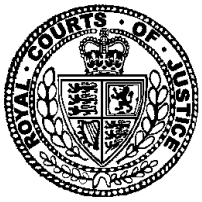

Neutral Citation Number: [2025] EWHC 2243 (KB)

Case No: FL-2022-000024; FL-2022-000025, FL-2022-000026, FL-2022-000027, FL-2023-000004, FL-2023-000009, FL-2023-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 August 2025

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

AABAR HOLDINGS S.À.R.L & OTHERS

Claimants

- and –

(1) GLENCORE PLC
(2) MR IVAN GLASENBERG
& OTHERS

Defendants

- -
- -

Andrew Onslow KC, Richard Mott and Usman Roohani (instructed by **Stewarts Law LLP, Quinn Emanuel Urquhart & Sullivan UK LLP, Pallas Partners LLP, and Bryan Cave Leighton Paisner LLP**) for the **Claimants**
Richard Hill KC and Gregory Denton-Cox (instructed by **Clifford Chance LLP**) for **Glencore**
Andrew Lodder (instructed by **Steptoe International UK LLP**) for **Mr Glasenberg**

Hearing dates: 21, 22 May and 27 June 2025
Further correspondence 11 and 23 July 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN :

A. INTRODUCTION

1. The Claimants, the First Defendant Glencore Plc ("Glencore") and the Second Defendant Mr Ivan Glasenberg ("Mr Glasenberg") appear before the Court in these ongoing actions before the English Court (the "English Proceedings") on the hearing of applications brought by Glencore and Mr Glasenberg respectively seeking orders that they are not required to provide disclosure of certain documents obtained from foreign investigators which would otherwise be disclosable in accordance with existing disclosure orders of this Court.

2. In this regard, paragraph 5 of the second Case Management Conference Order ("CMC2 Order") in the English Proceedings required the Defendants to make (by a specified date) "any application they intend to make, based on alleged foreign restrictions on disclosure…" whereby they sought to vary their existing disclosure obligations in the English Proceedings.

3. On 28 February 2025, and further to paragraph 5 of the CMC2 Order, Glencore and Mr Glasenberg each issued application notices, respectively the "Glencore Disclosure Restriction Application" and the "Glasenberg Disclosure Restriction Application" (together, the "Disclosure Restriction Applications").

4. The Glencore application notice and the Glasenberg application notice also made other applications, but those have already been dealt with separately, and are not addressed in this judgment.

5. The relevant disclosure obligations are, in summary:-

   (1) Glencore's obligation to give Category 2 disclosure, being one category of early disclosure required by the first Case Management Conference Order ("CMC1 Order"), in this case comprising documents "provided to the Glencore Group by the relevant authorities in each of the Investigations" as referred to at paragraph 1 of Appendix 1 to the CMC1 Order (CMC1 Order, para 22(a)).

   The "Investigations" referred to at Appendix 1 of the CMC1 Order comprise investigations in a number of jurisdictions, in relation to which documents were provided both by the Glencore Group and to the Glencore Group by the relevant authorities. These Investigations are, in broad summary, those carried out by:-

   (1) The US Department of Justice ("DOJ") and the US Commodity Futures Trading Commission ("CFTC").

   (2) The Brazilian Ministério Público Federal ("MPF").

   (3) The English Serious Fraud Office ("SFO").

   (4) The Canadian Ontario Securities Commission ("OSC").

(5) The Dutch Public Prosecutors Office ("DPPO") and the Dutch Fiscal Information and Investigation Service ("FIOD").

(6) The Swiss Office of the Attorney General ("Swiss OAG").

As addressed in more detail below, these investigations are into alleged bribery by Glencore and others in various overseas countries.

(2) The Defendants' obligation to give Extended Disclosure in accordance with the DRD of documents not already disclosed (CMC1 Order, paragraph 24).

6. Since the issue of the Glencore Disclosure Restriction Application, and as appears below, the only remaining aspect of the Glencore Disclosure Restriction Application that remains live (as opposed to aspects that it is agreed can now be addressed in the draft Order before the Court) relate to three documents that were provided from the criminal case file by the DPPO to Glencore International AG ("GIAG"). Following a request on behalf of Glencore to the DPPO seeking its consent to the disclosure of these documents in the English Proceedings, the DPPO did not give its consent.

7. The Glasenberg Disclosure Restriction Application (brought by Mr Glasenberg, a former director and partial owner of Glencore) concerns Mr Glasenberg's application to withhold inspection of one document, namely a Request for Mutual Legal Assistance (the "MLAT Request") from the DPPO and FIOD to the Swiss OAG dated 3 November 2023. Again, following a request on behalf of Mr Glasenberg to the DPPO seeking its consent to the disclosure of the MLAT Request in the English Proceedings, the DPPO did not give its consent.

8. The Glencore Disclosure Restriction Application had also sought relief in relation to documents provided by the authorities in Canada and Switzerland, in the course of the investigations into certain Glencore Group companies in those jurisdictions. However, it is now common ground that:-

(1) The application in relation to Canadian documents should be adjourned pending the outcome of an application in Canada; and

(2) The order sought in relation to the remaining Swiss documents should be granted, as (i) the Defendants have succeeded in removing restrictions so as to enable most of the Swiss documents to be disclosed, and (ii) given the likely unimportance of the few remaining documents, it is "not proportionate to incur the costs and Court time of arguing over the balance".

9. As for the three documents provided by the Dutch authorities, Glencore says that it has been placed in an invidious position. Taking steps to provide disclosure under the existing order for early disclosure in the English Proceedings, in relation to these documents could (it is said) put them in breach of Dutch law and at risk of prosecution and sanction in the Netherlands, but withholding disclosure (absent relief from this Court as sought in the Glencore Disclosure Restriction Application) would put them in breach of existing orders

as to early disclosure in the English Proceedings and so at risk of committal for contempt and sequestration of assets. Mr Glasenberg makes a similar submission in relation to his position and the MLAT Request.

10. The relevant principles of English law on applications such as the present are well established, and were largely common ground. I address them in detail in Section C below. They were set out in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 ("*Bank Mellat*") from which a "three-stage" approach can be discerned: stage 1, would or might compliance with the order entail a breach of foreign criminal law; stage 2, if so is there a real (that is actual) risk of prosecution in the foreign state; and (if reached) stage 3, a balancing exercise is conducted weighing the risk of prosecution in the foreign state with the importance of the documents of which inspection is ordered to the fair disposal of the English Proceedings.

11. For their part, Glencore and Mr Glasenberg submit that disclosure of the respective documents in the English Proceedings would amount to an offence in Dutch criminal law (under section 184(1) of the Dutch Criminal Code ("DCC")), with Mr Glasenberg submitting (in relation to the MLAT Request) that it would also be an offence under section 272 of the DCC (stage 1). They each submit that this would give rise to a real risk of prosecution in the Dutch courts by the Dutch prosecuting authorities (stage 2) and, submit that at stage 3, on the balancing exercise, the risk of prosecution in the Netherlands outweighs the value of the documents, which they submit are likely to be of limited relevance and not necessary for the fair disposal of the English Proceedings.

12. For its part, the Claimants oppose the Disclosure Restriction Applications. They submit that the disclosure of the documents would not amount to an offence under section 184(1) of the DCC or (in relation to Mr Glasenberg) section 272 of the DCC (stage 1), that in any event there is no real risk of prosecution (stage 2), and if stage 3 is reached, when the Court does the balancing exercise between any risk of prosecution in the Netherlands (which the Claimants submit is less than real) and the importance of the documents of which inspection is ordered for the fair disposal of these proceedings (which the Claimants submit is high), the balance comes down overwhelmingly in favour of refusing the Disclosure Restriction Applications.

B. RELEVANT BACKGROUND

13. To place the Disclosure Restriction Applications in context, it is necessary to say something about the claims made in the English Proceedings and the procedural history to date (including that in relation to disclosure).

B.1 The English Proceedings

14. There are four separately represented Claimant groups, referred to by the names of their solicitor firms as the "QE Claimant", the "Pallas Claimants", the "Stewarts Claimants" and the "BCLP Claimants". The actions are all being case managed together pursuant to my CMC1 Order dated 23 May 2024. All of the Claimants bring claims against Glencore. The Pallas and QE Claimants also

bring claims against some of Glencore's former directors, namely Mr Glasenberg and Mr Kalmin.

15. Glencore is a global natural resources company, and the ultimate parent company of the Glencore group of companies (the "Glencore Group"), which includes GIAG, a company incorporated under Swiss law. Another Glencore company is Glencore UK Limited ("Glencore UK") which is a company incorporated in England & Wales, and is the wholly owned subsidiary of GIAG. Another company, Glencore Energy is also incorporated in England and Wales, and it is the wholly owned subsidiary of Glencore UK.

16. The Claimants' claims relate to alleged (and, in some cases, admitted) bribery and corruption in the business activities of certain operating subsidiaries within the Glencore Group, in Africa (the Democratic Republic of the Congo ("DRC"), South Sudan, Nigeria, Cameroon, the Ivory Coast and Equatorial Guinea) and South America (Brazil, Venezuela) and alleged oil price manipulation in relation to the fuel oil market at certain US ports.

17. The Claimants allege that Mr Glasenberg and Mr Kalmin knew or were reckless as to the existence of this misconduct within the Glencore Group. The Claimants also allege other senior personnel had such knowledge, including Mr Mistakidis, Mr Beard and Mr Gibson.

18. Some of this alleged misconduct has been the subject of investigations by law enforcement authorities in the United States, Brazil and the United Kingdom (by the SFO), as well as in other jurisdictions including Switzerland (by the Swiss OAG) and the Netherlands (by the DPPO and FIOD).

19. Certain companies within the Glencore Group have admitted conduct amounting to bribery or corruption in the period 2006 to 2018, and conduct amounting to oil price manipulation in the period 2011 to 2019. To date, that has led to the imposition of fines on, and confiscation of funds from, companies within the Glencore Group totalling US$1.4 billion. The Claimants rely upon the admissions made by the Glencore Group as part of those investigations.

20. One of the investigations opened was an investigation by the SFO. The SFO opened an investigation into the Glencore group of companies on 12 June 2019 on suspicion of bribery and associated offences relating to oil, oil trading and related products and activities. The investigation was primarily focused on the activities of Glencore's London office, specifically the activities of the "West Africa desk" and the conduct of Glencore's employees based in the UK, who were associated with the "West Africa desk".

21. It is not necessary to set out the history of the SFO investigations for the purposes of the present applications. It suffices to note (as further addressed below) that the SFO has intervened in the English Proceedings, resulting in the imposition by me of a "Confidentiality Club" in respect of certain categories of disclosed documents. The relevance of that is that the Claimants submit (and Glencore and Mr Glasenberg recognise) that I could fashion an order and impose similar confidentiality restrictions (in the form of a Confidentiality Club) in resect of the documents, the subject matter of the Disclosure Restriction

Applications, which would (1) prevent such documents being publicly available and (2) reduce or minimise concerns under foreign law (see *Bank Mellat* at [63(v)]).

B.1.1 Claims under Section 90 of the FSMA

22. All the Claimants bring claims against Glencore under s.90 of the Financial Services and Markets Act 2000 (the "FSMA"). These claims arise out of the alleged acquisition by the Claimants of shares in Glencore ("the Shares") as part of, or in the aftermarket for: (a) Glencore's Initial Public Offering on 19 May 2011 ("the IPO") and (except in the case of the QE Claimant) (b) Glencore's merger with Xstrata Plc on 2 May 2013 ("the Merger").

23. The Claimants allege that, in the light of the alleged and/or admitted misconduct referred to above that had occurred by the time of the IPO, the prospectus issued in relation to the IPO ("the IPO Prospectus") contained untrue and misleading statements and omitted information required to be included under Part VI of FSMA. The Pallas, Stewarts and BCLP Claimants also allege that, in the light of the alleged and/or admitted misconduct referred to above that had occurred by the time of the Merger, the prospectuses issued in relation to the Merger ("the Merger Prospectuses"), together with the IPO prospectuses ("the Prospectuses") contained untrue and misleading statements and/or omitted information required to be included under Part VI of FSMA.

24. The Pallas Claimants further advance their claims under s.90 of FSMA concerning the IPO Prospectus and the Merger Prospectus against each of Mr Glasenberg and Mr Kalmin, and the QE Claimant advances its claims under s.90 of FSMA concerning an IPO Prospectus against the remaining Director Defendants. The Pallas Claimants' claims against Mr Glasenberg and Mr Kalmin are advanced only in respect of the alleged statements and omissions concerning the business of the Glencore Group in the Democratic Republic of the Congo.

25. The Claimants contend that they have suffered loss as a result of the alleged misstatements in, and alleged improper omissions from, the IPO Prospectus and/or the Merger Prospectuses, as the case may be, and claim compensation from one or more of the Defendants (in accordance with their respective claims) under s.90 of FSMA for loss suffered in respect of the Shares.

B.1.2 Claims under Section 90A of the FSMA

26. The QE Claimant and the BCLP Claimants bring claims against Glencore under s.90A of FSMA.

27. The QE Claimant claims (pursuant to paragraph 3 of Schedule 10A of FSMA) that Glencore's various publications identified at Schedule 7 to the Consolidated Particulars of Claim ("the Schedule 7 Published Information"):-

    (1) contained untrue or misleading statements, in circumstances where at least one person discharging managerial responsibilities ("PDMR") at Glencore

knew (or was reckless as to whether) the statements were untrue or misleading; and/or

(2) omitted matters required to be included, in circumstances where at least one PDMR at Glencore knew that said omissions amounted to the dishonest concealment of material facts.

28. Both the QE Claimant and the BCLP Claimants claim (pursuant to paragraph 5 of Schedule 10A of FSMA) that Glencore dishonestly delayed the publication of information to which Schedule 10A of FSMA applies, in circumstances where at least one PDMR at Glencore allegedly knowingly acted dishonestly in delaying publication.

29. The QE Claimant claims compensation for Commodities S.à.r.l having allegedly continued to hold Shares in reliance on the Schedule 7 Published Information and allegedly suffering loss as a result of untrue or misleading statements or omissions, as well as for loss allegedly suffered as a result of Glencore's alleged dishonest delay in publishing information. The BCLP Claimants only claim compensation for loss allegedly suffered as a result of Glencore's alleged dishonest delay in publishing information.

B.1.3 Cornerstone Investors and Common Law Claims

30. The QE Claimant, a Pallas Claimant ("GIC") and a Stewarts Claimant ("the Master Fund"), together the "Cornerstone Investors", rely on separate Cornerstone Agreements entered into on 4 May 2011 with Glencore, Glencore International and various banks. The Cornerstone Investors contend that under the Cornerstone Agreements, each investor has a contractual right against Glencore to compensation that duplicates the rights that other investors acquired upon acquisition of the Shares, including rights under s.90 of FSMA and (in the case of the QE Claimant) common law.

31. Finally, the QE Claimant currently also advances claims in the tort of deceit, alternatively negligence, against Glencore and the remaining Director Defendants in relation to the alleged false and/or misleading statements and omissions in the IPO Prospectus.

B.1.4 The Defendants' Defences

32. In broad summary, the Defendants admit the alleged misconduct by certain companies in the Glencore Group for the purposes of these proceedings insofar as the same has already been admitted by the Glencore Group in the course of settling six specific law enforcement investigations ("the Admitted Conduct"). Otherwise, the Defendants either deny or put the Claimants to proof as to the alleged misconduct.

33. Glencore denies that any of the members of its Board of Directors, including any of the Director Defendants, were aware of or reckless as to the existence of any alleged misconduct. The Director Defendants deny awareness of or recklessness in respect of any misconduct (whether part of the Admitted Conduct or not) at any material time. Glencore admits that certain other former

employees of the Glencore Group were aware of facts insofar as admissions have already been made following the investigations referred to above, but not otherwise.

34. The Defendants put each of the Claimants to proof as to their standing to pursue any claims under s.90 and/or s.90A of FSMA (as applicable).

35. As regards the s.90 FSMA claims:-

(1) Mr Glasenberg and Mr Kalmin admit that they were persons responsible for the IPO Prospectus and the Merger Prospectuses.

(2) Glencore, Mr Glasenberg and Mr Kalmin deny that the IPO Prospectus or Merger Prospectuses contained any of the alleged untrue or misleading statements or omitted any matters required to be included.

(3) Each Defendant relies on the exemption from liability under paragraph 1 of Schedule 10 of FSMA and contends that, at all relevant times, they reasonably believed: (a) that the statements in the IPO Prospectus and Merger Prospectuses were true and not misleading and/or (b) that any omitted matters had been properly omitted.

36. As regards the s.90A FSMA claims:-

(1) Glencore denies that (a) any of the Schedule 7 Published Information or Prospectuses contained any of the alleged untrue or misleading statements or omitted any matters required to be included and (b) it dishonestly delayed the publication of any information that it was required to publish.

(2) Glencore accepts that the Director Defendants were (at certain times) PDMRs of Glencore, but denies that Mr Mistakidis and Mr Beard were.

(3) Glencore denies that any PDMR dishonestly delayed publishing information and that any PDMR knew of misleading statements or dishonest omissions from the Schedule 7 Published Information or the Prospectuses.

37. As regards the Cornerstone Investors' claims, Glencore admits that the Cornerstone Agreements provided the investor under the relevant Cornerstone Agreement with a contractual right to compensation that duplicated the rights which other investors who purchased or subscribed for shares in the International Offer would have had under s.90 of FSMA and/or at common law in respect of the contents of the IPO Prospectus (if any).

38. As regards the QE Claimant's claims in deceit and/or negligence:-

(1) Glencore and the Director Defendants deny that they owed any common law duty to the QE Claimant in respect of the IPO Prospectus and/or that the statements in the IPO Prospectus can have caused any loss and deny that the alleged misrepresentations and/or omissions in the IPO Prospectus were made dishonestly and/or negligently.

(2) Glencore and the Director Defendants also deny that the omission of any information amounted in law to an actionable misrepresentation (whether dishonest or negligent).

39. As to alleged loss, the Defendants repeat their case on the alleged misstatements and omissions (with Glencore and Mr Glasenberg denying on that basis that the Claimants have suffered loss in respect of the Shares) and otherwise put the Claimants to proof of the individual alleged loss.

40. The Defendants contend that certain aspects of the Claimants' claims are time-barred.

41. The Claimants deny that any of their claims are time-barred and rely, insofar as necessary, on the extended limitation period under s.32 of the Limitation Act 1980. The QE Claimant also relies on s.14A of the Limitation Act 1980 as regards its claims for negligent misrepresentation.

B.2 Procedural History to Date

42. The first Case Management Conference in the English Proceedings ("CMC1") took place before me between 21 and 23 May 2024. The CMC1 Order provided, amongst other matters as follows:-

(1) The Case Memorandum and List of Issues agreed by the parties to the English Proceedings was approved and annexed to the CMC1 Order.

(2) There would be a split trial, with issues marked in red in the List of Issues (the "Trial 1 Issues") to be tried before the remaining issues, and all other issues are to be determined at a further trial.

(3) By 25 October 2024, Glencore was to provide disclosure of certain documents, including SFO Category 2 Documents. SFO Category 2 Documents were defined as:-

> "Documents provided to the Glencore Group by the relevant authorities in each of the Investigations referred to in paragraph 1 above, in so far as they relate to the jurisdictions referred to in Section B of the [Consolidated Particulars of Claim]".

The "relevant authorities" include the SFO (see Appendix 1 to CMC1 Order).

(4) By 30 April 2025, Glencore was to provide extended disclosure in respect of all issues in the List of Issues.

(5) By 30 October 2025, the parties are to file and serve witness statements of fact that they intend to rely on.

(6) The Pre-Trial Review ("PTR") was to be fixed in the week commencing 22 June 2026, with a time estimate of 1 day.

43. As to the list of issues approved by the Court, there are 47 main issues for determination, of which 26 are Trial 1 Issues. As is common with securities litigation cases of this kind, the Trial 1 Issues primarily relate to liability and the "defendant side issues".

44. At CMC1, I directed that Glencore was to provide early disclosure, at various dates, of eleven categories of documents identified at Appendix 1 to the CMC1 Order (to the extent relevant to the issues in the List of Issues for Disclosure ("LOID")).

45. The premise for the CMC1 disclosure order was the Claimants' submission that each of these categories of documents would be "readily available" (because, it was suggested, they would already have been compiled and reviewed by the Defendants), and so could be "readily located" and provided in short order (see QE's letter of 23 April 2024 at paragraphs 10 and 15), which was the backdrop against which Orders were made at CMC1.

46. Paragraph 22(a) of the CMC1 Order provided that, by 25 October 2024, Glencore was to provide disclosure of certain categories of documents listed in Appendix 1 to the CMC1 Order, to the extent relevant to the issues in the LOID.

47. Those documents included documents within Category 2: "Documents provided to the Glencore Group by the relevant authorities in each of the Investigations referred to in paragraph 1 above, in so far as they relate to the jurisdictions referred to in Section B of the CPOC". The Investigations listed in paragraph 1 were the investigations into Glencore Group companies by the authorities that I have already referred to above.

48. Glencore initially proposed that, given the limitations on dissemination of documents provided by some of the relevant authorities, this should not be a category of early disclosure (see the second witness statement of Mr Tolaini ("Tolaini 2") at [63]). However, Glencore was willing to consent to paragraph 22(a) of the CMC1 Order in the interests of cooperation between the parties and to narrow the issues between the parties (per Tolaini 7 at [29]) and "Subject to receiving the necessary permissions where relevant restrictions/limitations on dissemination exist" (see Clifford Chance's letter of 20 May 2024, at paragraph 29).

49. In the event, Glencore says that the disclosure exercise to date has been a time-consuming exercise, with a large amount of time and money having been spent on early disclosure, which has been provided in tranches on 24 September 2024, 25 October 2024, 12 December 2024, 20 December 2024, 10 March 2025, 14 March 2025, 31 March 2025 and 29 April 2025.

50. Following the CMC1 Order, Glencore took steps to obtain permission to disclose documents within Category 2, where possible, liaising with local counsel and the relevant authorities across the various jurisdictions. By the time of CMC2, in November 2024:

(1) Glencore had obtained consent to review documents provided by the MPF in the Brazilian Investigation, so that relevant documents (if any) could be disclosed;

(2) Glencore had concluded that there were no applicable restrictions on documents provided to the Glencore Group by the DOJ or CFTC in the United States, so relevant documents could be disclosed; and

(3) there remained (at that time) restrictions on disclosure of documents provided by the relevant authorities in Canada (the OSC), Switzerland (the Swiss OAG) and the Netherlands (the DPPO and FIOD), in the course of the investigations into certain Glencore Group companies in those jurisdictions.

51. Meanwhile, in August 2024, the SFO was contacted by Clifford Chance LLP ("CC") (Glencore's solicitors), in the context of the SFO's investigation, about Glencore's disclosure obligations under the CMC1 Order. CC sought the SFO's permission to disclose certain SFO Category 2 Documents it had identified as being responsive to the CMC1 Order. This led to extensive correspondence that it is not necessary to set out for the purpose of the Disclosure Restriction Applications. Suffice it to note that following representations made at CMC2 which was listed for 26 to 28 November 2024, Orders were made at that CMC which led to an application by the SFO thereafter in relation to disclosure which was heard (in private) immediately before the present hearing, and which (amongst other matters) resulted in the Court approving a Confidentiality Club in relation to particular categories of documents.

