

**TTP2207**

**Fourth Directions – 9 May 2023**

Any reference below to “HEOC” is to the Heathrow Express Operating Company.

I am grateful to HEOC for its response to my Third Directions given on 4 May 2023. Inevitably, these directions are slightly delayed as a result of the bank holiday on 8 May 2023.

In light of the content of HEOC’s realistic and sensible approach to the other documents annexed to its SRD, the only document which these directions have in view is the HS2 Supplemental Agreement. I have not received any submissions from HAL (the other party to the agreement).

The starting point is that the provisions of the HS2 Supplemental Agreement underpin HEOC’s reference. It follows that its material provisions must form part of the Panel’s decision at least in summary in order that all those interested in the decision can understand why HEOC is entitled to bring this appeal, and why the Panel has reached its decision. Without having heard the full evidence and submissions of the Dispute Parties it is not possible at this time to know how far the decision will need to refer to the agreement.

Turning first to the context of disclosure. The document has been disclosed within a reference made under the provisions of the Network Code, and within which the starting point is that such documents should be published, as I have explained in my Third Directions.

In light of the above, given the context in which this document has been provided, I have serious doubts that the first limb of the test in *Coco* is made out.

I have, however, carefully considered HEOC’s submissions in full.

I have considered whether the material might have the requisite quality of confidence, and I also have significant doubts about whether the information in the HS2 Supplemental Agreement does have that quality.

I note that HEOC indicates as follows “*The Agreement contains provisions of a commercially sensitive nature and refers to various other agreements including (i) the HEX TAA, (ii) the Deed of Waiver and Amendment, and (iii) the HS2 Compensation Agreement (as defined in the Agreement). These agreements (including the Agreement) have not previously been released into the public domain and the existence of some of these agreements is itself confidential in nature.*”

Other than the existence of a number of other agreements, HEOC does not specify what provisions (with specific reference) are, in its view, commercially sensitive.

I note that there is documentation in the public domain which appears to identify some of the agreements to which reference is made. For example, a TAC (passenger services) published by the ORR for consultation appears to identify the August 1993 HEX TAA (and indeed this document is identified in the SRDs). It is not clear to me how the bare fact of disclosure that the agreement has been amended gives rise to the necessary quality of confidence which a reference to the original HEX TAA does not have (since its existence is public). Indeed, it is

clear from the existence of the HS2 Supplemental Agreement that there have been amendments.

Equally, it is not clear to me how a reference to a compensation agreement agreed under statutory authority but of which no substantive details are provided could have a commercially detrimental impact on HEOC. I expect that the conditions in which a relevant award of compensation may be sought are set out on the face of the legislation in question. I can accept that the calculation of compensation or the amount might be commercially sensitive in some circumstances, but no such details would be made public here. Compensatory arrangements are included in all ORR model TAA and the Network Code; it can be assumed that industry parties would reasonably believe that some form of compensation agreement exists between HEOC and Network Rail.

Accordingly, I am minded to conclude that the HS2 Supplemental Agreement should be published in the usual way but I note HEOC's reference to the possibility of requests for redaction (though without giving any particulars of what such redactions it may wish to request). Taking the above into account, if HEOC wishes to pursue a request for redactions I ask that it provide specific details of each redaction which they request, along with a reasoned justification in each case by **17:00 on 9 May 2023**.

[Signed on the original]

Paul Stevenson

Hearing Chair TTP2207