be awaited prior to management action being taken at national/local level. Regulation 19E(1)(b) states: "Where there are circumstances likely to lead to substantial changes in work organisation or contractual relations' management (under 19E(2) "shall ensure that the procedures for informing and consulting the EWC and the national employee representation

bodies in relation to the …(changes) are linked so as to begin within a reasonable time of each other."

90. It is a limitation of the subsidiary requirements that nothing further is said concerning the links between the timing of transnational and national I&C processes - something which TICER does require EWC Agreements to determine (Reg. 17(4)(c)).

91. Management's "right to manage" is protected (e.g. Recital 37 and 14; para 8(4)). In return it appears the Directive requires management do all it can in terms of arrangements for information and consultation to facilitate the EWC being able to give an opinion in a timely fashion which "will be useful to the decision-making process" (Recital 23 definition of consultation) and obtain a reasoned response (Para 9(7)(b). In this way transnational consultation is intended to add value to managerial decision making. However the Regulations do not stipulate that management cannot implement its decision until an opinion has been given by the EWC.

Decisions and Orders

92. We find that the complaint under Regulation 21 is well founded (the 27 March 2017 meeting did not constitute an extraordinary information and consultation meeting)

93. We find the complaint under Regulation 23 is well founded (unreasonable imposition of confidentiality).

94. We make no determination under Regulation 24 (withholding information)

95. We find the complaint under Regulation 21A(d) is not well founded (that national action should not have been taken until an EWC opinion had been given).

96. We make no Orders in respect of these decisions. 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 complaints. Nor is it appropriate to make Orders given (a) the passage of time, (b) the stipulation in the Regulations 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 orders would be redundant in those areas where Management has taken action subsequent to the complaints being brought to the CAC (the lifting of confidentiality and the confidential disclosure of financial information).

Panel

Professor Linda Dickens MBE, Panel Chair
Mr Mike Cann
Ms Bronwyn McKenna

12 February 2018

Appendix 1

Names of those who attended the hearing on 11 January 2018:

For the Complainants

Mr. Hans-Peter Hinrichs	-	Member of the EWC Steering Committee
Mr. Franck Pramotton	-	Member of the EWC Steering Committee
Mr. Peter Harvey	-	Member of the EWC Steering Committee
Mr. Johan van den Bossche	-	Member of the EWC Steering Committee
Mr. Peter Renner	-	EWC Member
Mr. Hellmut Gohde	-	EWC Expert

For the Employer

Vince Toman	-	Barrister, Lewis Silkin
David Hopper	-	Senior Associate, Lewis Silkin
Marie Hoolihan	-	Legal Assistant, Lewis Silkin
Vance Kearney	-	Vice President, HR, EMEA*, Oracle
Vanessa Markham	-	Assistant General Counsel, Employment, Oracle
Dianna Owen	-	Director of Employment Relations, EMEA, Oracle
Christel Van Peteghem	-	Oracle
Anna Fariello	-	Oracle
Sarah Hopkins	-	Oracle

*EMEA = Europe, Middle East and Africa

Appendix 2

THE LAW

Regulation 21 covers disputes about the operation of a EWC or information and consultation procedure and provides as follows:

21.—(1) Where—

(a) a European Works Council or information and consultation procedure has been established under regulation 17; or

(b) a European Works Council has been established by virtue of regulation 18,

a complaint may be presented to the CAC by a relevant applicant where paragraph (1A) applies.

(1A) This paragraph applies where a relevant applicant considers that, because of the failure of a defaulter—

(a) the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule, have not been complied with; or

(b) regulation 18A has not been complied with, or the information which has been provided by the management under regulation 18A is false or incomplete in a material particular.

(1B) A complaint brought under paragraph (1) must be brought within a period of six months beginning with the date of the alleged failure or non-compliance.

(2) In this regulation, "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management.

(3) In this regulation "relevant applicant" means—

(a) in the case of a failure concerning a European Works Council, either the central management or the European Works Council; or

(b) in the case of a failure concerning an information and consultation procedure, either the central management or any one or more of the information and consultation representatives,

and "defaulter" means the persons mentioned in sub-paragraph (a) or (b) against whom the complaint is presented.

(4) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule.

(5) An order made under paragraph (4) shall specify—

(a) the steps which the defaulter is required to take;

(b) the date of the failure; and

(c) the period within which the order must be complied with.

(6) If the CAC makes a decision under paragraph (4) and the defaulter in question is the central management, the relevant applicant may, within the period of three months beginning with the

date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6A) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.

(7) Paragraph (6A) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the central management, that the failure resulted from a reason beyond the central management's control or that it has some other reasonable excuse for its failure.