52. It was also at CMC2 that it was ordered (at paragraph 5 of the CMC2 Order) that the Defendants make (by a specified date) "any application they intend to make, based on alleged foreign restrictions on disclosure…." whereby they sought to vary their existing disclosure obligations in the English Proceedings. Glencore and Mr Glasenberg did so on 28 February 2025, with the Glencore Disclosure Restriction Application and Glasenberg Disclosure Restriction Application which are the subject matter of this judgment.

B.3 Aspects of the Claims against Glencore and Mr Glasenberg

53. As already foreshadowed, each of the claims relate to alleged and/or admitted misconduct in certain subsidiaries within the Glencore Group in (i) the DRC; (ii) West Africa and South America; as well as (iii) oil price manipulation in relation to the fuel oil market at certain US ports. The Claimants claim that, as a result of the alleged and/or admitted misconduct on which they rely, certain prospectuses and/or other information published by Glencore contained misstatements and/or omitted matters which they should have included, and that each of the Claimants have incurred losses on their investments in Glencore as a result.

54. The claims include allegations that between 2007 and 2017 the Glencore Group was involved in bribery and corruption in the DRC across a number of transactions, pursuant to a corrupt arrangement between the Glencore Group and Dan Gertler (and entities associated with him). The Claimants infer the

existence of a corrupt arrangement between the Glencore Group and Mr Gertler, pursuant to which the Glencore Group engaged Mr Gertler to act on its behalf to facilitate the acquisition and protection of investments in the DRC by the use of corrupt means.

55. The Claimants infer such matters from various facts, including the terms of certain transactions which the Claimants allege were not made on commercially explicable terms; GIAG's admissions of bribery in the DRC; the fact of a settlement agreement between GIAG and the DRC government; and various other admissions.

56. The Claimants allege that individuals including Mr Glasenberg knew or suspected, or were recklessly indifferent to the fact, (i) that the operations of the Glencore Group in the DRC involved bribery and corruption and were reliant on the assistance of Mr Gertler, (ii) that substantial and secretive benefits were provided directly or indirectly to Mr Gertler and (iii) of what is defined as the "DRC Corrupt Arrangement".

57. The Defendants deny the existence of the DRC Corrupt Arrangement and knowledge on the part of the relevant individuals. These allegations of bribery and corruption are hotly contested and one of the most important aspects of the Claimants' case. They do not form part of the so-called Admitted Conduct.

B.4 The Dutch Investigations

58. As has already been identified, some of the alleged and/or admitted misconduct on which the Claimants rely has been the subject of investigations by law enforcement authorities in various jurisdictions. Of direct relevance to the Disclosure Restriction Applications are the investigations undertaken by the Swiss OAG, and the DPPO and the FIOD in the Netherlands.

59. In this regard, a criminal investigation was commenced by the DPPO and the FIOD into the activities of the Glencore Group in the DRC (the "Dutch Investigation"). The investigation began in 2019 (per Tolaini 7 at [85]). It appears from a press release of the FIOD that it is focused on the possible bribery of high-ranking officials in the DRC in relation to obtaining mining licences in cobalt and copper mines.

60. The Claimants submit, therefore, that the Dutch Investigation, as well as documents, evidence and conclusions generated by it, are therefore important to core issues between the parties. Mr Hill KC, on behalf of Glencore, accepted at the hearing, that the Dutch Investigation was similar in scope to the Swiss OAG investigations, which resulted in a Swiss summary penalty order on 5 August 2024 holding GIAG criminally liable for failing to take all necessary measures to prevent the bribery of a Congolese official by its business partner.

61. The Claimants infer from the Swiss summary penalty order that the Congolese official was a Mr Mwanke, who is or was a very high-ranking member of the government and close to President Kabila, and that the business partner who bribed Mr Mwanke was Dan Gertler (see Bailes 2, at [30]), a figure who is likely to be of importance in the current proceedings. The Claimants note that such

inference was not denied in Tolaini 11 (or, as the Claimants put it, even engaged with).

62. The Swiss order imposed a compensation order of U$150 million and a fine of 2 million Swiss Francs (CHF). GIAG did not formally admit the findings but agreed not to appeal them, and the order became final on 15 August 2024.

63. On the same day as the Swiss penalty order was made (5 August 2024), the DPPO discontinued its investigation into GIAG on the basis that the investigations of the Swiss and Dutch authorities had covered the same ground, and as GIAG was a Swiss company, it was more appropriate for it to be penalised in Switzerland (see press release of the DPPO of 5 August 2024). However, the DPPO investigation into certain individuals and entities related to the original investigation has continued (see Tolaini 7 at [86]). No concrete information about that continuing investigation by the DPPO is known.

64. Mr Glasenberg's involvement in the Dutch and Swiss investigation into GIAG was as an interviewee, being interviewed by the Swiss OAG on 27 to 29 September and 3 November 2023, with a financial investigator from the FIOD in attendance. On 3 November 2023, the DPPO/FIOD made the MLAT Request of the Swiss OAG seeking legal assistance in relation to the Dutch authorities' investigation into GIAG and other suspects. On 12 April 2024, Mr Glasenberg's solicitors were informed that his Swiss counsel had received a copy of the MLAT Request from the Swiss OAG, apparently for the purpose of giving Mr Glasenberg an opportunity to object to copies of his interview statements being provided to the Dutch authorities pursuant to that MLAT Request.

65. It was as a result of the Swiss OAG providing Mr Glasenberg's Swiss counsel with a copy of the MLAT Request that it came to be within Mr Glasenberg's control. Mr Glasenberg considers the MLAT Request to be a document falling within his disclosure obligations under the CMC2 Order and he duly identified it in his first disclosure certificate.

66. As regards inspection, his solicitors sought permission from the Swiss OAG and the DPPO/FIOD to provide the MLAT Request to the Claimants. The Swiss OAG confirmed it had no objection to that. However, in an email dated 29 January 2024, the DPPO/FIOD stated that it did "object to the disclosure of our Mutual Request for Legal assistance to the Claimants in the U.K. civil litigation".

67. I address the correspondence of Glencore and Mr Glasenberg with the FIOD in Section G below. It is the ongoing investigation in the Netherlands that provides the backdrop to the DPPO not consenting to the release of the documents for inspection in the English Proceedings, albeit, as will appear, the expert evidence before me is that the DPPO does not, in fact, have any power to give such consent in any event, even if it had been desirous of doing so (which it is clear it is not, as will appear below).

C. THE APPLICABLE LEGAL PRINCIPLES

68. The applicable legal principles are well established and were largely common ground before me subject to differences of emphasis between the Claimants on the one part, and Glencore and Mr Glasenberg, on the other. The leading case remains that of *Bank Mellat.* There is also a useful recent review of the relevant authorities by Henshaw J in the case of *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) ("*PIFSS*") at [43]-[51].

69. Where permitting inspection would be an offence in England, the Court could not order inspection in any circumstances. The Court, whose function it is to enforce the law of England, will not order someone to do something which is, of itself, an offence in English law: *Morris v Banque Arabe et Internationale d'Investissement SA* [2001] I. L Pr. 37 ("*Morris*"), at [39].

70. However, obligations of confidentiality arising under foreign law do not provide an automatic basis to withhold disclosure and inspection. The right to inspect documents disclosed in litigation is not unqualified and the Court retains a discretion to order or withhold a document from inspection: *National Crime Agency v Abacha* [2016] EWCA Civ 760; [2016] 1 WLR 4375, at [30]–[31].

71. The relevant principles in the context of alleged foreign restrictions on providing inspection of documents are stated in the Court of Appeal's decision in *Bank Mellat* at [63]. The following propositions can be identified:-

    (1) An order will not lightly be made where compliance would entail a party to English litigation breaching its own criminal law (not least with considerations of comity in mind), but the Court is not precluded from doing so (*Bank Mellat* at [16] and [63(i)–(iii)]).

    (2) When exercising this discretion, the Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A "real risk" is one that is more than "purely hypothetical": *Morris* at [71] (Neuberger J), applied in *Bank Mellat* at [72].

    (3) The Court is concerned with the risk of prosecution, rather than the risk (or gravity) of subsequent sanction if prosecuted and convicted (*Bank Mellat* at [33], [64], [69]; *Tugushev v Orlov* [2021] EWHC 1514 (Comm) per Butcher J ("*Tugushev*") at [32]).

    (4) The party must show that the criminal law relied on is not merely a "text, or an empty vessel" (*Tugushev* at [33]), but the past may or may not be a safe guide to future performance or risk (*Joshua v Renault SA* [2024] EWHC 1424 (KB) at [78]).

    (5) The smaller or less significant the risk (even if it surmounts the threshold of being a "real risk"), the less weight it will be given in the balance: *Tugushev* at [34].

    (6) The Applicant bears the burden of showing the reality of the risk of prosecution, and absence of evidence of any prosecution in the

circumstances will weigh against the application: *Tugushev* at [49]. See also, in this regard what was said by Henshaw J in *PIFSS* at [44], "It is for the disclosing party to show that the foreign law is regularly enforced so that the threat to that party is real".

(7) A balancing exercise must be conducted, weighing (i) the actual risk of prosecution in the foreign state, and (ii) the importance of the documents of which inspection is ordered to the fair disposal of the English Proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which the Court would be very mindful (*Bank Mellat* at [63(iv)]).

(8) Should inspection be ordered, the Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected (*Bank Mellat* at [63(v)]).

(9) Where an order for inspection is made by the Court, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court (*Bank Mellat* at [63(vi)]).

(10) "Comity is capable of playing a free-standing part in the judicial decision-making process, and … does not arise for consideration solely when a real risk of prosecution has been shown" (*PIFSS*, per Henshaw J at [51]).

72. During the course of the hearing, I put to Mr Hill KC, that the following points are of relevance when assessing whether there is a real risk of prosecution, and I understood him to accept the same:-

(1) If a defendant has, or may have, an actual, or a potential, defence to any criminal charge this is itself relevant (and I would have thought may be highly relevant) in relation to the decision whether the prosecuting authority will prosecute in the first place, so this factor goes to risk of prosecution as well as coming in again at stage 3 (the balancing exercise).

(2) The extent of the possible sanction may itself be relevant (and again I would have thought may be highly relevant) in relation to the decision whether the prosecuting authority will prosecute in the first place, so this factor goes to risk of prosecution as well as coming in again at stage 3 (the balancing exercise).

(3) The fact that a defendant is acting under compulsion of law by order of the English Court (and could face committal for contempt and sequestration of assets in case of disobedience thereof) may reduce the risk of a prosecution in the foreign court due to considerations of comity (see *Bank Mellat* at [63(vi)]) or reduced culpability by reason of the necessity of compliance with an English Court's Order. Ditto if the defendant has done all it can to seek to persuade the English Court not

to make such an order (by making an application such as the present) but has been unsuccessful in doing so.

(4) The English Court can fashion its Order (a) to reduce or minimise the concerns under foreign law, for example by imposing confidentiality restrictions in respect of the documents inspected (see *Bank Mellat* at [63(v)]) and/or (b) make clear that the party is acting under compulsion, for example in the Recitals to the Order or by the endorsement of a Penal Notice (identifying and spelling out the consequence of non-compliance), either of which will be relevant in relation to the decision whether the prosecuting authority will prosecute in the first place and so go to the risk of prosecution as well as coming in again at stage 3 (the balancing exercise).

73. In *O v C* [2024] EWHC 2838 (Comm), Sir Nigel Teare at [22(iii)], reiterated that the burden of proving a real risk is on the applicant (as indeed it is at stage 1 as to whether a criminal offence has or may have been committed).

74. As to comity, Sir Nigel Teare added that:-

> "The Court can fashion an order that reduces or minimises the concerns under the foreign law (*Bank Mellat* at [63(iv)]; and *Tugushev* at [35]), and considerations of comity may be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the Court's order: "Comity cuts both ways" *Bank Mellat* at [63(vi)]; *Tugushev* at [36]."

75. In this regard, during the course of the hearing I invited the parties to serve either an agreed draft Order or their respective draft Orders, setting out those matters which they considered would show that Glencore and Mr Glasenberg were acting under compulsion in terms of an Order of the English Court if inspection was ordered, together with a proposed confidentiality club, in each case designed to reduce the risk that Glencore and Mr Glasenberg would be prosecuted. In this regard, it was also envisaged that the recitals would include a recital to the effect that the Court has had regard to the possible consequences of breach of an English Court Order (the possibility of sanction in the UK) and this being a matter that might be borne in mind by the DPPO in considering whether to prosecute.

76. The parties provided a draft Order on 11 July 2025 setting out the matters that they proposed be included in the Order in the above context, and thereafter provided draft confidentiality club wording on 23 July 2025.

77. So far as the balancing exercise is concerned, Glencore submits that many of the cases where disclosure has been ordered despite a real risk of prosecution are ones in which the risk of prosecution was nonetheless very low and documents were plainly important and voluminous, referring to *Bank Mellat* at [22], [26], [73] and [76]; *Tugushev* at [39], [55] and [56]; *Byers v Samba Financial Group* [2020] EWHC 853 (Ch) ("*Byers*") at [102], [107(i)] and [107(iv)] and *Morris* at [68] and [71].

78. Of course, every case will turn on its own particular facts, and in *LLC EuroChem North-West 2 v Société Générale SA* [2025] 6 WLUK 298 ("*EuroChem*"), Bright J rejected a suggestion that the likelihood that the content of one exchange of messages would have any real effect on anything he had to decide was very low, as being an invitation for the court to speculate, which the court was not prepared to do (see at [5]). The Judge identified (in the context of the risk of prosecution) that he would have expected there to be examples of parties who were in possession of correspondence with the relevant administrative body, who had disclosed the same, being prosecuted – but none was cited to him.

79. Bright J ordered that the document concerned must be produced. In this regard he imposed a confidentiality regime so it would not be made public and thanked the objecting party's counsel for arguing its case, "forcefully and with care and has taken every possible point" (at [21] and [22]). I confirm that such sentiments are equally true of the submissions of Mr Hill KC on behalf of Glencore and Mr Lodder on behalf of Mr Glasenberg. Such matters are, of course, relevant in relation to both any real risk of prosecution and when conducting the balancing exercise.

D. THE DISCLOSURE RESTRICTION APPLICATIONS

D.1 The Glencore Disclosure Restriction Application

80. As already foreshadowed above, since the issue of the Glencore Disclosure Restriction Application the only remaining aspect of the application that remains live (as opposed to aspects that it is agreed can now be addressed in the draft order before the Court) relate to three documents that were provided from the criminal case file by the DPPO to GIAG at an early stage of the investigation into GIAG in that jurisdiction in December 2021. They are two police reports and a presentation slide deck prepared by the Dutch Fiscal Information and Investigation Service (the FIOD).

81. Following correspondence between Glencore's lawyers and the DPPO seeking disclosure of (amongst other documents) the three documents, the DPPO did not give its consent. This correspondence, which is addressed in detail in Section F.1, is potentially of some considerable importance in the context of whether or not there would be a breach of s.184(1) of the DCC if the documents were disclosed in the English Proceedings and (even more pertinently) whether there would be a real risk of Glencore being prosecuted for any alleged breach of s.184(1) in such circumstances.

82. As for the three documents themselves, Glencore and their English solicitors CC confirm that they have not themselves seen the documents: see CC's letter dated 15 April 2025 at [3] ("we understand from De Brauw that they cannot share any specific information about the contents of…the FIOD Documents"). Tolaini 11 at paragraphs 56-57 referred to this letter without any suggestion that the position had changed.

D.2 The Glasenberg Disclosure Restriction Application

83. The Glasenberg Disclosure Restriction Application (brought by the Second Defendant, Mr Glasenberg, a former director and partial owner of Glencore) concerns Mr Glasenberg's application to withhold inspection of one document, namely the MLAT Request from the DPPO and FIOD to the Swiss OAG dated 3 November 2023. Again, following a request on behalf of Mr Glasenberg to the DPPO seeking its consent to the disclosure of the MLAT Request in the English Proceedings, the DPPO did not give its consent.

E. EVIDENCE BEFORE THE COURT

E.1 Factual Statements

84. There are the following factual witness statements before the Court, which I have read and bear well in mind:-

(1) The seventh and eleventh witness statements of Luke Richard Tolaini on behalf of the Claimants ("Tolaini 7" and "Tolaini 11").

(2) The first witness statement of Zoe Osborne on behalf of Mr Glasenberg ("Osborne 1").

(3) The second witness statement of Elaina Bailes on behalf of the Claimants ("Bailes 2").

E.2 Expert Evidence

E.2.1 Applicable Principles in relation to the scope of Expert Evidence as to Foreign Law

85. The function of expert witnesses on foreign law was summarised by the Court of Appeal in the case of *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] C.L.C. 417 at [23]-[24]:-

> "23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:
>
> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.
>
> 24. The first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness. And it is important, in our judgment, to note the purpose for

> which the evidence is given. This is to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be. Thus, in *G & H Montage GmbH v Irvani* [1990] 1 WLR 667 (CA), Mustill LJ said (at p. 684G):
>
> > 'The fact that the plaintiffs' expert was not able to do more than assert, in this novel situation, his own view on how the German court would react when faced with a similar problem does not disqualify his evidence from being relied upon. There are many fields of law in which the books provide no direct answer, and where the skill of the lawyer lies precisely in predicting what answer should be given. If the judge concludes that the expert's prediction is reliable, he is fully entitled to give effect to it.'
>
> This passage emphasised that the expert witness is entitled to give opinion evidence in the absence of direct authority, but we would underline the restrictions which it places upon him. His role is to 'predict' what the foreign court would decide, and only in this sense should he say 'what answer should be given'".

86. The experts can accordingly assist the Court in relation to the provisions of the DCC and their interpretation as a matter of Dutch law, as well as in relation to any relevant Dutch authorities. They can also opine upon aspects of the risk of there being a prosecution by the Dutch authorities based on any relevant experience they may have in that regard.

87. However, and as Mr Hill KC rightly accepted in the course of his oral submissions, the risk of prosecution also involves consideration of the correspondence with the DPPO, which he also rightly accepted the English Court is itself well placed to construe, and it is ultimately also a matter for the English Court to make findings as to whether or not there is a real risk of prosecution having regard to all relevant considerations which includes not only the expert evidence, but also matters going beyond the proper scope of expert evidence (including, for example, matters that could be included within an English order, such as recitals and a confidentiality club, and the perspective of the English Court as to considerations of comity).

E.2.2 The scope of the Expert Evidence

88. Paragraph 8 of the CMC2 Order permitted the Defendants to adduce written evidence from one expert in each of the fields of Canadian law, Dutch law and Swiss law insofar as relevant to the Disclosure Restriction Applications.

89. In respect of Dutch law (which is the only foreign law that remains relevant to what remains of the Disclosure Restriction Applications), Glencore and Mr Glasenberg have filed expert reports from Professor Matthijs Nelemans ("Nelemans 1" and "Nelemans 2"), whilst the Claimants have filed an expert's report from Professor Dian Brouwer ("Brouwer 1").

90. The expert evidence of Dutch law addresses three categories of documents, to which (the Defendants submit) foreign legal restrictions apply:-

    (1) Documents from the criminal file in the DPPO Glencore Investigation ("FIOD Documents").

    (2) Email correspondence, including attachments, between De Brauw (GIAG's Dutch legal advisers) and the DPPO and/or the FIOD, which fall outside the criminal file (the "DPPO/FIOD Correspondence").

    (3) A Mutual Request for Legal Assistance (the MLAT Request) from the FIOD to the OAG dated 3 November 2023. This document was provided to Mr Glasenberg and is the subject of his application.

91. Whilst (1) and (2) were originally the subject matter of the Glencore Disclosure Restriction Application, the Claimants confirmed, in advance of the hearing, that they will not pursue any further challenge to the non-production of the DPPO/FIOD Correspondence (see Stewarts' letter of 9 May 2025 at paragraph 4).

92. This hearing is accordingly only concerned with the three FIOD Documents (on the Glencore Disclosure Restriction Application) and the MLAT Request (on the Glasenberg Disclosure Restriction Application). Accordingly, it is generally not necessary to address the experts' views on the DPPO/FIOD Correspondence. However, and as shall appear, one aspect of the DPPO/FIOD expert evidence remains relevant, namely by way of contrast as to how Professor Nelemans expressed his views on the FIOD Documents, and risk of prosecution, in Nelemans 1, compared with how he expressed his views in respect of the DPPO/FIOD Correspondence, which is then to be contrasted with how he expressed himself in respect of the FIOD Documents, and risk of prosecution in Nelemans 2.

E.2.3 General Observations on the Experts

93. Unfortunately, and whilst there are some areas of common ground between Professor Nelemans and Professor Brouwer in relation to Dutch law (as addressed in Section D.2.4), there is a stark disagreement between them both as to whether, in the event of disclosure in the English Proceedings, any offence would be committed under section 184(1) of the DCC (in the case of Glencore and Mr Glasenberg) or under section 272 of the DCC (in the case of Mr Glasenberg) and, even more fundamentally, there is a stark disagreement as to whether there is any, or any real, risk of prosecution in such circumstances under section 184(1) of the DCC or (in the case of Mr Glasenberg) section 272 of the DCC.

94. Professor Nelemans has been a Professor of Financial Law Enforcement at the Criminal Law Department of Tilburg Law School since 2014, where he obtained a PhD in 2007. He has a background in the academic study and teaching of financial and economic criminal law and its enforcement by regulatory authorities and public prosecutors. He has provided advice and evidence for a range of corporates and to leading law firms, and has been a guest

teacher at leading US universities. However, he does not speak of any experience in the practice of criminal law, or in dealing with Dutch criminal authorities (in Nelemans 1, at paragraphs 4-6).

95. Professor Brouwer also has a background in the advanced study and teaching of criminal financial law. He has published widely on the subject and has been a member of central committees concerning criminal procedure and economic criminal law (see Brouwer 1, at paragraph 5, Appendix 1). However, in contra-distinction to Professor Nelemans, he is also a practising lawyer, with over 25 years' experience in white collar crime cases, and of dealing with the DPPO.

96. Whilst I have no doubt that each expert has sufficient expertise to opine on Dutch law generally, including in relation to provisions of the DCC, I consider that Professor Brouwer has the greater practical experience of the application of the DCC and of dealing with the DPPO, in terms of how the DPPO operates and makes decisions whether to prosecute or not, as well as factors and matters likely to be considered by the DPPO in coming to that decision.

97. I consider that greater experience in this area is important, as a key issue is whether there is, or is not, any real risk of prosecution. The Claimants submit that, in such circumstances, where there is a difference in opinion between Professor Brouwer and Professor Nelemans I should prefer the views of Professor Brouwer to those of Professor Nelemans, in particular in relation to the real world aspects of their evidence which is most acute, and most in point, in relation to their opinion evidence concerning any actual risk of prosecution. I consider that there is considerable force in such submission, and I have borne such distinction well in mind when considering their respective evidence.

98. However, and more fundamentally, the Claimants also criticise Professor Nelemans for what are said to be striking changes in Professor Nelemans' evidence between Nelemans 1 and Nelemans 2 in relation to the FIOD Documents, in circumstances where there is no convincing explanation, or justification, for such change in evidence, as a result of which it is submitted that where there is a difference between Professor Nelemans and Professor Brouwer as to the views they express both as to Dutch law and as to the risk of prosecution the views of Professor Brouwer should be preferred.

99. In Nelemans 1, and the issue as to whether there would be any commission of a criminal offence, Professor Nelemans repeatedly (and with at least internal consistency) puts it no higher than that disclosure of the FIOD Documents **may** amount to an offence under section 184 of the DCC (second part). He does so both in terms and implicitly by contrast with his opinions about the DPPO/FIOD Correspondence (where his views are much more forthright). The difference in language (and conclusions) is striking, and clearly shows a more tentative, and less certain, opinion in relation to the FIOD Documents. Thus:-

(1) In Nelemans 1, at paragraph 95 it is said:

> "Given that the DPPO has indicated and repeated that the criminal investigation into the co-suspects is ongoing and that it considers disclosure of the FIOD Documents (as well as the

> DPPO/FIOD Correspondence) detrimental to the investigation, the DPPO **may** conclude that a disclosure by GIAG intentionally hinders the ongoing investigation (sections 132a DCCP and in this respect also section 3 of the Police Act 2012), interrogations or specific ongoing investigative actions (such as listed in sections 94-126 DCCP, including seizures and taps) by the DPPO."
>
> (emphasis added)

(2) Equally in Nelemans 1, at paragraph 112, he concludes:

> "If GIAG were to provide the FIOD Documents to Glencore and its counsel, **there is a chance** that this will result in a violation of the second part of section 184 DCC, which is based on the same analysis as set out in the earlier paragraphs. Likewise, if Glencore (once it had received the FIOD Documents) were to disclose them in the Proceedings, **there is also a chance** of a violation of the second part of section 184 DCC".
>
> (emphasis added)

100. By contrast, on the DPPO/FIOD Correspondence, he concludes in Nelemans 1, at paragraph 113:-

> "To the extent that GIAG were to disclose the DPPO/FIOD Correspondence to Glencore and its counsel, **this would likely result in a breach of the Undertaking, as well as a violation of section 272 DCC**. If Glencore (once it had received the DPPO/FIOD Correspondence from GIAG) were to disclose the correspondence in the Proceedings, **this would likely result in a violation of section 272 DCC**, but it would not be a breach of the Undertaking since Glencore is not a party to the Undertaking".
>
> (emphasis added)

101. Yet in Nelemans 2 (responding to Professor Brouwer's report in which Professor Brouwer set out his reasons why he concluded (at paragraph 27 of Brouwer 1) that the disclosure of documents in the context of civil proceedings in the UK cannot give rise to concerns in the context of the second offence in section 184(1) of the DCC, and why he disagreed with Professor Nelemans' conclusion (in Nelemans 1, paragraph 95) that, "the DPPO may conclude that a disclosure by GIAG intentionally hinders the ongoing investigation", Professor Nelemans now suggested that disclosure in the English Proceedings will also prevent, obstruct or foil the DPPO's refusal of consent to disclosure (*i.e.*, fulfil the second limb of s. 184(1)): see for example Nelemans 2, at 200(a).

102. It is difficult to see how this can be characterised (as Mr Hill KC sought to characterise it) as a "rebuttal point", but even if it were appropriate to characterise it as a rebuttal point, Professor Nelemans then reaches a much

stronger conclusion than in Nelemans 1, concluding (at Nelemans 2, paragraph 57 that):-

> "preventing, obstructing or foiling the ongoing investigation and/or specific investigative acts by disclosing the FIOD Documents […] and/or the MLAT Request or acting contrary to the DPPO's refusal to consent with disclosing these documents, **would in my opinion be a violation of the second part of section 184(1) DCC**. I note that this is a stronger conclusion than in Nelemans 1 (paragraph [95]) and is derived from the foregoing more detailed analysis of section 184(1) DCC".
>
> (emphasis added)

103. The difficulty I have with Professor Nelemans' asserted reason for this shift ("more detailed analysis of s.184") is that, in reality, his "more detailed analysis" amounts to little more than his disagreement with Professor Brouwer about the intended scope of s.184, and to the extent that he is relying on the correspondence with the DPPO, as addressed in Section F.1 below, I do not consider that such correspondence supports his much stronger conclusion – very much the reverse. As shall be seen in that correspondence the DPPO did not say that any part of section 184(1) applied.

104. There is also, in Nelemans 2, what appears to be an unjustified "firming up" on risk of prosecution, and a dilution of the chances of the Defendants being able to advance successful affirmative defences (which would also impact on the risk of prosecution). Thus, in Nelemans 1 there is no concluded view on the level of risk of prosecution expressed in relation to disclosure of the FIOD Documents (see at 148(a)), yet in contrast in relation to the DPPO/FIOD Correspondence Professor Nelemans expresses the view that it is "more likely than not that the DPPO will prosecute GIAG … for disclosing the DPPO/FIOD Correspondence to Glencore. Such statement relates to section 272 of the DCC although he adds, "potentially also on the basis of the second part of section 184 of the DCC).

105. Equally in Nelemans 1, Professor Nelemans recognised that Glencore's correspondence with the DPPO in relation to section 184(1) and what he characterises as the "ambivalence of the DPPO's statement" (in fact as will appear I consider it more than that), "would make it more difficult for the DPPO to prosecute under section 184 of the DCC as a prospective defendant that disclosed the FIOD Documents and was prosecuted under section 184 of the DCC would raise the defence of absence of any culpability (also known as the AVAS-defence)" and argue that they relied on the earlier statements by the DPPO on the applicability of section 184 of the DCC. In Nelemans 1, Professor Nelemans also considered that this would "provide a compelling argument to support an AVAS-defence".

106. Yet, in Nelemans 2, Professor Nelemans ultimately opines in his conclusion paragraph 200(c), "that a prosecution is more likely than not and that the chances of successfully invoking an affirmative defence are slim" (though this seems to be a general conclusion which covers the DPPO/FIOD Correspondence and the FIOD Documents and is not specific to the FIOD

Documents). Once again, I do not consider that the matters set out in Nelemans 2 justify such change of stance.

107. Whilst it is suggested by Mr Hill KC that it is understandable (as occurs with lawyers) to firm up one's views after further analysis and consideration, experts are instructed to give their independent expert opinion, and are under a professional obligation to explain and justify any change of opinion. In this context it is somewhat strange that views expressed without considering another's expert report should then be expressed in very much stronger terms after reading the report of another expert who expresses a contrary view with which the first expert disagrees.

108. I consider that such changes in Professor Nelemans' opinions, which I do not consider are satisfactorily explained in Nelemans 2, do call into question the reliability of his evidence. In such circumstances, and given also the greater relevant experience of Professor Brouwer in relation to the practical application of the DCC and dealing with the DPPO, I have approached the views expressed by Professor Nelemans with circumspection, and where there is a difference between the views of Professor Nelemans and Professor Brouwer both as to Dutch law and as to the risk of prosecution, I consider that the views expressed by Professor Brouwer should be preferred.

109. There are, however, some matters that are common ground between the experts, namely:-

(1) No statutory (or other) confidentiality obligations apply to the FIOD Documents either in the hands of GIAG, as first recipients, or of subsequent recipients: Nelemans 1 at paragraphs 78-79, 127; Brouwer 1 at paragraphs 113, 127; and Nelemans 2 at paragraphs 12, 60-61. That is the effect of s.30(1) of the Dutch Code on Criminal Procedure ("DCCP").

(2) Production of the FIOD Documents in these proceedings would not breach either s.52 of the Dutch Judicial Data and Criminal Records Act ("DJDCRA") or s.7 of the Dutch Police Data Act ("DPDA"), and would not thereby amount to an offence under s.272 of the DCC.

F. SECTION 184(1) OF THE DUTCH CRIMINAL CODE

110. Section 184(1) of the DCC (as translated into English by Professor Nelemans, at Nelemans 1, paragraph 93) provides as follows (numbering added for ease of reference):-

> "[LIMB 1] anyone who intentionally fails to comply with an order or a demand made pursuant to a statutory provision by an official charged with or authorized to detect or investigate criminal offences, as well as;
>
> [LIMB 2] anyone who intentionally prevents, hinders or thwarts any action undertaken by one of those officials in implementation of any legal provision

> shall be punished with a prison term or not more than three months or a fine of the second category".

111. The section deals with a demand of an official charged with or authorised to detect or investigate criminal offences. As is common ground between the parties, section 184(1) contains two limbs, and provides for two separate criminal offences:-

    (1) Limb 1, failure to comply with an official order or demand; and

    (2) Limb 2, namely intentionally "preventing, hindering or thwarting" any official action (Nelemans 1 at paragraphs 93-95; Brouwer 1 at paragraphs 13 and 14). There is a minor difference in translation between the experts in relation to Limb 2 (Professor Nelemans "prevents, hinders or thwarts", Professor Brouwer "prevent, obstruct or foil") but it is not suggested that anything turns on this.

112. It is common ground between the parties that the first limb of section 184(1) (failure to comply with an order or demand) does not apply in the present case (see Nelemans 1 at paragraph 94; Brouwer 1, at paragraph 15).

113. The difference between the parties (and the experts) is whether disclosure of the FIOD Documents could amount to a violation of the second limb of s.184(1) on the basis that disclosure would intentionally prevent, hinder or thwart an action undertaken by the DPPO (and if so whether there is a real risk of prosecution in relation to the same).

114. The approach to be taken in this case is thus a staged process:-

    (1) As a matter of Dutch law and procedure, and the likely approach of the DPPO, would disclosure of the FIOD Documents amount to an offence under the second limb of s.184 DCC, and would it be regarded by the DPPO as such (stage 1)?

    (2) If there is an offence, is there an actual (real) risk of disclosure of the FIOD Documents being met by the DPPO's prosecution of GIAG and/or Glencore, and their directors, and/or disciplinary action against their lawyers (stage 2)? In this regard, and whilst the relevant risk is the risk of prosecution, rather than the risk or gravity of subsequent sanctions (which features in stage 3 if reached), it was common ground that the nature of likely sanction could also factor in as to whether there was a real risk of prosecution in such circumstances. It is further common ground that for a first time offender the likely sanction would be a low level fine of around €100.

    (3) If there is a real risk of prosecution, and in the exercise of the Court's discretion, and balancing the risk of prosecution in the Netherlands against the importance of the documents of which inspection is ordered to the fair disposal of the English Proceedings, should the Court grant the Disclosure Restriction Applications (stage 3)? It was also common ground that questions of comity not only arise at stage 3 (if reached) but

also at stage 2 (consistent with what was stated in *Bank Mellat* at [63(iii) and (vi)]).

F.1 Correspondence with the DPPO and the DPPO's Views

115. There is extensive correspondence between De Brauw (the Dutch lawyers acting for Glencore) and the DPPO. As a preliminary point, and as the Claimants note, De Brauw are in Chambers and Partners and in Legal 500 both in Europe and the Netherlands in Band 1 for financial crime, and as such they can be assumed to have an extensive knowledge of Dutch criminal provisions yet (as will appear) it never appears to have crossed their mind, when seeking to flush out the DPPO's position in correspondence, that an offence under Limb 2 of section 184(1) might be committed or that the DPPO might think that it would be.

116. The Claimants say rightly so because on their case the second limb of section 184(1) is not even a "text or empty vessel" (see *Tugushev* at [33]) but simply does not apply, and the only suggestion that it might apply comes from a tentative suggestion for Professor Nelemans adopting an academic approach. The Claimants submit (with some force) that neither De Brauw, nor the DPPO, in the relevant correspondence, identified any possible breach of the second limb of section 184(1) by reason of disclosure of the documents under consideration in the English Proceedings. On any view, the correspondence reflects CC's and De Brauw's contemporary understanding of any potential criminal offences.

117. A further preliminary point to note is that it is common ground between the experts that whilst Glencore has sought consent from the DPPO to disclose the FIOD Documents in these proceedings, and the DPPO has declined to give such consent, the DPPO does not in fact have any power to give consent, even had it wished to do so (see Nelemans 1, at paragraph 85 which is not contested in Brouwer 1). That needs to be borne in mind when considering statements made by the DPPO.

118. A final preliminary point is that Mr Hill KC rightly acknowledged that the proper construction of such correspondence is ultimately a matter for this Court (rather than for the experts, though, of course, the experts may also express their views about such correspondence, which they do, and which the Court will bear in mind, though not necessarily accept).

119. On 7 October 2024, De Brauw wrote to the DPPO identifying that Glencore had been ordered by the English High Court to provide documents relevant to the English Proceedings which included documents originating from the DPPO and FIOD, and identified documents and correspondence falling with such category and asked whether there was any objection to the provision of the same to CC for possible production in the UK. Mention was also made of the possibility that to the extent necessary personal or sensitive information could be redacted.

120. The DPPO responded on 15 October 2024, the DPPO stated:-

> "You have requested me to inform you whether there are any objections on the side of the [DPPO] to provide 1) documents from the file in the criminal investigation into Samos [i.e., the DPPO Glencore Investigation] and 2) e-mail correspondence between you and the [DPPO] regarding the investigation into Samos in a civil lawsuit in the United Kingdom in which Glencore is involved.
>
> Seeing that the criminal investigation in respect of the co-defendants has not been completed yet, **there is a risk of damage to the criminal case if judicial data, such as documents from the criminal file or e-mails between you and the [DPPO] regarding the investigation into Samos were to be submitted in other court proceedings.** Seeing the public's familiarity with the case and (one of) the co-defendants, redacting the names of the co-defendants does not offer any solace for this either.
>
> In addition, the Dutch Judicial Data Act does not offer any basis for the (further) provision either, so that there is no possibility of providing judicial data to third parties for this purpose anyway.
>
> **I therefore do not give you permission** to share documents from the criminal file or e-mail correspondence between you and the [DPPO] in the criminal investigation into Samos with third parties".
>
> (emphasis added)

121. The DPPO's position therefore was (and as will be seen, remained in DPPO's emails of 4 November 2024 and 14 February 2025) no more than that, "… there is a risk of damage to the criminal case if judicial data, such as documents from the criminal file or e-mails between you and the [DPPO] regarding the investigation into Samos were to be submitted in other court proceedings". The DPPO has never identified that disclosure would breach any provision of Dutch criminal law, or that if disclosure took place Glencore or anyone associated with them would be prosecuted. Such points have to be seen in the context of the fact that very detailed correspondence with the DPPO ensued (as addressed below).

122. On 30 October 2024, De Brauw thanked the DPPO for their 15 October letter and asked if their answer would be different if the documents were to be shared within the framework of a confidentiality ring that the Claimants would be prepared to agree to which CC has passed on to De Brauw.

123. On 4 November 2024, the DPPO replied, stating as follows:-

> "As we communicated on 15 October last, the [DPPO] does also not give permission to share documents from the file with third parties, not even to a limited number of persons. We therefore reject the proposal of Clifford Chance for the '*confidentiality ring*"'.

124. On 13 January 2025, CC wrote a further letter to the DPPO. The letter set out in extensive detail the subject matter of the English Proceedings and Glencore's disclosure obligations therein. That was then followed with a section headed "Summary of our understanding as to why Glencore is restricted from disclosing the DPPO Documents in the Proceedings".

125. Immediately below that in paragraph 19 CC stated as follows:-

> "Based on our previous discussions with De Brauw, our current understanding is there are a number of restrictions under Dutch law concerning Glencore's disclosure of the DPPO Documents in the Proceedings. We summarise our current understanding of the applicable restrictions below".

126. There then followed reference to a previous undertaking with the DPPO, Article 142 and 144 of the Dutch Judicial Organization Act ("DJOA") and section 39f of the DJDCRA. None of those points in fact remain alive, but the relevance is that such references (together with what was said about section 184(1) in the next paragraph) on any view reflected the contemporary understanding of De Brauw and CC in relation to any relevant provisions of Dutch Criminal law (given what was then asked of the DPPO), and that did not include any express reference to the second limb of section 184(1).

127. In paragraph 23 CC did make reference to section 184(1):-

> "We also understand that a contravention of an instruction from the DPPO to Glencore and its Dutch legal representatives to keep the DPPO Documents confidential may result in Glencore committing a crime by violating section 184 of the Dutch Penal Code (failure to abide by a binding instruction) and may also expose Glencore's Dutch counsel to disciplinary actions based on violations of its professional standards obligations (article 46 of the Dutch Lawyers Act)".

128. The express reference to a violation of section 184(1) is to a "failure to abide by a binding instruction". This is either a reference to Limb 1 of section 184(1) or that phrase is being used by way of shorthand to identify section 184(1). Either is possible but I consider that the former is more likely for two reasons. First the more likely (the Claimants would say only likely) potential contender for a violation of section 184(1) is a failure to abide by a binding instruction (Limb 1). Secondly, it appears that neither CC nor De Brauw considered the second limb of section 184(1) to be of any relevance at this time (the Claimants would say rightly). In any event, and on any view, the attention of the DPPO was expressly drawn to section 184(1).

129. The CC letter then continued as follows at paragraph 24:-

> "**To the extent that the DPPO's understanding of the applicable restrictions concerning the DPPO Documents under Dutch law differs** from the summary provided in paragraphs 20-23 above, **or if there are further restrictions which the DPPO has identified**, we respectfully request that the DPPO outline its difference in understanding or the further restrictions".
>
> (emphasis added)

130. The DPPO were therefore being asked if their view differed from that which had been set out, or if there were further restrictions which the DPPO had identified, and if so the DPPO was being asked to outline its differences in understanding or any further restrictions it had identified.

131. The CC letter then provided at paragraph 25 as follows:-

> "While we respect the DPPO's initial denial of De Brauw's request, we hereby respectfully request that that the DPPO reconsider its position. In order to support the DPPO in its consideration of the request, we set out below the potential consequences for Glencore if the consent is not granted and the next steps that we expect would follow should the DPPO grant its consent for the DPPO Documents to be disclosed to the Claimants in the Proceedings".

132. CC then set out such steps, as well as identifying the approach of the English Court and *Bank Mellat* factors, and then asking, in terms of next steps, the DPPO to respond by 20 January 2025 if it was not willing to give consent, stating (amongst other matters), "whether the DPPO agrees with our summary of the applicable restrictions under Dutch law concerning the DPPO Documents, and whether the DPPO has identified any additional restrictions".

133. What in fact happened is that on 13 February 2025, De Brauw sent an email to the DPPO asking further questions and also referring to, and asking about when the DPPO would be able to react to CC's letter of 13 January 2025. De Brauw's email, and the DPPO's response thereto (including as to CC's letter of 13 January 2025) are of some considerable importance in relation to the issues that arise viz any applicability of, and any violation of, the second limb of section 184(1) and any risk of prosecution in relation thereto. They accordingly merit detailed analysis.

134. The DPPO responded to De Brauw's email of 13 February 2025 on 14 February 2025 (i.e. the following day). They did so in these terms, "Please find below our reaction to your questions in blue. We hope we have provided you with sufficient information with the above". For ease of distinction, I set out the DPPO's response (i.e. the blue text) in italics, in what follows.

135. Towards the start of De Brauw's email they state as follows:-

> "We have learned – as also explained in the letter you received from Clifford Chance UK on 13 January 2025 – that Clifford Chance UK must explain to the High Court of England and Wales why the documents cannot be shared. For this purpose, **they have engaged an expert, Mr. Matthijs Nelemans, professor in Tilburg (the Netherlands). In his draft export report, Mr. Matthijs Nelemans explains, among other things, the applicable limitations and/or restrictions under Dutch law for sharing such documents**. Clifford Chance UK (currently) intends to submit this report to the High Court of England and Wales on 14 February 2024".
>
> (emphasis added)

136. This is an important revelation in the light of the arguments now pursued by Glencore and Mr Glasenberg. It is clear that by the stage of De Brauw's email of 13 February 2025 (and the matters asked therein), though I am told not at the time of the CC letter of 13 January 2025, Professor Nelemans had been instructed on behalf of Glencore. What is more it is clear that, as at 13 February 2025, Glencore and De Brauw had his draft report (the latter expressly refers to what Professor Nelemans explains in his draft report), and such report must have been near completion given that it was contemplated that it would be served on 14 February 2025, and Nelemans 1 was in fact dated 28 February 2025.

137. Accordingly, such (tentative) views as Professor Nelemans had on the second limb of section 184(1) must therefore have already existed and been known to Glencore and De Brauw. It would be remarkable therefore if they did not intend to refer to the second limb of section 184(1) unless, De Brauw, no doubt well versed in Dutch criminal law, did not feel that even merited an express reference to the second limb of section 184(1) in their email of 13 February 2025. However, the former is surely the more likely explanation as they knew that Professor Nelemans would be referring to the second limb (however tentatively).

138. De Brauw then stated that "In order to ensure that the information in the expert report is as accurate as possible **and corresponds with your view** of the above, we have four questions for you. It would be much appreciated by us if you could have a look at them" (emphasis added). It seems therefore, that they were seeking to ensure that the information in the report corresponded with the DPPO's views. It would be all the more remarkable therefore, if De Brauw was not intending to refer to both limbs of section 184(1).

139. The first question was as follows:-

> "1. Regarding the denial of permission for the (further) provision (emails from the PPS dated 15 October and 4 November 2024):
>
> We read your emails dated 15 October and 4 November 2024 as a ban on sharing the following documents and emails with third

> parties, including lawyers, external counsel for claimants and the experts appointed by the High Court:
>
> • [redacted]
>
> • [redacted]
>
> • [redacted], and
>
> • [redacted]
>
> According to Section 184 of the Dutch Criminal Code, the deliberate failure to comply with an order or demand or restricting or obstructing the implementation of a legal requirement – in short – is a criminal offense. Could you let us know whether the ban in the sense referred to above should indeed be considered, in the opinion of the PPS, as an "order" within the meaning of Section 184 of the Dutch Criminal Code **or can be brought under the scope of that Section otherwise**?".
>
> (emphasis in bold added)

140. De Brauw is thus referring in the first lines to the opening part of section 184(1) i.e. Limb 1, but they also ask "or can be brought under the scope of that Section otherwise" which therefore contemplates whether the ban can be brought under the rest of section 184(1) which would include Limb 2 (albeit its terms are not expressly referred to).

141. The DPPO response is as follows:-

> "*No, you asked us for permission to submit the documents mentioned by you above in the civil lawsuit in the UK. We have indicated several times that we cannot grant permission for this, because the wsjg (Dutch Criminal Data Act) does not allow this. And also because it would be harmful for the criminal case against the co-defendants. This, however, is not an order within the meaning of Section 184 of the Dutch Criminal Code."*

142. The answer "No" could be to section 184(1) generally, but it goes on to refer to, and give an unequivocal answer to the first limb: "This, however, is not an order within the meaning of Section 184 of the Dutch Criminal Code". On any view, this is an unequivocal confirmation that there is no violation of the first limb of section 184(1) (which accords with the experts' views and is common ground between the parties). However, the parties agree that it is ambiguous as to whether it is a confirmation that it cannot be brought within the second limb of section 184(1).

143. Nevertheless, it would be remarkable if the DPPO would have given the answer it did if it considered that any aspect of Glencore's conduct (specifically, disclosing the documents in the English Proceedings) would give rise to a

violation of the second limb of section 184(1), given, first, that the DPPO is being asked about section 184(1) as a whole ("or can be brought under the scope of that Section otherwise"); second, it will surely have put its mind to that matter having been asked that question and; third, there is no suggestion that the DPPO is doing anything other than being helpful in responding to what it is being asked (including as to whether there is a violation of a criminal provision), and with knowledge of why it is being asked. In other words, if the DPPO had believed there was any possible violation of the second limb of section 184(1), it would surely have shared that belief and said so, given that De Brauw are candidly enquiring whether there has been any violation of a criminal provision (section 184(1)).