(8) Regulation 22 shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

Regulation 21A provides for a complaint in the event of a failure on the part of central management to provide the EWC with the means required to fulfil its function. It provides as follows:

21A.—(1) A complaint may be presented to the CAC by a relevant applicant who considers that—

(a) because of the failure of a defaulter, the members of the special negotiating body have been unable to meet in accordance with regulation 16(1A);

(b) because of the failure of a defaulter, the members of the European Works Council have not been provided with the means required to fulfil their duty to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings in accordance with regulation 19A;

(c) because of the failure of a defaulter, a member of a special negotiating body or a member of the European Works Council has not been provided with the means required to undertake the training referred to in regulation 19B; or

(d) regulation 19E(2) applies and that, because of the failure of a defaulter, the European Works Council and the national employee representation bodies have not been informed and consulted in accordance with that regulation.

(2) A complaint brought under paragraph (1) must be brought within a period of six months beginning with the date of the alleged failure.

(3) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with regulation 16(1A), 19A, 19B or 19E(2), as the case may be.

(4) An order made under paragraph (3) shall specify—

(a) the steps which the defaulter is required to take;

(b) the date of the failure; and

(c) the period within which the order must be complied with.

(5) If the CAC makes a decision under paragraph (3), the relevant applicant may, within the period of three months beginning with the date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the defaulter requiring it to pay a penalty to the Secretary of State in respect of the failure.

(7) Paragraph (6) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the defaulter, that the failure resulted from a reason beyond the defaulter's control or that it has some other reasonable excuse for its failure.

(8) Regulation 22 shall apply to a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

(10) In this regulation—

(a)"defaulter" means, as the case may be—

(i) the management of any undertaking belonging to the Community-scale group of undertakings;

(ii) the central management; or

(iii) the representative agent or the management treated as the central management of the Community-scale undertaking or Community-scale group of undertakings within the meaning of regulation 5(2);

(b)"failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management;

(c)"relevant applicant" means—

(i) for a complaint in relation to regulation 16(1A), a member of the special negotiating body;

(ii) for a complaint in relation to regulation 19A, a member of the European Works Council;

(iii) for a complaint in relation to regulation 19B, a member of the special negotiating body or a member of the European Works Council;

(iv) for a complaint in relation to regulation 19E(2), a member of the European Works Council, a national employee representation body, an employee, or an employees' representative.

Regulation 23 provides for a complaint in the event of the disclosure of information or a document which central management has provided on the basis that it is to be held in confidence. It provides as follows:

23.—(1) A person who is or at any time was—

(a) a member of a special negotiating body or a European Works Council;

(b) an information and consultation representative; or

(c) an expert assisting a special negotiating body, a European Works Council or its select committee, or information and consultation representatives,

shall not disclose any information or document which is or has been in his possession by virtue of

his position as described in sub-paragraph (a), (b) or (c) of this paragraph, which the central management has entrusted to him on terms requiring it to be held in confidence.

(2) In this regulation and in regulation 24, a person specified in paragraph (1)(a), (b) or (c) of this regulation is referred to as a "recipient".

(3) The obligation to comply with paragraph (1) is a duty owed to the central management, and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

(4) Paragraph (3) shall not affect the liability which any person may incur, nor affect any right which any person may have, apart from paragraph (3).

(5) No action shall lie under paragraph (3) where the recipient reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act or, as the case may be, Article 67A of the 1996 Order.

(6) A recipient whom the central management (which is situated in the United Kingdom) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration as to whether it was reasonable for the central management to impose such a requirement.

(7) If the CAC considers that the disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking, it shall make a declaration that it was not reasonable for the central management to require the recipient to hold the information or document in confidence.

(8) If a declaration is made under paragraph (7), the information or document shall not at any time thereafter be regarded as having been entrusted to the recipient who made the application under paragraph (6), or to any other recipient, on terms requiring it to be held in confidence.

Regulation 24 provides for a complaint in the event of central management withholding information on the basis that the disclosure of such information would seriously harm the functioning of, or would be prejudicial to, the undertaking or group of undertakings concerned. It provides as follows:

24.—(1) The central management is not required to disclose any information or document to a recipient when the nature of the information or document is 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.

(2) Where there is a dispute between the central management and a recipient as to whether the nature of the information or document which the central management has failed to provide is such as is described in paragraph (1), the central management or a recipient may apply to the CAC for a declaration as to whether the information or document is of such a nature.

(3) If the CAC makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, seriously harm the functioning of, or be prejudicial to, the undertaking or group of undertakings concerned, the CAC shall order the central management to disclose the information or document.

(4) An order under paragraph (3) above shall specify—

(a) the information or document to be disclosed;

(b) the recipient or recipients to whom the information or document is to be disclosed;

(c) any terms on which the information or document is to be disclosed; and

(d) the date before which the information or document is to be disclosed.