144. Question 4 was as follows:-

> "4. As for the letter from Clifford Chance UK: We would like to know, at the request of Clifford Chance UK, when you think you will be able to react to the letter you received from them on 13 January 2025".

145. The DPPO responded in these terms which was clearly their intended response to CC's letter of 13 January 2025:-

> *"This is our reaction to this letter.* ***We will limit our reaction to the questions that concern Dutch law****. This means we will not deal with the questions with number 34 and following. Again, we have indicated several times that we do not give permission to share the documents with third parties. This is because it is harmful for our criminal case and also because the wsjg does not provide for this.* ***In addition to this, we also observe that sharing information from the criminal file falls under the scope of the GDPR. You will have to weigh the importance of sharing the information with third parties against the importance of confidentiality in view of the criminal case that is still pending****.*
>
> *As far as we are concerned, the importance of the criminal case carries more weight.* ***We do not share your view that the sharing of the information from the criminal file constitutes a violation within the meaning of Section 184 of the Dutch Criminal Code (this in response to paragraph 23 of the letter from Clifford Chance)****. The reference to Section 142 of the RO (Dutch Judicial Organization Act) (paragraph 21) is incorrect in our view, as this provision concerns the observation by a judicial officer. In our view, the "undertaking" merely concerns the presentation given by De Brauw Blackstone and the correspondence on that matter and the substantive discussions between the parties, but not the criminal file itself".*
>
> (emphasis added)

146. There are number of points to note:-

(1) This is intended to be the DPPO's reaction to the CC letter. They had clearly therefore read it. More specifically, it is making clear that they are limiting their reaction to questions that concern Dutch law (that therefore includes the section that includes both paragraphs 23 and 24 which I quote above).

(2) They make a statement that they "do not share your view that the sharing of the information from the criminal file constitutes a violation within the meaning of Section 184 of the Dutch Criminal Code". Importantly, they are addressing not whether it would be a failure to comply with an order (first limb section 184(1)) but whether sharing the information from the criminal file "constitutes a violation within the meaning of Section 184(1)". They have therefore put their mind to the act of "sharing the information" from the criminal file and whether it amounts to "a violation within the meaning of Section 184(1)" and they do not share the view that this constates a violation within the meaning of section 184. The context is therefore "sharing the information" and whether this is a violation "within the meaning of" section 184(1)" (that is surely a reference to within the meaning of section 184(1) as a whole). It would be astonishing if in giving that answer they had not considered whether sharing the information would violate section 184(1) in any sense, and I in any event read what they have said as confirmation that their view is that sharing the information is not a violation within the meaning of section 184(1) (full stop).

(3) It is right that the DPPO then state "(this in response to paragraph 23 of the letter from Clifford Chance)" and paragraph 23, it will be recalled, stated, "We also understand that a contravention of an instruction from the DPPO to Glencore and its Dutch legal representatives to keep the DPPO Documents confidential may result in Glencore committing a crime by violating section 184 of the Dutch Penal Code (failure to abide by a binding instruction)", which is in relation to limb 1 of section 184(1), but there is no reason why the response should be so limited, and it is not, as it expands the answer from a contravention of an instruction, and failure to abide by a binding instruction, to sharing of information and whether sharing of information constitutes a violation of section 184(1), notwithstanding that CC's view was expressed in terms of Limb 1 of section 184(1).

(4) In any event, and whether or not that is so, it would still defy belief that the DPPO would not have identified that sharing the information was a violation of section 184(1) if it considered it was. To give a literal response to an aspect of CC's letter would not be within the spirit of what was being asked in CC's letter, not least given that in the very next paragraph, paragraph 24, (and still in the section on Dutch law), CC had asked, "To the extent that the DPPO's understanding of the applicable restrictions concerning the DPPO Documents under Dutch law differs from the summary provided in paragraphs 20-23 above, or if there are further restrictions which the DPPO has identified, we respectfully

request that the DPPO outline its difference in understanding or the further restrictions".

(5) Yet further (and perhaps ironically), it is the DPPO that is shooting down the alleged violations that CC is positing both in relation to section 184(1) and section 142 of the DJOA i.e. it is going out of its way to disabuse Glencore of any suggestion that it is violating such provisions of Dutch law (despite the DPPO clearly expressing that it does not want the material to be disclosed). It again defies belief that the DPPO would not identify a provision of Dutch criminal law if it considered that the same was violated. If anything, to not do so would be both misleading and disingenuous, and there is no proper basis for suggesting either. On the contrary, the tone of the DPPO's response is that it is giving a substantive response that reflects its own views (and as will appear, such response would be likely to give rise to an affirmatory AVAS-defence in any event – as Professor Nelemans originally acknowledged (see Nelemans 1, at paragraph 96)).

(6) Tellingly, the DPPO state that "we also observe that" sharing of information from the criminal file falls under the scope of the GDPR, and go on to say "**You will have to weigh** the importance of sharing the information with third parties against the importance of confidentiality in view of the criminal case that is pending" (emphasis added). If the DPPO was of the view that disclosure constituted a criminal offence on the basis that disclosure could interfere with or foil the investigation (the second limb), then the DPPO would not have recognised that Glencore had a choice to "weigh the importance of sharing the information with third parties against the importance of confidentiality in view of the criminal case that is still pending" or express the DPPO's view "the importance of the criminal case carries more weight". Such a choice is simply inconsistent with any suggestion that disclosure would constitute a criminal offence, whether under section 184(1) or indeed any other provision of Dutch criminal law.

147. In the above circumstances, and for the above reasons, I consider that in their 14 February email, the DPPO are confirming that their view is that the sharing of the information from the criminal file does not constitute a violation within the meaning of section 184 of the DCC. Given that the DPPO are the relevant prosecuting authority I consider that this is the best possible evidence that disclosure will not involve a breach of section 184(1) of the DCC (whether under the first or second limb). Whilst this is jumping ahead to a consideration of the risk of prosecution, I can see no prospect whatsoever of prosecution in such circumstances.

148. In any event, and as addressed in due course below, I am in no doubt that what the DPPO stated in their response would also give rise to an affirmatory defence in the inherently improbable scenario of a prosecution. It is an inherently improbable scenario for the additional reason that the fact that there would be (or even would be likely to be) an affirmatory defence, factors back in to the risk of prosecution, as it is inherently improbable that the DPPO would consider it in the public interest to prosecute if Glencore had an affirmatory defence as a

result of what the DPPO had itself said (quite apart from other affirmatory defences in the context of compulsion as a result of the English order).

F.2 The Views of the Experts on Section 184(1)

F.2.1 Professor Nelemans - Nelemans 1

149. It will be recalled that in Nelemans 1, and the issue as to whether there would be any commission of a criminal offence, Professor Nelemans repeatedly puts it no higher than that disclosure of the FIOD Documents **may** amount to an offence under section 184 of the DCC (second part). He does so both in terms and implicitly by contrast with his opinions about the DPPO/FIOD Correspondence (where his views are much more forthright). The difference in language (and conclusions) is striking, and clearly shows a more tentative, and less certain, opinion in relation to the FIOD Documents. Thus:-

(1) In Nelemans 1, at paragraph 95 it is said:-

> "Given that the DPPO has indicated and repeated that the criminal investigation into the co-suspects is ongoing and that it considers disclosure of the FIOD Documents (as well as the DPPO/FIOD Correspondence) detrimental to the investigation, the DPPO **may** conclude that a disclosure by GIAG intentionally hinders the ongoing investigation (sections 132a DCCP and in this respect also section 3 of the Police Act 2012), interrogations or specific ongoing investigative actions (such as listed in sections 94-126 DCCP, including seizures and taps) by the DPPO".
>
> (emphasis added)

(2) Equally in Nelemans 1, at paragraph 112, he concludes:-

> "If GIAG were to provide the FIOD Documents to Glencore and its counsel, **there is a chance** that this will result in a violation of the second part of section 184 DCC, which is based on the same analysis as set out in the earlier paragraphs. Likewise, if Glencore (once it had received the FIOD Documents) were to disclose them in the Proceedings, **there is also a chance** of a violation of the second part of section 184 DCC".
>
> (emphasis added)

150. Such (tentative) suggestions as to a violation of Limb 2 of section 184(1) in relation to the FIOD Documents are to be contrasted with the views expressed by Professor Nelemans in relation to the DPPO/FIOD Correspondence (Nelemans 1, at paragraph 113):-

> "To the extent that GIAG were to disclose the DPPO/FIOD Correspondence to Glencore and its counsel, **this would likely result in a breach of the Undertaking, as well as a violation**

> **of section 272 DCC**. If Glencore (once it had received the DPPO/FIOD Correspondence from GIAG) were to disclose the correspondence in the Proceedings, **this would likely result in a violation of section 272 DCC**, but it would not be a breach of the Undertaking since Glencore is not a party to the Undertaking."
>
> (emphasis added)

151. If one then seeks to identify the basis on which Professor Nelemans considered that there was a chance of a violation of the second limb of section 184(1) at the time of his first report it is difficult to identify any such basis. It seems to be based almost entirely on his own interpretation of the correspondence between De Brauw, CC and the DPPO, yet as appears above, such correspondence does not evidence there being any such chance (low though Professor Nelemans is at this stage expressing such chance).

152. It will be recalled that Limb 2 of section 184 provides that, "anyone who intentionally prevents, hinders or thwarts any action undertaken by one of those officials in implementation of any legal provision shall be punished with a prison term or not more than three months of a fine of the second category". In paragraph 95 of Nelemans 1 Professor Nelemans gives his reason for there being a chance (as quoted above) as "**Given that the DPPO has indicated and repeated** that the criminal investigation into the co-suspects is ongoing and that it considers disclosure (as well as the DPPO/FIOD Correspondence) detrimental to the investigation (referring to sections 132a DCCP and section 3 of the Police Act 2012) the DPPO **may** conclude that disclosure by GIAG intentionally hinders the ongoing investigation" (emphasis added) which he (presumably) then equates with "hinder[ing] any action undertaken by one of those officials in implementation of any legal provision" and so amounting to a violation of Limb 2 of section 184(1).

153. However the fundamental difficulty with that opinion (tentatively expressed though it is) is that despite the fact that the DPPO has repeatedly stated in the correspondence with De Brauw (and CC) that, "there is a risk of damage to the criminal case if judicial documents such as documents from the criminal file…were to be submitted in other court proceedings" the DPPO have not expressed the view that the disclosure would amount to a violation of Limb 2 of section 184(1), and indeed what they have said (as analysed above) is inconsistent with them holding such a view, and with the answers they gave, and it is inconceivable that they would not have stated that it amounted to a breach of section184 (1) when asked about that very section, if that was the view they held. Yet further, and having made such statements, it is inherently improbable that the DPPO would reach a contrary view (or act on such a contrary view) in the future. So Professor Nelemans' speculative hypothesis as to what the DPPO "may conclude" is contrary to what is actually known (as a matter of fact) as to the stance of the DPPO.

154. It appears that Professor Nelemans may well have recognised that such hypothesis was on shaky foundations as he addresses what he describes as the

"ambivalence of the DPPO's statement" (in its 14 February 2025 response), stating:-

> "At least, the ambivalence of the DPPO's statements would make it more difficult for the DPPO to prosecute under section 184 DCC, as a prospective defendant that disclosed the FIOD Documents and was prosecuted under section 184 DCC would raise the defence of absence of any culpability (also known as an AVAS-defence) and argue that they relied on the earlier statements by the DPPO on the applicability of section 184 DCC".

155. But the DPPO's stance is more than ambivalent. As addressed above, not only did it make statements about the absence of a violation of section 184 of the DCC, it is clear that it did not itself consider that there was any violation within the meaning of section 184 of the DCC as a whole, and had it so considered it surely would have stated the same (given what it was being asked). Yet further, Professor Nelemans' reliance on the possibility of an affirmative defence (which he was to back track on in Nelemans 2), is itself a recognition that if the DPPO wished to prosecute Glencore for a breach of section 184(1) it would have to change the stance it currently had (reflected in the statements to Glencore), and Professor Nelemans identifies no basis for any belief that the DPPO would do so (not least given that he recognises that if the DPPO did so Glencore might have an affirmative defence, which would be a very good reason for the DPPO not to change its stance).

156. It is difficult to see Professor Nelemans' hypothesis in Nelemans 1 as anything other than academic speculation as to what might be argued (if one were seeking to argue that an offence arose) that is not grounded in anything that the DPPO had said. Equally, and as Professor Nelemans candidly recognised, "There is no case that is highly analogous to the facts at hand". That is hardly a propitious start in circumstances where the very foundations of the hypothesis are based on a construction of the correspondence with the DPPO that it does not bear.

F.2.2 Professor Brouwer

157. Professor Brouwer concludes (at paragraph 27 of his report) that the disclosure of documents in the context of civil proceedings in the UK cannot give rise to concerns in the context of the second limb of section 184(1) of the DCC. In this regard he sets out his views as follows at paragraphs 26 and 27:-

> "26. In the present case, we are considering the disclosure of documents. Even if the disclosure of documents and the information contained therein would be viewed as theoretically having some impact on the DPPO's investigation or the FIOD's activities, I do not see how an investigative act already undertaken can be 'prevented' or 'obstructed' within the meaning of section 184(1) DCC by the subsequent physical act of disclosing certain documents in the context of civil proceedings taking place in the United Kingdom ("UK"). For the same reasons, I also do not see how such official acts could be considered 'foiled'. Disclosure

> will not result in the official acts already undertaken 'being rendered powerless' (*krachteloos maken*) nor do they 'fail' (*mislukken*) 'because they are deprived of their intended consequence' (*doordat daaraan het beoogde gevolg wordt ontnomen*). As discussed, any official acts that the DPPO or the FIOD may want to engage in at some time in the future, after the disclosure of the documents, need not even be considered in this context.
>
> 27. I therefore conclude – and state as my opinion – that the disclosure of documents in the context of civil proceedings in the UK cannot give rise to concerns in the context of the second offence in section 184(1) DCC. In this respect no distinction can or needs to be made between the different documents that are the subject of this opinion. Neither the disclosure of the FIOD Documents, nor the disclosure of the DPPO/FIOD Correspondence, nor the disclosure of the MLAT Request, as physical acts can detrimentally impact the execution or completion of any physical official act that has already been undertaken, or is in the process of being executed, at the moment of disclosure".

158. In the course of his report Professor Brouwer expresses the view that in order to qualify as an official act for the purposes of section 184(1), the act must be a "physical act" (see Brouwer 1, paragraph 21) and cannot be committed in relation to an official act defined as broadly as "the ongoing investigation" (Brouwer 1, paragraph 22). He further states that an ongoing investigation is not a concrete/physical official act (although interrogations, or "other physical investigative actions already undertaken" may be (Brouwer 1, paragraph 25).

159. In this regard he refers to a decision of the Dutch Supreme Court (the "HR") and the associated opinion of the Advocate General, which he addresses at paragraphs 19 and 20 of his report, before concluding at paragraphs 21 to 24 as follows:-

> "21. From this established case law, it follows that the official act itself must be viewed as a physical act. In this, section 184(1) DCC can be assumed to be closely related to the very physical offence of 'resisting arrest through violence', which can be found close by, in section 180 DCC, and which is also placed in Title VIII ("Crimes against the public authorities") of Book 2 of the DCC.
>
> 22. There is no authority (caselaw or otherwise) expanding the concept of 'official act' in section 184(1) DCC beyond a physical act, for instance to a more abstract or general activity or to a range of acts. The second offence in section 184(1) DCC has not been interpreted or regarded by the courts as a more abstract "obstruction of justice"-offence. This stands to reason since another element of section 184(1) DCC is that the 'official act' prevented/obstructed/foiled must always be undertaken 'in the

> execution of any legal provision' (*ondernomen ter uitvoering van enig wettelijk voorschrift*). Criminal liability can therefore only attach in respect of lawful official acts, which may give rise to a defence if the particular 'official act' was not carried out in accordance with domestic law or had no basis in domestic law. It is apparent that such an assessment cannot be made if the scope of section 184(1) DCC is expanded to abstract or theoretical investigative acts in a criminal case. It is clear, therefore, that the second offence in section 184(1) DCC cannot be committed in relation to an official act defined as broadly as e.g. "the ongoing investigation into GIAG's co-suspects" or what Mr Tolaini's seventh witness statement calls "the Ongoing DPPO Investigation".
>
> 23. From this it also follows that still abstract, theoretical official acts – acts that may or may not be undertaken sometime in the future – cannot give rise to a concern in relation to section 184(1) DCC. See in this context Prof. Mr. A.J. Machielse, with whom I concur: "The syntax here implies that a future action cannot be considered. Something must therefore have been undertaken, or at least begun."
>
> 24. The case cited above makes clear that the second offence in section 184(1) DCC (preventing, obstructing or foiling an official act) can only be committed in relation to an official act that has either already been concluded (foiling) or has been undertaken (preventing or obstructing). This requires that the official act must at least have started, must have commenced, which, in turn, means it must have found expression in the form, of an initial beginning of the execution of the official act. From this caselaw it is also apparent that that the second offence in section 184(1) DCC is only applicable to acts countervailing an undertaken physical official act, that have the effect of preventing or obstructing the further execution or completion of that physical official act. Such countervailing acts should be sufficiently material to be capable of actually preventing or obstructing the physical official act…".

160. He then explains why he disagrees with Nelemans 1 paragraph 95 in his paragraph 25:-

> "25. On the grounds set out above, I disagree with Nelemans 1 [95], which claims that "the DPPO may conclude that a disclosure by GIAG intentionally hinders the ongoing investigation […] interrogations or specific ongoing investigative actions […] by the DPPO." As I have explained above, an "ongoing investigation" is not a concrete official act and therefore cannot be prevented, obstructed or foiled within the meaning of section 184(1) DCC. Interrogations (already undertaken or ongoing) are such official acts but they can only be 'prevented' or 'obstructed' within the meaning of section 184(1) DCC by acts which

> physically impact the execution or completion thereof (such as physically disturbing or cutting short the interview between the FIOD officials and their interviewees). The same holds true for other specific physical investigative actions already undertaken".

161. Professor Brouwer's view that in order to qualify as an official act for the purposes of section 184(1) the act must be a physical act, is itself very much disagreed with in Nelemans 2. Professor Nelemans considers that for the purposes of s.184(1) of the DCC, the "act" does not have to be physical, but in any event, an official act will always involve some physical expression of the official's intention, and an investigation will comprise individual independent physical acts (see Nelemans 2, at paragraphs 31-37 and 54). He also considers that the execution of the investigation is an official act (Nelemans 2, paragraphs 37-44 and 55). He further considers that in any event, the DPPO's repeated refusal to give consent to the disclosure of the documents can itself be regarded as a separate act, a point first raised in Nelemans 2 (see Nelemans 2, paragraphs 44 and 56).

162. I have to say that this difference of view led to a wholly disproportionate, and quite unnecessary, debate in the oral submissions as to whether Professor Brouwer was correct or not that in order to qualify as an official act for the purposes of section 184(1) the act must be a physical act and cannot be committed in relation to an official act defined broadly as the "ongoing investigation". I do not find it necessary to determine this issue as it is, I am satisfied, a red herring. The issue is whether the disclosure of the documents in the English Proceedings amounts to a violation of Limb 2 of section 184(1). I do not consider that this issue is answered by reference to the debate as to whether the act must be a physical act, or that it is necessary to reach a conclusion as to which Professor's evidence is to be preferred on such issue in determining whether there would be a violation of Limb 2 of section 184(1).

163. For the reasons that I have already identified, I consider that in their 14 February email, the DPPO are confirming that their view is that the sharing of the information from the criminal file does not constitute a violation within the meaning of section 184 of the DCC. Given that the DPPO are the relevant prosecuting authority, I consider that this is the best possible evidence that disclosure will not involve a breach of section 184(1) of the DCC (whether under the first or second limb). There is nothing in Nelemans 1 that justifies a different view (for the reasons that I have given). Brouwer 1 is consistent with that view (even if one puts to one side the opinions he expresses about the issue of "physical acts"). That leaves the question of whether there is anything in Nelemans 2 that would lead to a different conclusion (were I to accept the views of Professor Nelemans in Nelemans 2), to which I will now turn.

F.2.3 Professor Nelemans – Nelemans 2

164. I have, as already foreshadowed, considerable difficulty in relation to Professor Nelemans' firming up of his opinions in Nelemans 2 both in relation to Limb 2 of section 184 and in relation to the risk of prosecution. I only address the former in this section.

165. First, in Nelemans 2, Professor Nelemans now suggested that disclosure in the English proceedings will also prevent, obstruct or foil the DPPO's refusal of consent to disclosure (*i.e.*, fulfil the second limb of s. 184(1) for this reason: see for example Nelemans 2, at 200(a)). As already noted, it is difficult to see how this can be characterised (as Mr Hill KC sought to characterise it) as a "rebuttal point", but even if it were appropriate to characterise it as a rebuttal point, Professor Nelemans then reaches a much stronger conclusion than in Nelemans 1, concluding (at Nelemans 2, paragraph 57 that):-

> "preventing, obstructing or foiling the ongoing investigation and/or specific investigative acts by disclosing the FIOD Documents […] and/or the MLAT Request or acting contrary to the DPPO's refusal to consent with disclosing these documents, **would in my opinion be a violation of the second part of section 184(1) DCC**. I note that this is a stronger conclusion than in Nelemans 1 (paragraph [95]) and is derived from the foregoing more detailed analysis of section 184(1) DCC".
>
> (emphasis added)

166. The difficulty I have with Professor Nelemans' asserted reason for this shift ("more detailed analysis of s.184") is that, in reality, his "more detailed analysis" amounts to little more than his disagreement with Professor Brouwer about the intended scope of s.184 (itself something of a red herring as I have already identified), and to the extent that he is relying on the correspondence with the DPPO, as addressed above, I do not consider that such correspondence supports his much stronger conclusion – very much the reverse in circumstances where the DPPO stated that "We do not share your view that the sharing of the information from the criminal file constitutes a violation within the meaning of section 184 of the Dutch Criminal Code". Nowhere in any of that correspondence did the DPPO say that disclosure of the documents in the English Proceedings would constitute a violation of section 184(1) and it is clear that they were not of that view.

167. I do not consider that there is anything in Nelemans 2 that either justifies the views he expressed in Nelemans 1, or the even stronger conclusion he expressed in Nelemans 2 that there would be a violation of the second part of section 184(1). Once again, Professor Nelemans appears to rely upon his reading of the correspondence (which does not bear the interpretation he places upon it) and his views on the wording of Limb 2 of section 184. Once again it is notable that he cites no case law or commentary to support his expressed view as to a violation of the second Limb of section 184, and it is a view that is neither consistent with, nor accords with, what is said by the DPPO.

168. I also note that Professor Nelemans has not identified any situation analogous to the present one in which a criminal offence has been found to have been committed.

F.2.4 Conclusion on any violation of Section 184(1) of the DCC

169. I do not consider that Glencore and Mr Glasenberg have demonstrated that disclosure of the documents (the three documents and the MLAT Request) in the English Proceedings would constitute a violation within the meaning of section 184(1) whether under the first or second limb. I would go further than that. I consider that in their 14 February email, the DPPO are confirming that their view is that the sharing of the information from the criminal file does not constitute a violation within the meaning of section 184 of the DCC. Given that the DPPO are the relevant prosecuting authority, I consider that this is the best possible evidence that disclosure will not involve a breach of section 184(1) of the DCC (whether under the first or second limb), and I so find.

170. Accordingly, as a matter of Dutch law, I do not consider that disclosure of the three FIOD Documents and the MLAT Request would amount to an offence under the second limb of section 184 of the DCC, and that is consistent with the approach of the DPPO in relation thereto (stage 1).

G. IS THERE A REAL (ACTUAL) RISK OF PROSECUTION?

G.1 Introduction

171. In light of my conclusion at stage 1, I consider that it is inherently improbable that there would be any prosecution in the Netherlands of Glencore or Mr Glasenberg (or anyone associated with them) in relation to section 184(1) of the DCC, and as such that there is no real risk of prosecution or indeed any risk of prosecution.

172. However, given that there is a difference between the Claimants, and Glencore and Mr Glasenberg (and indeed their respective experts) as to whether or not there is a real risk of prosecution in the event of disclosure of the three FIOD Documents and the MLAT Request, in the context of section 184(1) of the DCC (which is not limited to the question of whether there is or may be a violation of the DCC), and given that I have heard full argument on the same, I will address the risk of prosecution in this Section.

173. I bear well in mind the applicable principles that I have already identified, including that "real" means actual risk of prosecution in the foreign state, and is a risk that is more than "purely hypothetical" (*Morris* at [71] (Neuberger J), applied in *Bank Mellat* at [72]). The Court is concerned with the risk of prosecution, rather than the risk (or gravity) of subsequent sanction if prosecuted and convicted (*Bank Mellat* at [33], [64], [69]; *Tugushev* [2021] per Butcher J at [32]) although as has already been noted, and as is common ground, the likely sanction will be of relevance not only at stage 3 but also at stage 2 as it impacts on the likelihood of a prosecution (such as if the sanction is likely to be modest (for example a modest fine)). The party must show that the criminal law relied on is not merely a "text, or an empty vessel" (*Tugushev* at [33]), but the past may or may not be a safe guide to future performance or risk (*Joshua v Renault SA* at [78]). In addition, the applicant bears the burden of showing the reality of the risk of prosecution, and absence of evidence of any prosecution in the circumstances will weigh against the application: *Tugushev* at [49], and as was said by Henshaw J in *PIFSS* at [44], "It is for the disclosing party to show that the foreign law is regularly enforced so that the threat to that party is real".

174. Comity is also important at stage 2 as well as stage 3. In this regard, where an order for inspection is made by the Court, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court (*Bank Mellat* at [63(vi)]), and as such, "Comity is capable of playing a free-standing part in the judicial decision-making process, and … does not arise for consideration solely when a real risk of prosecution has been shown" (*PIFSS*, per Henshaw J, at [51]).

175. I consider that there are a very large number of reasons why there is no real risk of prosecution even if (contrary to my finding above) disclosure of such documentation would (or might) constitute violation of the second limb of section 184(1) of the DCC.

G.2 No breach of the DCC

176. Firstly, if there is no breach of section 184(1) of the DCC, then it is inherently unlikely that there would be a prosecution – prosecuting authorities do not prosecute where no offence has been committed. However, even if (contrary to my findings) there was any real doubt as to whether an offence was committed, as Henshaw J stated in *PIFFS* at [156], prosecution may be "relatively unlikely if there is real doubt about the law".

G.3 The view of the DPPO in relation to Section 184(1) of the DCC

177. Secondly, and even leaving aside my finding that there has not been any violation of section 184(1), the fact is that the DPPO has not itself expressed the view that there is or might be any violation of section 184(1), and on the contrary, it has expressed the view that it does not share Glencore's view that the sharing of information from the criminal file constitutes a violation within the meaning of section 184 of the DCC. It would therefore require a change of view on the part of the DPPO for a prosecution to result, and it is difficult to see any basis for such change of view hereafter, not only given its own existing stance but also the fact that other factors, as identified below, would also militate against any change of stance.

G.4 The Statements of the DPPO in Correspondence and Affirmative Defences

178. Thirdly (and relatedly), the DPPO's very stance in the correspondence would, I am satisfied, in all likelihood lead to affirmative defences being available to Glencore and Mr Glasenberg in relation to any prosecution under section 184(1) of the DCC, and in such circumstances no prosecutor would be likely to commence a prosecution if affirmative defences were available – the affirmative defences therefore also go to reduce the already infinitesimal risk of prosecution yet further.

179. Unfortunately, in this area as well the experts are not (at least anymore) *ad idem* as to the existence of affirmative defences arising out of the correspondence with the DPPO. I say anymore, as it appeared from Nelemans 1 that Professor Nelemans, like Professor Brouwer, initially did contemplate affirmative

defences arising (albeit he understated what the DPPO had indicated in correspondence).

180. Thus in Nelemans 1 he stated (at paragraph 96) in relation to the DPPO's answer in its email of 14 February 2025:-

> "At least, the ambivalence of the DPPO's statement would make it more difficult for the DPPO to prosecute under section 184 DCC, as a prospective defendant that disclosed the FIOD Documents and was prosecuted under section 184 DCC would raise the defence of absence of any culpability (also known as an AVAS-defence) and argue that they relied on the earlier statements by the DPPO on the applicability of section 184 DCC".

181. This is consistent with Professor Brouwer's evidence (in paragraphs 138 and following of Brouwer 1). As he explains in paragraph 138:-

> "138. If the accused can rely on an affirmative defence, he cannot be convicted for the offence with which he has been charged. Dutch law recognises written and unwritten affirmative defences. The written defences can mostly be found in sections 39 to 44 of the DCC. The unwritten defences have been developed in the case law of the Supreme Court".

182. Professor Brouwer considers that in relation to section 184 of the DCC, one such unwritten defence presents itself and considers the DPPO email of 14 February 2025 to be particularly relevant in this regard. After setting out the question and the DPPO's response (as already quoted and addressed above) he expresses his view as follows:-

> "I agree with Nelemans 1 [para. 96; 137; 148(a)] that this second statement would raise the defence of absence of any culpability (also known as an AVAS-defence) for the first offence in section 184(1) DCC. It is my opinion that a judge, in prosecution under the first offence in section 184(1) DCC, would accept such a defence. Nelemans 1 [para. 96; 137; 148(a)] is ambivalent as to whether the second statement by the prosecutor would also support a defence of AVAS as to the second offence of section 184(2) DCC. It is my opinion that both quoted passages taken together, the wording of the prosecutor's email is broad enough to also encompass the second offence of section 184(1) DCC. From this, it is my opinion that in a prosecution under the second offence of section 184(1) DCC this defence may be raised by all possible defendants (GIAG, Glencore, Mr Glasenberg). It is my opinion that a judge will then probably – more likely than not – accept that defence".

183. As addressed below (and to which I will return), Professor Brouwer also considers that the fact that Glencore and Mr Glasenberg would not be giving

disclosure voluntarily but as a result of an English Court order would also give rise to an affirmative defence (see Brouwer 1, paragraphs 143 to 144).

184. However, having read Professor Brouwer's report, far from maintaining his existing view, Professor Nelemans back-tracked on the existence of an affirmative defence (it would seem as part of his firming up on risk of prosecution), now concluding that the chances of successfully invoking an affirmative defence "are slim" (Nelemans 2, at paragraphs 156 and 200(c)).

185. I consider that Professor Nelemans' change of stance has all the hallmarks of being "lawyered" or, at the very least, a change of expert opinion that is lacking in any convincing justification and which is, perhaps, reflective of a recognition that the existence of affirmative defences torpedoes any real risk of prosecution:-

(1) At paragraph 152 he states, "I disagree that the position is as clear as is suggested in Brouwer 1" (though it was Professor Nelemans' who stated the position that he did in Nelemans 1, paragraph 142), now making the point that Glencore is informed about the ambivalence of the DPPO and thus the risk of applicability of the second part of section 184(1), which it is said will undermine the likelihood that an AVAS-defence will be accepted, since this affirmative defence requires at least good faith. Quite apart from understating the stance of the DPPO (as addressed in the analysis of the correspondence above) it was Professor Nelemans who said that the DPPO's statement "would make it more difficult for the DPPO to prosecute under section 184 DCC", and nothing would appear to have changed to undermine that statement of Professor Nelemans professional opinion. In any event, Professor Nelemans fails to recognise, or acknowledge, that Glencore and Mr Glasenberg would be acting with knowledge of the findings in this judgment in relation to the correspondence (and associated expert evidence that I accept) which would reinforce, not undermine, the availability of affirmative defences and very much lead to Glencore and Mr Glasenberg acting in good faith in relying upon such affirmative defences.

(2) At paragraph 153, and partially in the context of section 272 of the DCC, Professor Nelemans then opines:-

> "153. With respect to section 272 DCC, I am of the opinion that an appeal to a valid official order (bevoegd gegeven ambtelijk bevel) further to section 43 DCC will not automatically be granted. A balancing exercise must be carried out, in this case weighing the implications of violations of various criminal law provisions by Glencore and natural persons against the importance of providing information in civil proceedings in the UK, which implies that **the defence will not automatically be granted** given the conflicting norms and the implications of breaches…".
>
> (emphasis added)

That a defence will not "automatically" be granted does not equate with the chances of successfully invoking an affirmative defence being slim (and lies more easily with at least the possibility of an affirmative defence being granted).

(3) Paragraphs 155 and 156 of Nelemans 2 are the paragraphs that most obviously have the hallmarks of being "lawyered" in an attempt to increase the perception of a risk of a prosecution and with a view to downplay the relevance of affirmative defences to any decision to prosecute in the first place:-

> "155. However, regardless of the above, it is important to note that a legal entity or natural person can still be prosecuted, with the question of whether there are grounds for exclusion from criminal liability through affirmative defences only being considered at the end of the proceedings. Since this is not an obvious case in which it is self-evident that the interest of civil proceedings takes precedence over the public interest of ensuring that a company and natural persons comply with multiple criminal provisions, in my opinion the existence of **a theoretical potential affirmative defence** will have little influence on the decision to prosecute.
>
> …
>
> 156. **As a general point here, I understand the UK Court is interested in the likelihood of prosecution, not the likelihood of conviction**. A potential affirmative defence does not prevent prosecution altogether. As stated above, a legal entity or natural person can still be prosecuted, with the question of whether there are grounds for exclusion from criminal liability through affirmative defences only being considered at the end of the proceedings".
>
> (emphasis added)

Quite apart from the further downgrading of the affirmative defences to "a theoretical potential affirmative defence" (without any substantial justification in the associated paragraphs of Nelemans 2), this is playing on the territory of the legal test in *Bank Mellat*, and the fact that what is relevant is the risk of prosecution not conviction, but this ducks the fact that (as is common ground between the parties, and was repeatedly acknowledged by Mr Hill KC) the very existence of potential affirmative defences reduces the risk of prosecution in the first place, which is a self-evident truth and is also something that I consider Professor Nelemans also downplays in paragraph 156.

(4) Professor Nelemans then expressed the following conclusion at the end of paragraph 156 (also addressing the further potential affirmative defence of necessity/emergency for section 40 DCC to apply):-

> "… and in this regard **wish to add that the chances of successfully invoking an affirmative defence are slim** because there must be good faith on the side of the suspects, a state of emergency for section 40 DCC to apply, and there will be need to be a balancing exercise as between, on the one hand, national criminal law norms and, on the other hand, a UK civil order".

I do not consider that what precedes this in Nelemans 2 justifies the conclusion (which downgrades previously expressed opinions of Professor Nelemans (most obviously Nelemans 1 at paragraph 96)) that the chances of successfully invoking an affirmative defence are slim, and once again Professor Nelemans fails to recognise that Glencore and Mr Glasenberg would be acting in good faith based on the DPPO correspondence, this Court's findings in relation to the same, and this Court's order should an order be made.

186. As for the purported justifications for such change of stance on the part of Professor Nelemans, I do not find them convincing. By way of example, Professor Nelemans states at paragraph 155 as follows:-

> "It may also be in the DPPO's interest to use this case to obtain a ruling in principle on the enforcement of orders issued by foreign courts. As Brouwer 1 (paragraphs [71], [94], [122], [123] and [134]), rightly points out, there is no case law in this area yet. However, the DPPO regularly brings cases where the law is uncertain and where there is a social need to clarify the law, ranging from participation in criminal organisations to assisted suicide cases. The expediency principle offers room for the DPPO to follow a policy-based, instrumentalist application of criminal law".

187. Quite apart from the fact that this would seem to be speculation on Professor Nelemans' behalf, it is difficult to see why the DPPO would wish to choose this case to obtain clarity in the law when, on any view, it has itself stated in writing to Glencore that it did not share Glencore's view that "the sharing of the information from the criminal file constitutes a violation within the meaning of Section 184 of the Dutch Criminal Code", and in an email in which, despite identifying that disclosure would be harmful to the criminal investigation, it has not even asserted that Glencore would be committing any criminal offence, and goes so far as to contemplate that Glencore "will have to weigh the importance of sharing information with third parties against the importance of confidentiality in view of the criminal case that is still pending", which is inconsistent with the commission of any criminal offence and redolent of it being a balancing exercise for Glencore.

188. In the above circumstances I prefer the evidence of Professor Brouwer (which is consistent with the views initially expressed by Professor Nelemans in Nelemans 1) to the evidence of Professor Nelemans in Nelemans 2. I consider that the DPPO's very stance in the correspondence would, in all likelihood, lead to affirmative defences being available to Glencore and Mr Glasenberg in

relation to any prosecution under section 184(1) of the DCC, and in such circumstances no prosecutor would be likely to commence a prosecution if affirmative defences were available, As already noted, the affirmative defences therefore also go to reduce the already infinitesimal risk of prosecution yet further.

G.5 Further Potential Affirmative Defences

189. This is also true of the further affirmative defences of "acting pursuant to an authorised court order" and/or "necessity/emergency" (in the context of compliance with any English Court order), as addressed by Professor Brouwer, which also apply in relation to any alleged offence under section 272 of the DCC (in the case of Mr Glasenberg). In this regard, Professor Brouwer states as follows at paragraphs 143 and 144:-

> "143.When it comes to both section 184 and section 272 DCC it must be noted that any disclosure would not be voluntary but would be the result of a UK court order. I have already stated as my opinion (para. 120) that in a Dutch domestic case there could be no doubt that any confidentiality obligation of section 7 DPDA and/or section 52 DJDCRA would be set aside under the working of a domestic judicial disclosure order. This means that under a domestic judicial disclosure order, there would be no offence to prosecute under section 272 DCC. Although this would be different for section 184 DCC, in a prosecution under this section the defendants Glencore – as addressee of the court order – and GIAG as its subsidiary could – in my opinion – rely on the affirmative defences of acting pursuant to an 'authorised official order' (*bevoegd gegeven ambtelijk bevel* – section 43 DCC) 89 and/or the defence of 'necessity/emergency' (*overmacht noodtoestand*), both of which I will discuss in more detail below. In my opinion, in such a prosecution a judge would accept these defences.
>
> 144. In the present case, whether a UK judicial order in a civil disclosure proceedings has the exact same effect as a Dutch judicial order in relation to the applicability of section 272 DCC has not yet been decided by the Dutch Supreme Court. As discussed above, it is my opinion that a UK judicial order requiring disclosure in civil proceedings does not have the exact same effect as a domestic order, and therefore cannot be regarded as automatically overriding the confidentiality obligation in section 7 DPDA and/or section 52 DJDCRA. It is my opinion however that such a UK judicial order would give rise to affirmative defences in a prosecution under section 184 DCC or section 272 DCC".

190. Professor Brouwer further addresses and justifies such opinions in paragraphs 145 to 147. I consider that the sentiments he expresses in paragraph 147 have particular resonance on the facts of the present case:-

> "147. The HR has accepted defences of 'necessity/emergency' on a regular basis albeit infrequently, for example in cases of – briefly put – private growth and medicinal use of cannabis by MS patients. In the present case, the "clash of interests" between the Dutch obligation of confidentiality and a UK court order will need a resolution, which can only exist in choosing one interest over the other. It is my opinion that a Dutch judge would consider the extensive debate that would have preceded a UK court order and would acknowledge that the defendants Glencore – as addressee of the court order – and GIAG as its subsidiary had done everything in their power to avoid the conflict of interests in the first place. It is my opinion that under these circumstances a Dutch judge would not want to find fault with the defendants having decided to give precedence to a concrete judicial order over an abstract legal requirement. It is therefore my opinion that it is probable – more likely than not – that a judge will accept one of these defences, either by recognising the UK judicial order as an 'authorised official order' (*bevoegd gegeven ambtelijk bevel*) or by recognising the conflict of interests as the defence of 'necessity/emergency' (*overmacht noodtoestand*)".

191. I have already touched upon the paragraphs in which Professor Nelemans addresses such matters (Nelemans 2, paragraphs 153 to 154). It will be recalled that in relation to an affirmative defence in relation to compliance with an authorised/valid official order, Professor Nelemans opined at paragraph 153 that, "the defence will not **automatically** be granted given the conflicting norms and the implications of breaches…" (emphasis added) whilst at paragraph 154, when addressing the affirmative defence of necessity/emergency, he identifies Supreme Court authority which he quotes as follows:-

> "154. The same holds for an appeal to the affirmative defence of necessity/emergency (*overmacht noodtoestand*), which requires (i) that there must be a state of emergency while it can be questioned whether this is indeed an immediate emergency, and (ii) that there will be a balancing act between the conflicting norms, i.e. that someone has given "precedence to the most important interest": "Since the ruling in the case of the helpful optician (Supreme Court 15 October 1923, NJ 1923, p. 1329), cases in which there is no life-threatening situation are also classified under section 40 DCC. In this context, we generally speak of force majeure in the sense of an emergency: these are cases involving a serious conflict of interests in which a choice is unavoidable. **In the words of the Supreme Court: exceptional circumstances may, in an individual case, mean that conduct which is punishable by law may nevertheless be considered justified, inter alia if the person acted in an emergency, i.e. — generally speaking — if the perpetrator, faced with the need to choose between conflicting duties and interests, gave precedence to the most important ones** (Supreme Court 16 September 2008…".

(emphasis added)

192. I consider that the passage highlighted is apt to cover compliance with any English Court order (which itself carries with it the possibility for committal for contempt and sequestration of assets) not least in circumstances where it is doubtful that any criminal statute has been violated in the first place.

193. The existence of such further potential affirmative defences further militates against any risk of prosecution in the first place under either section 184(1) of the DCC (Glencore and Mr Glasenberg) or section 272 (Mr Glasenberg).

194. Yet further, and even if there could not be certainty that affirmative defences would succeed, as Professor Brouwer states (Brouwer 1, at paragraph 167):-

> "But even if the DPPO would be of the opinion that a UK judicial order would not qualify as an affirmative defence, the DPPO will very likely decide that the fact that the defendants were acting pursuant to a foreign court order would render the case so much of a borderline or fringe case that prosecution would be disproportionate (dismissal ground #42, see above)".

G.6 An English Court Order and its terms and consequences

195. Related to any possible affirmative defences in the context of an English Court order (but separate therefrom) is the relevance of compliance with an English Court order to a reduction in the risk of prosecution. I consider that the fact that Glencore and Mr Glasenberg would be acting under the compulsion of an English Court order would in and of itself reduce, if not obviate, any, or any remaining, risk of prosecution in the Netherlands.

196. This is an important, free-standing point, which in and of itself, carries great weight in the assessment of any risk of prosecution. It is at this stage that comity very much comes into play at stage 2 (in addition to at stage 3 if such stage is reached), as was common ground before me. In this regard, the English Court may reasonably expect considerations of comity to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court: "Comity cuts both ways" (*Bank Mellat* at [63(vi)]). This is also consistent with the views expressed by Professor Brouwer that (in addition to giving rise to affirmative defences), an English Court order, "would furthermore be a weighty element in the prosecutor's decision whether or not to prosecute any alleged violation of the confidentiality obligation" (Brouwer 1, at paragraph 124).

197. It is important to appreciate (and for the Dutch prosecution authorities to understand), that failure to comply with an English disclosure order and provide inspection of the documents as ordered by the English Court could led to an application for committal for civil contempt of court which, if proven, can led to imprisonment in the case of individuals (such as Mr Glasenberg) and fines and sequestration of assets (in the case of a company such as Glencore). This is an important consideration which I consider reduces the risk of prosecution in the Netherlands given that there would be serious financial, reputational, and

personal consequences for each of Glencore and Mr Glasenberg if they failed to comply with an English Court Order.

198. It is also important for the Dutch prosecution authorities to appreciate that each of Glencore and Mr Glasenberg have gone to considerable lengths and considerable expense to advance the Disclosure Restriction Applications and have taken every possible point it is possible to take in support of their applications and in opposition to their being held to their disclosure obligations in the existing orders of the English Court, resulting in a hard fought hearing over two and a half days. Neither Glencore nor Mr Glasenberg could have done any more than they have to avoid being in potential breach of any provisions of Dutch law, and to avoid having to give disclosure of the four documents in question, and if they are ordered to do so they are blameless and not blameworthy for finding themselves in the position they find themselves, and such lack of culpability is itself a further factor militating against prosecution which I consider that Dutch prosecuting authorities would take into account.

199. In this regard, and whilst what Professor Brouwer states is in the context of an affirmative defence, I consider the following aspect of his evidence would also have resonance at the time when consideration was being given by the prosecuting authority whether to prosecute at all (see Brouwer 1, paragraph 147):-

> "It is my opinion that a Dutch judge would consider the extensive debate that would have preceded a UK court order and would acknowledge that the defendants Glencore – as addressee of the court order – and GIAG as its subsidiary had done everything in their power to avoid the conflict of interests in the first place. It is my opinion that under these circumstances a Dutch judge would not want to find fault with the defendants having decided to give precedence to a concrete judicial order over an abstract legal requirement".

200. The terms of the English Court Order can also bring home to the Dutch prosecuting authorities such matters, both in appropriate Recitals, and in the operative paragraphs of the Order which, in and of themselves would also reduce any risk of prosecution. It is for this reason (as recognised by the parties during the course of the oral hearing) that I directed that the parties should provide me with either an agreed draft, or the parties' respective drafts, of an Order containing such recitals and operative paragraphs as would bring home such matters to the Dutch prosecution authorities upon sight of such Order. In the event they were able to do so in the form of a joint Order containing those provisions they would wish to be included with a view to reducing the risk of prosecution, which was provided to me, subsequent to the hearing, on 11 July 2025.

201. In contributing to this draft Order, Glencore and Mr Glasenberg acknowledged that their contribution of such recitals and paragraphs would be with a view to reducing the risk of prosecution, but the inevitable consequence of such recitals and paragraphs, is that this will also go to reduce the chances of them proving that there is a real risk of prosecution and obtaining the relief sought on the

Disclosure Restriction Application. Whilst recognising this, I understand that they considered (rightly in my view) that the most important consideration is to reduce the risk of prosecution in the Netherlands, should the English Court be minded to maintain its existing Order and require inspection.

202. I set out at Annex A the joint draft Order provided to me by the Claimants, Glencore and Mr Glasenberg amended only so as to reflect the Order that I propose to make, and which incorporates their suggested wording for both recitals and operative paragraphs. I am in no doubt whatsoever that such recitals and operative paragraphs will have a profound effect, and should any risk of prosecution otherwise remain (contrary to the other findings I have made) will, in and of themselves, remove the same. I should make clear that I consider that the terms of the Order will, in and of itself, negate any real risk of prosecution.

203. As part of the Order, I would also impose a confidentiality club which would restrict who would see the documents in the English Proceedings, and which would prevent the public having access to such documents. Whilst the possibility of such a confidentiality club did not immediately assuage the concerns of the DPPO in the correspondence, I consider that the reality is that the imposition of such a confidentiality club would alleviate any risk of harm to the ongoing Dutch Investigation, and in such circumstances the risk of a prosecution would be further reduced (not least once the DPPO were aware of the rigorous restrictions imposed by such confidentiality club). This is a well-established measure that an English Court will put in place, whereby the English Court will fashion the order to reduce or minimise concerns under foreign law by imposing confidentiality restrictions in respect of the documents inspected (see *Bank Mellat* at [63(v)]).

204. Once again, I invited the parties to agree the wording of such a confidentiality club, and they supplied their draft to the Court on 23 July 2025. Whilst there remain certain differences between the parties on the precise wording (in relation to which I will hear submissions at the time of hand-down in order to finalise the same) I am satisfied, having had sight of the parties' draft wording, that the confidentiality club will further reduce the risk of prosecution as it will further reduce the risk of any harm to the ongoing Dutch Investigation which itself will further reduce the risk of a prosecution ensuing.

G.7 The likely Sanction for any breach of the DCC

205. Whilst the relevant risk is the risk of prosecution not the risk of the sanction imposed, the sanction can be of relevance at both stage 2 and stage 3. In the context of the balancing exercise at stage 3, in *Byers*, Fancourt J took into consideration (at [107(viii)]), in refusing to revoke an order for disclosure, that "Even if prosecution does result, the risks of severe punishment of the Bank or its employees are significantly overstated by the Bank's witnesses and the most likely consequence is a fine, not imprisonment or revocation or suspension of the Bank's licence".

206. The parties recognised that the likely sanction is also relevant at stage 2 for the obvious reason that it is likely to be an operative relevant factor considered by a prosecuting authority as to whether to prosecute at all (*a fortiori* if there are

other difficulties and potential affirmative defences in relation to such prosecution) which when weighed against the costs of prosecution strongly militate against any prosecution.

207. In the present case (and as is common ground), the likely sanction for a first time offender in relation to section 184 of the DCC (or section 272 of the DCC in the case of Mr Glasenberg) would be modest, and might be a modest fine or at most (where available) some form of community order.

208. As identified by Professor Brouwer at Brouwer 1 paragraphs 168 to 170:-

> "168.The offences in question can be considered relatively minor, both in a formal sense and a material sense of the word.
>
> 169.Formally, the sections in question carry very light penalties compared to the vast majority of the offences in the DCC. Section 184 DCC is punishable by imprisonment of up to three months, community service of up to 240 hours or a fine of up to EUR 5,150. The Court Guidelines for sentencing (*Oriëntatiepunten voor straftoemeting en LOVS-afspraken*) suggest a fine of EUR 100 or 20 hours of community service for a conviction under this section.
>
> 170.The DPPO has the authority to impose an 'out-of-court penalty' (*strafbeschikking*) for all offences that carry a maximum penalty of up to six years imprisonment. This authority has been subjected to published DPPO guidelines. The applicable DPPO Directive for failure to comply with an official order or behavioural instruction (*Richtlijn voor strafvordering niet opvolgen ambtelijk bevel of gedragsaanwijzing*) prescribes a fine of EUR 350 for first offenders violating section 184 DCC. Since these guidelines have been published, the DPPO will apply these guidelines on all cases, except when special circumstances apply. This means that in the present case, assuming all individuals and entities concerned qualify as first offenders, we may expect a criminal prosecution under section 184(1) DCC to be in the form of an out-of-court fine of no more than EUR 350".

209. Standing back, it defies belief that there is a real risk of prosecution given the likely sanction when weighed against the background of the DPPO correspondence, the uncertainty as to whether any offence has been committed, and the possibility of affirmative defences all for an outcome of a modest fine even were a (costly) prosecution to be successful. That is not a scenario likely to appeal to any prosecutor, or which is likely to lead to them instigating a prosecution.

G.8 The lack of Evidence of Prosecution

210. There is a lack of evidence of any prosecution (ever) under the second part of section 184 of the DCC. This is itself an important consideration. As was said in *Tugushev* at [33], it will ordinarily need to be shown that the foreign law is

not just a text or an empty vessel but is regularly enforced so that the threat to the party is real. The burden is on the applicants to show that the criminal provisions "are regularly enforced" (*EuroChem* at [15]), and the Court expects to see examples where a party has been prosecuted for disclosing documentation such as that under consideration (see *EuroChem* at [16]). There is no evidence of the same in the present case, and this is a further reason why the risk of prosecution is not real.

G.9 Jurisdiction

211. It is not certain that the Dutch Courts would even have jurisdiction in the context of section 184(1), although it appears that they probably would on the expert evidence before me. This point therefore does not add anything in relation to the risk of prosecution in the context of the Glencore Disclosure Restriction Application.

212. The position is different in the context of section 272 of the DCC which I address separately in relation to the Glasenberg Disclosure Restriction Application.

G.10 The Views of the Experts on Risk of Prosecution

213. Whilst the risk of prosecution is ultimately a matter for assessment by the Court on all the material before the Court, assisted by the views of the experts on those matters on which they can opine, I note that my concluded view is consistent with those expressed by Professor Brouwer who concludes at paragraph 180 of Brouwer 1 (and for the reasons set out in Brouwer 1 which accord with my own) that:-

> "My opinion therefore is that the risk of prosecution of GIAG, Glencore, Mr Glasenberg or any of the law firms involved in connection with any theoretical violation of either section 272 DCC or section 184(1) DCC is extremely remote".

214. I have already noted that Professor Nelemans has expressed very different opinions and, once again, his opinion has shifted between his first and second report, with what appears to be an unjustified "firming up" on risk of prosecution, and a dilution of the chances of the Defendants being able to advance successful affirmative defences (which themselves impact on the risk of prosecution as already addressed above).

215. Thus, in Nelemans 1 there is no concluded view on the level of risk of prosecution expressed in relation to disclosure of the FIOD Documents (see at 148(a)), yet in contrast in relation to the DPPO/FIOD Correspondence Professor Nelemans expresses the view that it is "more likely than not that the DPPO will prosecute GIAG … for disclosing the DPPO/FIOD Correspondence to Glencore. Such statement relates to section 272 DCC although he adds, "potentially also on the basis of the second part of section 184 DCC". Yet, in Nelemans 2, Professor Nelemans ultimately opines in his conclusion paragraph 200(c), "that a prosecution is more likely than not and that the chances of successfully invoking an affirmative defence are slim" (though this seems to be

a general conclusion which covers the DPPO/FIOD Correspondence and the FIOD Documents and is not specific to the FIOD Documents). Once again, I do not consider that the matters set out in Nelemans 2 justify such change of stance.

216. I also consider his reasons (in both Nelemans 1 and Nelemans 2) to be lacking in credibility. By way of illustration, I do not consider that the DPPO would consider that the present case would set a precedent or would undermine any future investigation. As is repeatedly recognised, this is a unique and unprecedented case. Equally, I do not see how the absence of prosecution would damage the Netherlands' standing in the international fight against corruption (not least given that disclosure in the English Proceedings will promote, and be part of, the fight against international corruption, and further its exposure). Nor do I consider this case to be an apposite one to settle presently uncertain aspects of Dutch law or establish the DPPO's and FIOD's "autonomy", not least given the statements the DPPO has made in the correspondence that militate against prosecution in the context of affirmative defences.

217. Even more fundamentally, I consider that in Nelemans 1 and Nelemans 2, Professor Nelemans fails to give any, or any proper, weight to all the factors identified above which go to reduce or eliminate the risk of prosecution.

218. I also note that one of the cases that Professor Nelemans refers to in Nelemans 2 at paragraph 139 would actually appear to illustrate the unlikelihood of a prosecution. The Court of Appeal case referred to (12 December 2012, ECLI:NL:GHARL:2017:10905) concerned 2 prosecutors who had provided information (recordings of suspect interviews) to journalists – a clearly serious matter. But the DPPO declined to prosecute the outcome, dismissing the complaint on policy grounds. The reported case concerned an appeal by the injured party against that DPPO decision. The court again held that the case was to be dismissed on policy grounds.

219. In the above circumstances, I prefer the views expressed by Professor Brouwer (which are also consistent with the matters I have identified above as to why I do not consider there to be a risk of prosecution) to those of Professor Nelemans. In this regard, not only do I consider that the unjustified "firming-up" in Professor Nelemans' evidence calls into question the reliability of his evidence, but I, in any event, consider that Professor Brouwer is far better placed to opine on the likelihood of prosecution given his greater practical experience of criminal law and dealings with the DPPO as a practitioner, as opposed to Professor Nelemans' experience as an academic.

220. Finally, I would only add by echoing the view expressed by other judges before me that where (as here) the parties' experts express different views as to the risk of prosecution it does not follow from disagreement that there is a "real risk" of prosecution, and indeed to the contrary, there is force in the view that prosecution is relatively unlikely if there is real doubt about the law. As Sir Nigel Teare stated in *O v* C at [22(iv)], quoting Henshaw J in *PIFFS* at [156]]:-

> "Where the parties' experts express a different view about the risk of prosecution, the Court should exercise care when approaching the issue of foreign law, but it does not follow from

> the disagreement that there is a 'real risk': "[*t*]*o the contrary, there is force in the view that prosecution is relatively unlikely if there is real doubt about the law*": [PIFFS] at [156] per Henshaw J".

G.11 Conclusion

221. For all the above reasons I do not consider that there is any risk of prosecution under section 184(1) of the DCC, still less a real, or actual, risk of prosecution.

222. Strictly speaking, it suffices for me to find (as I do find) that Glencore has not discharged the burden that is upon them to prove that there is a real risk of prosecution.

223. In such circumstances, stage 3 and the balancing exercise is not reached, and the Glencore Disclosure Application stands to be dismissed.

224. However, as I have heard full argument on stage 3, and lest there be any possibility of a violation of the DCC, and any risk of prosecution, I will also address stage 3 for completeness.

H. STAGE 3 – THE BALANCING EXERCISE

H.1 Preliminary Observations

225. As is noted in *Hollander, Documentary Evidence* (15th ed.) at paragraph 7-30, "It is notable that in most of the cases, the court has refused to vary the disclosure order because of the risk of foreign law incrimination". One reason for this may well be, as observed in *Morris* at [73], that:-

> "[T]he Court should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved, as the question of discovery and inspection is a question of procedure which, under international law, is to be determined in accordance with the lex fori".

226. As a further preliminary point, clearly if there is no real risk of prosecution (as I have found), the risk of prosecution will carry little, if any, weight. Equally, the smaller or less significant the risk (even if it surmounts the threshold of being a "real risk"), the less weight it will be given in the balance (see *Tugushev* at [34]).

227. In what follows I have assumed that there is (contrary to my findings above) a real risk of prosecution. I do so solely to illustrate the outcome if one were to get to the stage of performing the balancing exercise having concluded that there was a real risk of prosecution. For the reasons set out below I am satisfied that even on this (hypothetical) scenario the balance comes down in favour of dismissing the Glencore Disclosure Restriction Application and maintaining disclosure and inspection (as applicable).

H.2 The Importance of the Documents for the Fair Disposal of the English Proceedings

228. The Claimants submit that the three FIOD documents are both relevant and important for the fair disposal of the English Proceedings. This is addressed in the second witness statement of Elaina Bailes (see in particular Bailes 2 at paragraphs 29-33, 43 and 48).

229. In Tolaini 7, Mr Tolaini of CC identified (as already addressed) that the investigations in the Netherlands were led by the DPPO and executed by the FIOD. The investigation was directed to GIAG as of 2019, and first made known to GIAG in 2021. The investigation was dismissed on or around 5 August 2024 (the "DPPO Glencore Investigation"). Mr Tolaini explains that the DPPO Glencore Investigation was similar in scope to the "OAG Investigations" conducted by the Swiss authorities. In that regard, the "Concluded OAG Investigations" (as defined in Tolaini 7 at paragraph 99) ended, as already noted in a summary penalty order by the Office of the Attorney General on 5 August 2024 (the "Swiss Order"). Under the Swiss Order, GIAG was held criminally liable for failing to take all necessary reasonable and organisational measures to prevent the bribery of a Congolese public official by its business partner in 2011 and ordered to pay a fine of CHF 2 million and a compensation claim of US$150 million. While GIAG did not admit the findings, it agreed not to appeal the Swiss Order, which became final on 15 August 2024.

230. On the basis of (amongst other things) the Swiss Order, the Claimants aver, at paragraphs 27, 29 and 40A of their Re-Amended Consolidated Particulars of Claim (the "RACPOC"), that: Mr Gertler paid bribes of approximately $10 million to Mr Mwanke in 2011 in relation to certain significant transactions in the DRC; that Mr Gertler was acting in the interests of the Glencore Group when making those payments; and that Glencore ought to have been aware of the very high risk of bribery in the DRC generally and in relation to Mr Gertler and these transactions in particular.

231. As already noted, the DPPO Glencore Investigation was dismissed on the same day as the conclusion of the Concluded OAG Investigations (i.e. 5 August 2024), on the basis that (in summary) GIAG was a Swiss company and criminal proceedings in Switzerland were therefore preferable, the Swiss Order meant that it was no longer appropriate for the DPPO Glencore Investigation to continue.

232. Ms Bailes submits, I consider with some force, that in the circumstances, it is clear that the DPPO Glencore Investigation concerned issues, facts and matters which are of significant importance to the Co-Managed Claims. The RACPOC set out, at Section B1, a detailed case of serious wrongdoing by Glencore in relation to the DRC, and then make serious allegations of knowledge against relevant Glencore individuals. Further, the RACPOC expressly rely on (a) the DPPO Glencore Investigation and (b) the Swiss Order resulting from the Concluded OAG Investigations, in support of the Claimants' pleaded case in relation to DRC matters.

233. CC, in a letter dated 15 April 2025, explained (at paragraph 3(a)) that the three FIOD Documents consisted of two police reports (procesverbaal) and a presentation slide deck, all of which had been prepared by the FIOD. The Claimants submit (as identified in Bailes 2) that this further supports the natural inference that these documents are significant and important documents which will be relevant to the determination of the claims in the current proceedings. It is notable that subsequent statements of Mr Tolaini (Tolaini 7 and Tolaini 11) did not suggest to the contrary, nor was any such suggestion made in CC's letter of 15 April 2025.

234. This is to be contrasted, for example, with Glencore's clear position on the alleged irrelevance and peripheral nature of the OAG AP Documents (see Tolaini 7, at paragraph 105). Glencore has not engaged in a similar exercise in relation to the FIOD Documents.

235. Glencore now suggests (at paragraph 10 of Glencore's Skeleton) that the FIOD Documents "do not seem likely to be of particular significance to the English proceedings, still less of such importance as to outweigh the risks".

236. This new assertion causes me some concern. First, this is the first time that such an assertion has been made. Secondly, the basis for such assertion is unclear. Thirdly, it is far from clear how Glencore and CC even feel able to make such assertion given that, on the evidence, Glencore and CC have not even seen the documents. In this regard, both Glencore and CC have confirmed that they have not themselves seen the documents - see CC's letter dated 15 April 2015 at [3], "we understand from De Brauw that they cannot share any specific information about the contents of…the FIOD Documents". Nor does the position seem to have changed since given that Mr Tolaini, in Tolaini 11 at paragraphs 56 to 57, referred to this letter without any suggestion that the position had changed.

237. The assertion that the documents, "do not seem likely to be of particular significance to the English proceedings, still less of such importance as to outweigh the risks" seems, in such circumstances, to not only be a bare assertion, but also one that is devoid of any proper evidential basis.

238. It is supplemented by an assertion that under consideration are "only three documents" in comparison to the very large numbers of documents in many of the cases that are referred to, and to the very large number of documents that Glencore already has, and will hereafter, disclose as part of the disclosure exercise. The suggestion seems to be that it is unlikely that three documents should happen to be relevant and important documents. But that is a non-sequitur for a number of reasons:-

    (1) Just because very large numbers of other documents have been disclosed or will be disclosed does not mean that all relevant (and important) documents have been disclosed.

    (2) Secondly an individual document (or documents) may well be the "smoking gun" in the context of allegations of bribery and knowledge of Glencore executives, or lead to such documents.

(3) Thirdly, these are documents produced by the FIOD from their investigations (and so are in a category of their own). It does not follow that these will necessarily be documents that Glencore has amongst its own documents.

(4) Fourthly, by their very nature (relating as they do to the Dutch Investigation into the bribery in the DRC) they are likely to be relevant (and potentially highly relevant) to the claims advanced by the Claimants in the English Proceedings.

239. In such circumstances, I pressed Mr Hill KC in the course of his oral submissions as to how Glencore could assert that these documents "do not seem likely to be of particular significance to the English proceedings". This caused Mr Hill KC to change tack somewhat in his oral submissions (on 22 May 2025 Day 3), to submit that Glencore's position was that the documents are not likely to be "incrementally significant", which on Day 4 (27 June 2025) he clarified as meaning, "adding anything of significance". When I pressed him as to how he could say that the documents are not likely to be "incrementally significant" or "adding anything of significance" given that neither Glencore, CC, nor he had seen them, he said, "All I can say is it seems unlikely", and "it looks like that these are high level, early stage documents". I have to say that such exchanges evidence, if nothing else, that Glencore and those acting for them simply do not know what those documents contain, and to suggest that the Dutch were "piggy-backing" on the Swiss investigation does not mean that the Dutch were not conducting investigations of their own, and putting the product of such investigations into their reports.

240. Mr Onslow KC also makes what I consider amount to two potentially valid points about the "incrementally significant" point. First, that this amounts to an acceptance that the documents are, or may well be, significant in their own right (certainly that is a realistic position to take) and, secondly, the stance of Glencore and those acting for them is pure speculation, as they have not even tested their assertions with De Brauw (who have seen the documents), no doubt due to confidentiality reasons. The reality is that Glencore are simply not in a position to opine about such matters. It is therefore the second point which is the more fundamental, and powerful – Glencore simply cannot say whether they are significant or not – they have not seen them.

241. If one stands back, there is not even a safe basis for Glencore's speculation. First, there is no basis to assume that the Swiss investigation and penalty order were based on exactly the same evidence as that before the Dutch investigators. Secondly, there is no basis to assume that the Dutch Investigation was limited only to reviewing documents provided by Glencore. That, in of itself, seems inherently unlikely and improbable. It is known, for example, that the Dutch investigators attended Mr Glasenberg's interview by the Swiss OAG, and it seems unlikely that this is all they did.

242. In such circumstances, the unchallenged evidence is that of Ms Bailes. As she summarises, the Dutch Investigation has "focused on possible bribery of high-ranking officials in the Democratic Republic of the Congo (DRC), to obtain cobalt and copper mining licenses". I am satisfied that these are central issues

in this litigation given that it is Glencore's case that there was no DRC Corrupt Arrangement and no knowledge of the same. For the reasons she identifies, I consider that the documents are likely to be important and significant in the case.

243. I would only add that as is clear from the *EuroChem* case itself, which concerned a single document, an individual document can, in and of itself, be important. I consider this to be particularly so in the context of documents generated by an investigating authority themselves as even at an early stage, this may show the product of "all their own work" and may also deliberately do so whether that be a police report or (as in the context of the Glasenberg Disclosure Restriction Application) a request for mutual legal assistance which will, as will be addressed in relation to that application, by its very nature, be required to contain as detailed a description of the facts as possible, and address the criminalisation of the act in both jurisdictions.

244. I consider that the likely importance and significance of the FIOD Documents weighs very heavily in the balance (in reality overwhelmingly so given the limited risk of prosecution even if there were, contrary to my findings, a real risk of prosecution).

245. There are then comity considerations. I consider that these also weigh heavily in the balance and in favour of disclosure at stage 3 (as well at stage 2). This Court can, and should, reasonably expect that considerations of comity will influence the foreign state (here the Netherlands) in deciding whether or not to prosecute Glencore or Mr Glasenberg (see *Bank Mellat* at [63(vi)]) not least given that the whole purpose of disclosure and inspection is to further the fair trial of English proceedings which are themselves concerned with alleged international bribery and corruption, the prevention of which is no doubt a shared goal in both jurisdictions.

246. Yet further, and again weighing heavily in the balance and in favour of disclosure, is that this Court can and will craft its Order (including the recitals thereto) in a manner which will reduce, so far as possible, any risk of exposing Glencore or Mr Glasenberg to prosecution, and I am satisfied that an Order in the terms of Annex A hereto (as finalised upon hand down) will further that aim, and is likely to do so.

247. Equally, I consider that the Confidentiality Club that I will impose, will ensure that the documents are not publicly available, and will go some considerable further way to ensure that disclosure will not impede the ongoing Dutch investigation.

248. For all the above reasons I consider that undertaking the balancing exercise between (i) the risk of prosecution in the Netherlands (even if such risk is real, in contradistinction to my findings) and (ii) the importance of the documents of which inspection is ordered to the fair disposal of the proceedings (coupled with the comity considerations and the terms of the Order I propose), the later far outweighs the former.

249. Accordingly, Glencore's disclosure obligations in the English Proceedings in relation to the FIOD Documents remain, and the Glencore Disclosure Restriction Application is dismissed.

I. THE GLASENBERG DISCLOSURE RESTRICTION APPLICATION

I.1 Introduction

250. The Glasenberg Disclosure Restriction Application concerns Mr Glasenberg's application to withhold inspection of one document, the MLAT Request. Such letters of request for mutual legal assistance are inter-governmental documents setting out a request for investigative information or other legal assistance. The MLAT Request at issue in the present case was made by the DPPO and the FIOD to seek mutual legal assistance from the Swiss OAG and was dated 3 November 2023. I have already set out details of the Dutch Investigations in Section B.4 (paragraphs 59 to 63 above).

251. As already foreshadowed (at paragraph 64 and following above), but as will be repeated at this point for ease of reference, Mr Glasenberg's involvement in the Dutch and Swiss investigation into GIAG was as an interviewee. As explained in paragraphs 11 and 12 of the first witness statement of Ms Osborne (Osborne 1):-

    (1) Mr Glasenberg was interviewed by the Swiss OAG on 27 to 29 September and 3 November 2023, with a financial investigator from the FIOD in attendance.

    (2) On 3 November 2023, the DPPO/FIOD made the MLAT Request of the Swiss OAG seeking legal assistance in relation to the Dutch authorities' investigation into GIAG and other suspects.

    (3) On 12 April 2024, Mr Glasenberg's solicitors were informed that his Swiss counsel had received a copy of the MLAT Request from the Swiss OAG, apparently for the purpose of giving Mr Glasenberg an opportunity to object to copies of his interview statements being provided to the Dutch authorities pursuant to that Request.

252. It was as a result of the Swiss OAG providing Mr Glasenberg's Swiss counsel with a copy of the MLAT Request that it came to be within Mr Glasenberg's control. It is not a document that he created or to which he was a party, and the reason he has a copy is because the Swiss OAG wanted to afford him due process before providing his interview statements to the DPPO/FIOD thereunder.

253. As the MLAT Request is within his control in the circumstances described, Mr Glasenberg considers the MLAT Request to be a document falling within his disclosure obligations under the CMC2 Order and he duly identified it in his first disclosure certificate.

254. As regards inspection, his solicitors sought permission from the Swiss OAG and the DPPO/FIOD to provide the MLAT Request to the Claimants. The Swiss

OAG confirmed it had no objection to that. However the DDPO/FIOD did object in the correspondence that is addressed below. This led to Mr Glasenberg making the Glasenberg Disclosure Restriction Application.

I.2 The Correspondence with the DPPO

255. On 20 January 2025 Mr Glasenberg's lawyers (Steptoe International(UK) LLP) emailed Ms Schaafsma (Senior Public Prosecutor at the DPPO) seeking the DPPO's consent. Its terms are instructive (in terms of the recognition as to why disclosure was required in the English Proceedings). The email provided, amongst other matters as follows:-

> "As you may be aware, this firm represented Mr. Ivan Glasenberg in relation to the criminal investigations by the Swiss OAG, UK SFO and your offices into the activities of Glencore. Together with my colleagues Reid Weingarten and Brian Heberlig, I attended the various interviews of Mr. Glasenberg by the OAG and SFO (at which Mr. Arjan Meijer was also in attendance) in September 2023, November 2023 and March 2024. This firm is also instructed by Mr. Glasenberg to defend civil claims that have been commenced in the English High Court against Glencore and Mr. Glasenberg (and others), by various former and current shareholders of Glencore.
>
> In relation to the civil litigation in the English High Court, Mr. Glasenberg is required to disclose to the Claimants: (a) documents on which he relies and any documents that adversely affects his own case or support the Claimants' case, and (b) which have been or are within his control, except where the documents are privileged. As part of Mr. Glasenberg's obligations in the UK civil proceedings, we have identified a number of documents relating to his interviews with law enforcement that need to be disclosed to the Claimants (including, for example, the audio recording of his interview with the UK SFO in March 2024). We are in contact with both the Swiss OAG and UK SFO to seek their respective permissions to disclose the relevant documents to the Claimants.
>
> **The reason that we are writing to you is that we have also identified the attached request from your office which we consider is disclosable to the Claimants**. We should be grateful for your confirmation that you have no objection to our disclosing the attached letter to the Claimants. If you do object, we will be required to make an application to the English High Court and seek its permission to withhold the document. **If you object, it would accordingly be very helpful if you could set out the reason for your objection and any legal basis for refusing disclosure**. For the sake of completeness, we have also provided advance notice to the Swiss OAG of Mr. Glasenberg's disclosure obligations as set out above. The OAG has stated that it has no

> objections to Mr. Glasenberg providing disclosure of the attached letter".
>
> (emphasis added)

256. It will be seen that it was specifically requested that if the DPPO objected it would be very helpful if they could set out the reason for the objection and any legal basis for refusing the disclosure. Given that the request was being made to the Dutch prosecutor one might reasonably expect any response to identify if the DPPO considered that disclosure would violate any provision of the DCC.

257. Ms Schaafsma did not immediately respond, and on 29 January 2025 Steptoe International (UK) LLP chased the DPPO for a response in these terms:-

> "With apologies for following up, we wonder whether you have had the time to consider our request and, if so, whether you have any objection to our disclosing the attached document to the Claimants in the U.K. civil litigation, please? If you do object, we will need to prepare an application in the next week to the English High Court to vary our client's disclosure obligations, **which will also need to set out the basis upon which you object for the English High Court's consideration**".
>
> (emphasis added)

258. It is now known, of course, as is common ground between the experts, that the DPPO/FIOD has no power to give its consent (even if it wished to do so). In the event Ms Schaafsma declined to give the DPPO's consent in similar (though even shorter) terms than in the correspondence with Glencore, in a response the same day (29 January 2025):-

> "My apologies for this late response. I do object to the disclosure of our Mutual Request for Legal assistance to the Claimants in the U.K. civil litigation. The criminal investigation is still ongoing in the Netherlands with regard to other suspects. Therefore sharing information from our investigation could be detrimental. Furthermore, the Dutch Judicial Data and Criminal Records Act does not provide a basis for sharing this information. I hope this provides sufficient information to object to the requested disclosure.
>
> Kind regards,
>
> Annemarie Schaafsma
>
> Senior Public Prosecutor Dutch National Prosecutors' Office for serious fraud, environmental crime and asset confiscation Anti-corruption division".

259. The two reasons given for the objection are therefore (1) that, "the criminal investigation is still ongoing in the Netherlands with regard to other suspects"

and "sharing information from our investigation could be detrimental", and (2) that "the Dutch Judicial Data and Criminal Records Act does not provide a basis for sharing this information".

260. Although expressed more briefly, these are the same two reasons given by the DPPO/FIOD to Glencore in respect of its request for permission to disclose certain other DPPO/FIOD documents on 15 October 2024 (as already addressed above in Section F.1), namely that, because "the investigation into the co-suspects has not yet been completed, there is a risk of harm to the criminal case" and the DJDCRA "does not include a ground for such provision or passing on".

261. It is clear, therefore, that the DPPO is treating the Glasenberg request in exactly the same way as the Glencore request and for the same reasons. There is, therefore, no reason to distinguish between the two in terms of the attitude of the DPPO to any disclosure in the English Proceedings. As in relation to the Glencore request, the DPPO does **not** suggest that disclosure in the English Proceedings would amount to any violation of **any provision** of the DCC.

262. As Glencore has redacted the identity of the individual(s) at the DPPO responding to Glencore, their identity is not known. However, Mr Glasenberg has not redacted the identity of Ms Schaafsma or her role (Senior Public Prosecutor Dutch National Prosecutors' Office for serious fraud, environmental crime and asset confiscation Anti-corruption division). It would be remarkable if someone in that role would not have stated if the DPPO considered that disclosure in the English Proceedings would violate any provision of the DCC given her knowledge of what Mr Glasenberg was proposing to do, and given the express request to identify any legal basis for refusing disclosure.

263. In this regard, and as Professor Nelemans acknowledges (and I do not understand Mr Glasenberg to suggest to the contrary) there is no reason to consider that the position of the DPPO in relation to section 184(1) and the MLAT Request would be any different to that in relation to the FIOD Documents and so each of Glencore and Mr Glasenberg would have the same affirmative defences in case of prosecution. As Professor Nelemans states in Nelemans 1 at paragraph 137 (only to backtrack viz the chance of affirmative defences succeeding in Nelemans 2):-

> "137. If Mr Glasenberg were to disclose the MLAT Request, ignoring the DPPO's objection, there is a chance that this would result in a violation of the second part of section 184 DCC. The DPPO may conclude that a disclosure by Mr Glasenberg intentionally hinders its investigation or specific investigative actions. A complicating factor for the DPPO is that it has stated that the disclosure of the information from the criminal file does not result in a contravention within the meaning of section 184 DCC. If this is the DPPO's position as regards information from the criminal file, **it is likely that the same position applies to the MLAT Request since I assume that it contains background information on the investigation and partly concerns information from the FIOD**. At least, the ambivalence of the DPPO's statement would make it more difficult for the DPPO to

> prosecute under section 184 DCC as it allows for the defence of absence of any culpability (also known as an AVAS-defence) and reliance on the earlier statements by the DPPO on the absence of applicability of section 184 DCC. **Even though the DPPO has not directly indicated this to Mr Glasenberg's counsel, the DPPO's position is known to Mr Glasenberg and its counsel (and there are no reasons to assume that the DPPO would take a different position in relation to section 184 DCC if Mr Glasenberg were to raise the same question to the DPPO**) and therefore provides a compelling argument to support an AVAS-defence".
>
> (emphasis added)

264. I agree that it is an appropriate assumption that the DPPO would take the same position in relation to the MLAT Request as the FIOD Documents (and I do not understand Mr Glasenberg to submit otherwise), and the position that it has expressed is that it does not consider that disclosure of the same would constitute a violation within the meaning of section 184(1) of the DCC. As addressed below, my conclusions as to whether an offence would be committed under section 184(1) and as to the risk of prosecution under section 184(1) are accordingly the same in relation to the MLAT Request as the FIOD Documents.

I.3 Conclusion on any Violation of Section 184(1) of the DCC by Mr Glasenberg

265. I repeat Section F above. I do not consider that Glencore and Mr Glasenberg have demonstrated that disclosure of the documents (the three documents and the MLAT Request) in the English Proceedings would constitute a violation within the meaning of section 184(1) whether under the first or second limb. I would go further than that. I consider that in their 14 February email, the DPPO are confirming that their view is that the sharing of the information from the criminal file does not constitute a violation within the meaning of section 184 of the DCC. Given that the DPPO are the relevant prosecuting authority, I consider that this is the best possible evidence that disclosure will not involve a breach of section 184(1) of the DCC (whether under the first or second limb), and I so find.

266. Accordingly, as a matter of Dutch law, I do not consider that disclosure of the three FIOD Documents and the MLAT Request would amount to an offence under the second limb of section 184 of the DCC, and that is consistent with the approach of the DPPO in relation thereto (stage 1).

I.4 Is there a Real (Actual) Risk of Prosecution of Mr Glasenberg under Section 184(1) of the DCC?

I.4.1 Factors common with Glencore

267. I repeat Section G above. I consider that all the factors I identified in Section F as to why there is no real (actual) risk of prosecution of Glencore under section 184(1) apply mutatis mutandis in relation to Mr Glasenberg and any prosecution of Mr Glasenberg under section 184(1).

I.4.2 Factors specific to Mr Glasenberg

268. I do not consider that there are any factors specific to Mr Glasenberg that either increase, or reduce still further (if that was possible), the risk of prosecution.

269. In this regard I have considered whether any violation of section 272 of the DCC by Mr Glasenberg, and any risk of prosecution of Mr Glasenberg thereunder, would increase the risk of a prosecution of Mr Glasenberg under section 184(1). I do not consider that it would, not least given the DPPO's expressed view on section 184(1). The point is, however, academic, as is addressed in due course below.

I.4.3 Conclusion on Risk of Prosecution

270. For the reasons set out in Section G (and Sections I.4.1 and I.4.2 above), I do not consider that there is any risk of prosecution of Mr Glasenberg under section 184(1) of the DCC, still less a real, or actual, risk of prosecution. Strictly speaking, it suffices for me to find (as I do find) that Mr Glasenberg has not discharged the burden that is upon him to prove that there is a real risk of his prosecution under section 184(1).

271. Whilst the balancing exercise at stage 3 does not arise in such circumstances, I will consider such balancing exercise (as I did in the case of Glencore). However, it is convenient to do so after having first addressed section 272 of the DCC.

I.5 Section 272 of the DCC

272. Section 272 of the DCC criminalises "a person who intentionally violates any secret which he knows or should reasonably suspect that he is obliged to keep by virtue of … statutory provisions". The statutory provisions referenced therein refer to section 52 of the DJDCRA and section 7 of the DPDA.

273. Section 52 of the DJDCRA provides that "… anyone, who by virtue of this act, gains access to data regarding a third party is obliged to maintain confidentiality, except insofar as a regulation given by or pursuant to this act permits communication, or the execution of the task for which the information was provided necessitates communication thereof".

274. It is common ground that section 52 of the DJDCRA does not apply to Mr Glasenberg because he is a secondary recipient of criminal justice information - the MLAT Request was first sent to the Swiss OAG and only then received by Mr Glasenberg.

275. Section 7 of the DPDA provides that "… **the person to whom police data has been provided** is obliged to maintain confidentiality, except insofar as a regulation given by or pursuant to the law requires disclosure or his duties necessitate such disclosure" (emphasis added).

276. It is common ground that if the MLAT Request contains criminal justice information to which the DJDCRA applies and/or police data to which the

DPDA applies, then section 272 of the DCC makes it a crime for the recipient of that information intentionally to disclose it in circumstances where the recipient knows, or reasonably suspects, that they are bound by these statutory confidentiality provisions (unless one of the stated exceptions applies).

I.5.1 Correspondence with the DPPO

277. I have addressed the correspondence with the DPPO in section I.2 above. Whilst the DPPO did not address section 272 of the DCC, in addition to addressing section 184(1) of the DCC in its correspondence with Glencore, I do not consider there is any reason to assume that the DPPO considers that disclosure of the MLAT Request would violate section 272 of the DCC. Certainly, it has not expressed any such view, and the DPPO would surely have done so in its response of 29 January 2025 if it had considered that the disclosure of the MLAT Request in the English Proceedings would violate any provision of the DCC, including section 272 thereof.

I.5.2 The Views of the Experts on Section 272

I.5.2.1 Professor Nelemans – Nelemans 1

278. The gist of Professor Nelemans' opinion in Nelemans 1 is that disclosure of the MLAT Request would be a violation of section 272 of the DCC because of the duty of secrecy under section 7 of the DPDA (see Nelemans 1 at paragraph 138).

279. Professor Nelemans starts his analysis by distinguishing between three types of documents to demonstrate how different confidentiality regimes apply. In this regard:-

> "(a) The FIOD Documents have been produced by the FIOD to the DPPO. Hence, both the FIOD and the DPPO are in possession of the FIOD Documents. The DPPO (as a processor of data) will have to comply with the DJDCRA and the FIOD (as a processor of data) has to comply with the DPDA. **Any disclosure by the DPPO to the suspect further to section 30(1) DCCP would not contravene section 7 DPDA (and section 52 DJDCRA) as this is a disclosure pursuant to the DCCP and not the DPDA (or the DJDCRA). It also means that the suspect and its counsel are not subject to the confidentiality obligations in section 7 DPDA (and section 52 DJDCRA).** In paragraphs 123-124, I refer to a case in which a Dutch lawyer has been prosecuted for sharing police data with a third party, another suspect in the case (by having the other suspect listening in on an interrogation with the DPPO). This was considered a violation of section 7 DPDA. The information in that case, however, was not provided by the DPPO to the lawyer and its client, but by the police itself.
>
> (b) The DPPO/FIOD Correspondence contains email correspondence and is thus held by the two organisations (DPPO and FIOD), GIAG and its counsel. The DPPO (as a processor of the data) will have to comply with the DJDCRA and the FIOD

> (as a processor of data) has to comply with the DPDA. The DPPO/FIOD Correspondence contains email communications and do not fall under the regime of section 30(1) DCCP (as also indicated by the DPPO to GIAG and its counsel). Accordingly, the DJDCRA and DPDA are applicable to this information. It also means that GIAG and its counsel are subject to confidentiality obligations in section 7 DPDA (and section 52 DJDCRA). In this context, I refer to the case discussed in paragraphs 123-124, in which a Dutch lawyer has been prosecuted for sharing police data in violation of section 7 DPDA.
>
> (c) The MLAT Request has been produced by the DPPO and includes information on the investigation, meaning that it also includes information from the FIOD. The DPPO (as a processor of information) will have to comply with the DJDCRA and DPDA. This MLAT Request has been sent to the Swiss Public Prosecutor. **It was not received by Mr Glasenberg on the basis of the DCCP but Mr Glasenberg is subject to the confidentiality obligations in section 7 DPDA**".
>
> (emphasis added)

280. I make the following initial observations in respect of the above:-

(1) First, and to foreshadow the discussion below of Professor Brouwer's report, it appears at the time of this report, Nelemans 1, that Professor Nelemans appeared to have had the same understanding as Professor Brouwer of the legislative scheme. In other words, Professor Nelemans was also of the opinion that if disclosure is transmitted pursuant to the DCCP, then the DJDCRA and DPDA do not apply and thus section 7 is not engaged.

(2) Second, in his oral submissions, Mr Lodder noted that section 30(1) of the DCCP, which is the right of a suspect to access the documents on the case file, is to be regarded as *sui generis*. When I pressed Mr Lodder, he accepted that Mr Glasenberg did not receive the MLAT Request by virtue of the right of a suspect to receive a case file.

(3) Third, the last sentence of paragraph 79(c), states that the MLAT Request was not received by Mr Glasenberg on the basis of the DCCP. In fact it appears that the MLAT Request was provided to the Swiss authorities under section 5.1.2(1) and (3) of the DCCP, and was then provided by the Swiss authorities to Mr Glasenberg (it appears under their obligations under Swiss law).

(4) Fourth, Professor Nelemans' conclusion in paragraph 79(c) that "… Mr Glasenberg is subject to the confidentiality obligations in section 7 DPDA" is a bare assertion; there is no engagement or reason provided for why it is that section 7 applies.

281. Professor Nelemans takes the position that section 7 of the DPDA applies to any recipient of police data and not only the first recipient (see Nelemans 1, paragraph 113): "section 7 of the DPDA applies to any recipient of the information". The only support for this conclusion is footnote 34, which provides an observation of the Minister of Justice in the Explanatory Memorandum to the bill submitted to Parliament which provides:-

> "The premise of the article is that everyone is obliged to maintain confidentiality when given access to police data relating to third parties. This applies not only to persons who are charged with processing police data or who have received the data directly from the police, but also to any second and subsequent recipients who have received the data. They are also bound by a duty of confidentiality. This means that, subject to the exceptions discussed below, the obligation of confidentiality arising from this article precludes the provision of the data".

282. Whilst Mr Lodder stated that such statements are said to carry weight in construing the meaning of Dutch acts, that is not, in and of itself, in any way determinative of the proper construction of a section of a Dutch statute.

283. Professor Nelemans states that a person that has been provided with police data is obliged to keep the data confidential, and that in relation to the filed documents, section 30(1) of the DCCP overrides this obligation. In this regard:-

> "Since the FIOD Documents, DPPO/FIOD Correspondence and the MLAT Request contain information from the FIOD, the confidentiality obligation in section 7 DPDA is relevant. Section 7(2) DPDA reads as follows: '*The person to whom police information has been provided is obliged to keep it confidential except insofar as a rule given by or under the law requires disclosure or his duty requires it.*'
>
> According to this section, the person to whom police data has been provided (i.e. the DPPO) is obliged to keep the data confidential, except to the extent that a rule given by or under the law requires disclosure or his duty requires this.
>
> …
>
> Where it concerns the FIOD Documents, it is noted that information provided by the DPPO to the suspect under section 30(1) DCCP is accordingly not subject to the duties of confidentiality in the DJDCRA and DPDA. The DCCP does not provide a separate confidentiality obligation for the suspect".

284. At this point I would only foreshadow that the reference to section 30(1) of the DCCP, which is then expanded on in Nelemans 2, does not engage with the fact that the MLAT Request was provided to the Swiss authorities pursuant to section 5.1.2 of the DCCP (or as to the circumstances in which the Swiss authorities then provided it to Mr Glasenberg's lawyers).

I.5.2.2 Professor Brouwer

285. Professor Brouwer's opinion is that there cannot be a breach of section 7, and thus a violation of section 272, because the MLAT Request was never provided in that context. The MLAT Request was provided to the Swiss authorities under section 5.1.2(1) and (3) of the DCCP and therefore the DPDA does not apply at all to the subsequent recipient thereof (Mr Glasenberg).

286. In this regard:-

> "**111. As to the MLAT Request: section 5.1.2., paragraphs 1 and 3 DCCP read, insofar as relevant here**:
>
> > '1. The public prosecutor, the examining magistrate and the court of first instance handling a criminal case **are authorised to submit a request for legal assistance to the authorities of a foreign state**'
>
> "112. From this section, it is apparent that the MLAT Request was also provided to the Swiss authorities on the basis of the DCCP – and not on the basis of the DJDCRA or the DPDA. The further transfer of the MLAT Request by the Swiss prosecutor to Mr Glasenberg then followed pursuant to provisions of Swiss law – and therefore also not on the basis of the DJDCRA or the DPDA. From this it is apparent, in my opinion, that the MLAT Request has not been provided to Mr Glasenberg pursuant to the DJDCRA or the DPDA and thus section 7 DPDA and section 52 DJDCRA do not apply".
>
> (emphasis added)

287. Professor Brouwer opines that, "there can be no doubt that the MLAT Request was provided to the Swiss authorities on the basis of section 5.1.2.(1) and (3) DCCP" (see Brouwer 1, paragraph 128). Accordingly, he concludes that the confidentiality obligations under the DJDCRA and the DPDA do not apply to the MLAT Request.

288. In this regard Professor Brouwer also referred to a decision by the Dutch Supreme Court, including the following:-

> "3.2.2 **The DPDA regulates the processing of police data obtained in the context of the execution of police duties**. The processing of data is also understood to include the provision of such data (section 1, under c, DPDA). In the DPDA, the possibility of providing police data is not limited to authorities with a public task. The DPDA also allows for the provision of data to private persons and organizations in the interest of a compelling public interest".
>
> …

> "3.2.3 Section 7, paragraph 1 of the DPDA contains a duty of confidentiality and stipulates that the police officer or the person to whom police data has been made available is obliged to maintain confidentiality. Therefore, anyone who gains access to data relating to a third party pursuant to the DPDA may not pass on the data obtained".
>
> (emphasis added)

289. Professor Brouwer addresses the position taken in Nelemans 1 that section 7 DPDA applies to any recipient of police data. He starts by pointing out that section 7 of the DPDA "does not contain the sentence 'Anyone who, by virtue of this act, gains access…', unlike section 52 of the DJDCRA (which both experts agree does not impose confidentiality obligations on subsequent recipients). Professor Brouwer notes that the same and the Explanatory Memorandum (which I cited above) are "indeed arguments for the position taken in Nelemans 1 [113] that section 7 DPDA would apply to any recipient of police data – not only the first recipient".

290. He then goes on to say that "it is my opinion that there are arguments in favour of a different interpretation that leads to a more restricted scope of section 7 DPDA" (see paragraph 76 of Brouwer 1). He bases this on four arguments: (1) Nelemans 1 unsubstantiated construction of section 7 DPDA; (2) the far reaching consequences of the proposed construction of section 7; (3) further context to the Explanatory Memorandum; (4) case law of the Dutch Supreme Court (as quoted above).

291. In this regards Professor Brouwer opines as follows:-

> "77. First, it should be noted that the reasoning in Nelemans 1 constructing the meaning of section 7 DPDA is not very explicit, not very clear and not complete. More specifically, Nelemans 1 does not discuss other significant differences in the texts of section 52 DJDCRA and section 7 DPDA and does not reflect on the meaning of these textual differences in light of the interpretation of section 7 DPDA that is being put forward. In my opinion, there is ample reason to do so.
>
> 78. Section 52 DJDCRA holds, inter alia that "anyone who, by virtue of this act, gains access to data etc." In contrast, section 7 DPDA reads: "The person to whom police data has been provided etc.". On the basis of these differences it is apparent that the strict text of section 7 DPDA does not limit the confidentiality obligation to data that has been provide pursuant to the DPDA, or by virtue of the DPDA. Taken literally, the text of section 7 DPDA would therefore also apply to police data that has not been provided pursuant to the DPDA. This means that a literal reading of section 7 DPDA must lead to the result that also police data that is incorporated in information that has been provided on the basis of other Acts – e.g. section 30(1) DCCP – would fall under the confidentiality obligation of section 7 DPDA.

79. However, Nelemans 1 does not draw that conclusion. Nelemans 1 [79(a)] confirms that under Dutch law the suspect and his counsel are not subject to the confidentiality obligation of section 7 DPDA with regards to the case file that has been provided pursuant to section 30(1) DCCP. I agree with this position, but cannot fail to note that, in choosing this interpretation of section 7 DPDA, Nelemans 1 diverges from the strict text of the Act without being explicit and without giving any reasoning for that divergence. Nelemans 1 therefore seems to introduce a limitation on the scope of section 7 DPDA, which appears to entail that the confidentiality obligation in that section only applies to police data that has initially been provided pursuant to the DPDA – or, alternatively, that the confidentiality obligation ceases to apply once police data is provided to a party on the basis of the DCCP.

80. If that inference is correct, it must then be noted that Nelemans 1 does not discuss this limitation, does not give any reasons for this limitation, and – more importantly – does not apply that limitation in a consistent manner. As will be discussed below, the MLAT Request has been provided to the Swiss authorities on the basis of section 5.1.2(1) and (3) DCCP – not under the DPDA. According to the limitation on the scope of section 7 DPDA that Nelemans 1 appears to introduce, the conclusion with respect to the MLAT Request should therefore be that the confidentiality obligation in section 7 DPDA does not apply. However, Nelemans 1 [136] comes to a different conclusion. This sheds doubt on the quality of the reasoning in Nelemans 1.

81. The second argument is that the interpretation of section 7 DPDA chosen in Nelemans 1 has such far-reaching, and sometimes even absurd consequences that I for myself would want to see more authority than just one paragraph in the Explanatory Memorandum of the Act to accept such an interpretation. However, Nelemans 1 does not support its far-reaching conclusion with caselaw or academic discussion.

82. Leaving aside for now the issue we addressed above – the implicit limitation that the confidentiality obligation in that section apparently only seems to apply to police data that has initially been provided pursuant to the DPDA – the text of section 7 DPDA, in connection with the quoted paragraph form the Explanatory Memorandum of the Act, would seem to support the position in Nelemans 1 that not only the first recipient, but also all subsequent recipients of police data are bound to secrecy.

83. If this were the correct interpretation of section 7 DPDA, there is no end to the confidentiality of information. No matter how many times police data would be passed on, the confidentiality obligation of section 7 DPDA must be deemed to apply and to continue to apply. It is apparent that this would lead to outcomes

that are difficult to accept as reasonable. Consider a scenario where a school is informed that one of their staff is suspected of sexually abusing pupils. In the Netherlands it is not uncommon for schools to organize an information meeting for parents to inform them about the police investigation. If only the father of a pupil would attend this meeting, and the confidentiality obligation of section 7 DPDA would apply to any recipient of police data, then the father would not be allowed to discuss any police data shared in the meeting with the mother of his child, with his wider family, with his lawyer, with a doctor or with the child's therapist. Similarly, if police data would be discussed in court during a public hearing, journalists present would be barred from publishing any police data that has been discussed in the trial.

84. It is my opinion that a legal interpretation of a statute that leads to such far-reaching results, must be doubted – and therefore should be convincingly supported with commensurate authority. I note that – apart from one paragraph I an Explanatory Memorandum, such authority is lacking in Nelemans 1. I further note that such authority is not available in the Dutch legal sphere.

85. A third argument relies on a different paragraph in the Parliamentary discussions on the DPDA. **When asked a question related to the scope of section 7 DPDA during the discussion of the bill in Parliament, the Minister of Justice did not refer to any subsequent recipients**:

'The members of the PvdA asked whether there is a duty of confidentiality on the part of the receiving third parties. This is indeed the case. Pursuant to Section 7 of the bill, the recipient is bound by an obligation of confidentiality, except insofar as a regulation given by or pursuant to the law requires disclosure or his task necessitates it. Furthermore, the recipient is bound by the specific privacy regulations that apply to the data processing he or she carries out for the further processing of the data within his or her own organization. This will usually be the Personal Data Protection Act. Under this act, personal data may not be further processed in a way that is incompatible with the purposes for which it was obtained." (My translation).'

86. For the fourth argument, I refer to case law of the Dutch Supreme Court. In the case already discussed above about the law firm suing the Dutch State (DPPO) for violations of attorney-client privilege, the State and its witnesses not only relied on the confidentiality obligation in section 52 DJDCRA but also on the confidentiality obligation in section 7 DPDA. As with section 52 DJDCRA, the Supreme Court rejected the argument that the confidentiality obligation of section 7 DPDA was accompanied by a right to refuse to give evidence (verschoningsrecht). This limitation to the confidentiality obligation of section 52 DJDCRA in disclosure proceedings discussed above (see para. 67-70)

> therefore equally applies to section 7 DPDA. The reasoning of the Supreme Court to arrive at this conclusion is, however, also of importance to the issue of the scope of the confidentiality obligation of section 7 DPDA, more specifically the question of whether the scope of section 7 DPDA substantially differs from other similar provisions, including section 52 DJDCRA".
>
> (emphasis added)

292. I do not consider Mr Lodder's criticism of Professor Brouwer's attempt at elucidating section 7 of the DPDA as justified. Professor Brouwer provided a clear opinion based on four detailed and analysed arguments as to the construction of section 7 of the DPDA, supported by case law as well as further detail regarding the Explanatory Memorandum. It is, perhaps, more telling that Professor Nelemans did not refer to the fact that the Minister of Justice did not refer to any subsequent recipients when asked a question related to the scope of section 7 of the DPDA. This somewhat undermines the views expressed by Professor Nelemans.

I.5.2.3 Professor Nelemans – Nelemans 2

293. Professor Nelemans maintains his views in Nelemans 2. Thus he states at paragraph 79(a):-

> "**The MLAT Request was not provided via section 30(1) DCCP, so the obligations under section 52(1) DJDCRA (to the Swiss authorities) and section 7 DPDA (to the Swiss authorities and Mr Glasenberg) apply**. So, disclosure of the FIOD Documents would not constitute a violation of section 272 DCC, while disclosure of the DPPO/FIOD Correspondence and the MLAT Request would constitute a violation of this section. As noted above, nevertheless, for each of the FIOD Documents, DPPO/FIOD Correspondence and the MLAT Request, it is my opinion that disclosure would in any case be a violation of the second part of section 184(1) DCC".
>
> (emphasis added)

294. However by this stage Professor Nelemans was fully aware of the contents of Professor Brouwer's report, including the fact that the MLAT Request was provided pursuant to section 5.1.2 of the DCCP, as can be seen from paragraph 62 in Nelemans 2, but he does not engage with the same (or Professor Brouwer's views in respect of the same):-

> "…
>
> b. **The MLAT Request was not provided via section 30(1) DCCP, so, as set out in Nelemans 1, paragraphs [134]-[136], it is my view that the obligations under section 52(1) DJDCRA and section 7 DPDA apply**, along with the corresponding sanctions for breach of those obligations under section 272 DCC.

> c. The Swiss authorities have received the information request from the DPPO and as a recipient of this information, there is a confidentiality obligation under the DJDCRA and the DPDA. **Brouwer 1 has not shown that these confidentiality obligations have been set aside on the basis of the DCCP, in particular sections 5.1.2(1) and (3) DCCP**".
>
> (emphasis added)

295. Whilst he seeks to deflect matters onto Professor Brouwer (when the burden is upon Mr Glasenberg to show any breach of section 272) it is Professor Nelemans who fails to engage with section 5.1.2(1) of the DCCP, which it will be recalled provides:-

> '1. The public prosecutor, the examining magistrate and the court of first instance handling a criminal case **are authorised to submit a request for legal assistance to the authorities of a foreign state**'
>
> (emphasis added)

296. Professor Nelemans fails to grapple with the fact that the MLAT Request was provided to the Swiss authorities on the basis of the DCCP, and not on the basis of the DJDCRA or the DPDA. The further transfer of the MLAT Request by the Swiss prosecutor to Mr Glasenberg then followed pursuant to provisions of Swiss law – and therefore also not on the basis of the DJDCRA or the DPDA. He does not justify why, in circumstances where the MLAT Request has not been provided to Mr Glasenberg pursuant to the DJDCRA or the DPDA either section 52 of the DJDCRA or section 7 of the DPDA applies. In this regard he also fails to recognise that any receipt by Mr Glasenberg is pursuant to the Swiss authorities discharging their own responsibilities towards Mr Glasenberg.

297. Professor Nelemans also does not expressly engage with what Professor Brouwer had stated at paragraphs 78 and 79 of his report in relation to section 52 of the DJDCRA and section 7 of the DPDA:-

> "78. Section 52 DJDCRA holds, inter alia that "anyone who, **by virtue of this act**, gains access to data etc." In contrast, section 7 DPDA reads: "The person to whom police data has been provided etc.". On the basis of these differences it is apparent that the strict text of section 7 DPDA does not limit the confidentiality obligation to data that has been provide pursuant to the DPDA, or by virtue of the DPDA. Taken literally, the text of section 7 DPDA would therefore also apply to police data that has not been provided pursuant to the DPDA. This means that a literal reading of section 7 DPDA must lead to the result that also police data that is incorporated in information that has been provided on the basis of other Acts – e.g. section 30(1) DCCP – would fall under the confidentiality obligation of section 7 DPDA.

> 79. However, Nelemans 1 does not draw that conclusion. Nelemans 1 [79(a)] confirms that under Dutch law the suspect and his counsel are not subject to the confidentiality obligation of section 7 DPDA with regards to the case file that has been provided pursuant to section 30(1) DCCP. I agree with this position, but cannot fail to note that, in choosing this interpretation of section 7 DPDA, Nelemans 1 diverges from the strict text of the Act without being explicit and without giving any reasoning for that divergence. Nelemans 1 therefore seems to introduce a limitation on the scope of section 7 DPDA, which appears to entail that the confidentiality obligation in that section only applies to police data that has initially been provided pursuant to the DPDA – or, alternatively, that the confidentiality obligation ceases to apply once police data is provided to a party on the basis of the DCCP".
>
> (emphasis added)

298. Professor Nelemans continues to focus on section 30(1) of the DCCP in later parts of Nelemans 2, but again without grappling with the basis on which the MLAT Request was made to the Swiss authorities:-

> "85. Since the DPPO states that there are no grounds in the DJDCRA for De Brauw and/or Glencore to pass on the information, it suggests that the FIOD Documents and the DPPO/FIOD Correspondence provided to De Brauw and/or Glencore are completely or partly subject to the DJDCRA. In the same correspondence, the DPPO also stated that some documents have been provided on the basis of section 30(1) DCCP. Even though the law is unclear on this point, it should be assumed that the obligations set out in section 52(1) DJDCRA do not apply to the documents that have been provided on the basis of section 30(1) DCCP (see also Nelemans 1, paragraphs [76]-[78]). The most obvious legal mechanism here at work, although there is some legal uncertainty, is that the confidentiality obligation in one law is set aside by another formal law, without this being made explicit by the legislator. Nevertheless, it is generally accepted that documents obtained under section 30(1) DCCP are not subject to the confidentiality obligation. In addition, there is no indication that these documents automatically fall under the DJDCRA after the dismissal of the case.
>
> …
>
> 89. Insofar as these sections do not provide for disclosure to persons or authorities, police data may be disclosed to third parties pursuant to section 19 (incidental cases) and section 20 DPDA (structural). Disclosure to a third party may take place at the request of that party or on the initiative of the controller:

> 'Police data may only be provided if a number of requirements are met: the DPDA applies, the disclosure is for specific purposes, there is a compelling public interest and, if necessary, and, insofar as the police data in question have been processed in the context of criminal law enforcement, the disclosure should be discussed with the DPPO.'

90. Brouwer 1 (paragraph [99]) essentially states that, consistent with his interpretation of section 39f DJDCRA above, the provision of information under section 19 DPDA should be incidental in nature; because there is constant communication with the DPPO during a criminal investigation and prosecution, the DPDA would – according to Brouwer 1 – therefore not be able to qualify as a legal basis for such data sharing.

91. In my view, this is incorrect. The DJDCRA, the DPDA and the DCCP coexist, and each contains certain legal grounds (sometimes overlapping) for the provision of information in the context of investigations of criminal offences. And insofar as criminal investigation data and police data go hand in hand, there must be coordination between the DPPO and the police regarding the provision of data. The instruction I have referred to in paragraph [85] also describes how this should be done in the case of incidental provision: 'In the case of incidental disclosure, the data controller shall decide on a case-by-case basis whether it is necessary in the light of a material public interest and whether the purpose is compatible with the listed purposes.'

The DCCP as a legal basis

92. Because Brouwer 1 (paragraph [105]) seems to assume that the DJDCRA, DPDA and DCCP cannot coexist and overlap, the somewhat spontaneous conclusion follows that the DCCP must therefore be the basis for the provision of information (paragraph [105]):

> 'Now that neither the DJDCRA nor the DPDA provide for a legal basis in this regard, providing a suspect/accused and their counsel with information in the context of an ongoing criminal investigation and prosecution, such information exchange must have some other legal basis. Any other conclusion would mean that by exchanging information with, for example, defence counsel, a FIOD officer or prosecutor would violate the confidentiality obligations of the DJDCRA and the DPDA and – by extension – would commit a criminal offence. Given the frequency with which such exchanges happen, such offences would then be committed on a daily basis. This is of course not the case – which means

> that the legal basis for such exchanges of information between the parties in a criminal investigation and prosecution must be found in another Act. In my opinion, this cannot be any other Act than the DCCP itself.'

93. I am not convinced by such backwards reasoning (that if two of the three options do not apply, it must be the last one). I also do not find the substantive arguments convincing. I will explain this in more detail.

94. First of all, it follows from what I have described above about the DJDRA and DPDA provisions that criminal investigation information and police data may be provided to third parties under certain circumstances. This does not exclude the possibility that the DCCP may also provide a legal basis for data sharing in criminal investigations, albeit not exclusively.

95. Secondly, there may also be information that has been shared between the DPPO/FIOD and other parties that is not part of the case file. Brouwer 1 (paragraph [107]) discusses a situation in which all relevant information has been added or should be added to a case file to which section 30(1) DCCP applies, which allows the suspect to inspect the case documents. Referring to a quote from the parliamentary documents, Brouwer 1 (paragraph [107]) draws the following conclusion about the information in the case file:

> 'From this, it is apparent that all correspondence between the prosecution and the defence must be considered as potentially being part of the case file. Whether such correspondence is actually or should actually be part of a case file in a particular case is then only governed by the material test of 'relevancy' of section 149a(2) DCCP, which holds that the case file should include all documents that could reasonably be of importance for the decisions to be made by the judge during the hearing. Applied to the case at hand, this means that all correspondence between GIAG/De Brauw and the DPPO/FIOD would have to be added to the case file if it contained information that, at some later stage in the proceedings, turned out to be relevant for any decision the court would have to make in the context of a trial.'

96. **I agree with Brouwer 1 that not all information needs to be included in the criminal file. So there may also be information that has been shared between the DPPO/FIOD and other parties that is not part of the case file and cannot be provided on the basis of section 30(1) DCCP. Such information requires a different legal basis, which does not explicitly follow from the**

> **DCCP**. In any case, as explained, the DJDCRA and the DPDA can provide a legal basis for such information sharing".
>
> (emphasis added)

299. In this regard references to section 30(1) are not in point because the relevant question is whether obligations under section 272 can be breached in the context of the receipt of the MLAT Request under section 5.1.2 of the DCCP – not under section 30(1) of the DCCP. It should be noted that at this stage, Professor Nelemans is fully aware of the contents of Professor Brouwer's report, including that the MLAT Request was provided pursuant to section 5.1.2 of the DCCP and not section 30(1) of the DCCP.

300. In Nelemans 2 Professor Nelemans fails to engage with the fact that the MLAT Request was provided to the Swiss authorities pursuant to section 5.1.2 of the DCCP. To the extent that there is any engagement at all, it is, at best, oblique. For example, at paragraph 82 of Nelemans 2 it is stated as follows:-

> "The DJDCRA, the DPDA and the DCCP coexist, and each contains certain legal grounds (sometimes overlapping) for the provision of information in the context of investigations of criminal offences. And insofar as criminal investigation data and police data go hand in hand, there must be coordination between the DPPO and the police regarding the provision of data. The instruction I have referred to in paragraph [85] also describes how this should be done in the case of incidental provision: "In the case of incidental disclosure, the data controller shall decide on a case-by-case basis whether it is necessary in the light of a material public interest and whether the purpose is compatible with the listed purposes".

301. Ultimately (and apart from three passing references to sections 5.1.2(1) and (3) of the DCCP), Professor Nelemans does not engage with the same, and simply does not grapple with the fact that the MLAT Request was provided to the Swiss authorities by the DPPO pursuant to sections 5.1.2(1) and (3) of the DCCP or with the fact that Mr Glasenberg's lawyers received the MLAT Request from the Swiss authorities pursuant to their own responsibilities.

302. In the above circumstances (and quite apart from my more general findings in relation to Professor Nelemans, and his evidence, as addressed above, which lead me to prefer the views expressed by Professor Brouwer over those expressed by Professor Nelemans where their views differ) I prefer the views expressed by Professor Brouwer to those expressed by Professor Nelemans as to whether disclosure in the English Proceedings of the MLAT Request would amount to a breach of section 272.

303. In this case the DPPO submitted a request for legal assistance to the authorities of a foreign state under section 5.1.2(1) of the DCCP, and not on the basis of the DJDCRA or the DPDA, and the further transfer of the MLAT Request by the Swiss prosecutor to Mr Glasenberg then followed pursuant to provisions of Swiss law (and therefore also not on the basis of the DJDCRA or the DPDA).

In such circumstances, and as Professor Brouwer opines, the MLAT Request has not been provided to Mr Glasenberg pursuant to the DJDCRA or the DPDA and thus section 7 DPDA and section 52 DJDCRA do not apply.

I.5.3 Conclusion on any Violation of Section 272 of the DCC

304. I do not consider that Mr Glasenberg has demonstrated that the disclosure of the MLAT Request in the English Proceedings would constitute a violation of section 272 of the DCC.

305. I would go further than that. On the evidence before me I consider that there would be no violation of section 272 of the DCC. First, in the correspondence with the DPPO, the DPPO did not address section 272 of the DCC, and I do not consider there is any reason to assume that the DPPO considers that disclosure of the MLAT Request would violate section 272 of the DCC. As already noted, it has not expressed any such view, and the DPPO would surely have done so in its response of 29 January 2025 if it had considered that the disclosure of the MLAT Request in the English Proceedings would violate any provision of the DCC, including section 272 thereof. This leads me to the conclusion that the DPPO did not consider any offence under section 272 would be committed, which is entirely consistent with the evidence of Professor Brouwer, which I accept.

306. Secondly, I am satisfied that, as addressed in Section I.5.2 above, in the circumstances where the MLAT Request was received by Mr Glasenberg from the Swiss prosecuting authority under section 5.1.2(1) of the DCCP, the DPDA is not engaged, and there is no relevant statutory requirement of confidentiality under section 7 of the DPDA, and there can be no violation of section 272 of the DCC. In this regard, and for the reasons identified in Section I.5.2, I prefer the evidence of Professor Brouwer over that of Professor Nelemans as to any possible violation of section 272.

I.6 Is there a Real (Actual) Risk of Prosecution of Mr Glasenberg under Section 272 of the DCC?

307. In the light of my conclusion at stage 1, I consider that it is inherently improbable that there would be any prosecution in the Netherlands of Mr Glasenberg (or anyone associated with him) in relation to section 272 of the DCC, and as such that there is no real risk of prosecution or indeed any risk of prosecution.

308. However, given that there is a difference between the Claimants, and Mr Glasenberg (and indeed their respective experts) as to whether or not there is a real risk of prosecution in the event of disclosure of the MLAT Request, in the context of section 272 of the DCC, and given that I have heard full argument on the same, I will address the risk of prosecution in this Section.

I.6.1 Factors Common with Glencore and Section 184(1)

309. I repeat Section G above. I consider that all the factors I identified in Section F as to why there is no real (actual) risk of prosecution of Glencore and Mr

Glasenberg under section 184(1) apply mutatis mutandis in relation to Mr Glasenberg and section 272. Indeed in a number of respects (for example in relation to potential affirmative defences) Section G has already addressed the position in relation to section 272 in tandem with that in relation to section 184.

I.6.2 Factors Specific to Mr Glasenberg and Section 272

310. I do not consider that there are any factors specific to Mr Glasenberg, or section 272, that increase the risk of prosecution of Mr Glasenberg whether in relation to section 272 (or section 184(1)).

311. Indeed there are factors specific to section 272 which themselves would reduce the risk of prosecution. In Nelemans 1, Professor Nelemans did not express any conclusion on the risk of prosecution, but he did identify three factors that would reduce the risk of prosecution. Thus he states at paragraph 148(c) that:-

> "The considerations in relation to disclosure of the DPPO/FIOD Correspondence set out above (in paragraph 148(b)) also apply to disclosure of the MLAT Request, except that it does not involve a breach of the Undertaking. In my view, three factors would have a negative effect on the likelihood of prosecution. Firstly, it concerns only one document. Secondly, Mr Glasenberg is not the first recipient of the MLAT Request (the Swiss Public Prosecutor was). Thirdly, the DPPO could be selective to achieve its goal of deterrence and GIAG is the most obvious defendant. Accordingly, this makes it, in my view, less likely that the DPPO will (also) prosecute Mr Glasenberg if he were to instruct his counsel to disclose the MLAT Request".

312. Professor Brouwer addresses the risk of prosecution in some detail. I accept his evidence. In addition to the above points made by Professor Nelemans (with which Professor Brouwer agrees):-

(1) Professor Brouwer is of the opinion that there would be no violation of section 272 DCC when "any disclosure of relevant data would be pursuant to a UK judicial order to do so". That is also likely to make available the affirmative AVAS-defences of "authorised official order" and "necessity/emergency" to which the UK disclosure order would give rise. It is notable that this was not considered initially by Professor Nelemans in Nelemans 1 (contrast what Professor Nelemans says in Nelemans 2).

(2) Professor Brouwer is of the opinion that neither section 52 of the DJDCRA nor section 7 of the DPDA are accompanied by a right to refuse to give evidence (*verschoningsrecht*), meaning that, in a Dutch context, it is beyond doubt that any confidentiality obligation must give way to a judicial disclosure order. It is relevant to question whether there is an affirmative defence to the offence and it must be "a weighty element in the prosecutor's decision whether or not to prosecute any alleged violation of a confidentiality obligation".

313. As with section 184 of the DCC, and notwithstanding the range of potential penalties under section 272, the evidence of Professor Brouwer (and paragraph 172 of his report) is that (whilst):-

> "There is no guidance on sentencing under section 272 DCC from the courts or the DPPO, however, case law suggests that – excluding in cases concerning corrupt leaking police officers – violations also tend to fully end in (fully conditional) fines or community service".

314. Mr Glasenberg does not reside in, nor is he present, in the Netherlands, and accordingly the likely penalty would (at most) be a fine and, yet further, Professor Brouwer's opinion (which was neither contradicted nor engaged with in Nelemans 2), is that a fine would be fully conditional (i.e., suspended and so long as the offence was not committed again, it would not even have to be paid). Once again the likely penalty would militate against any prosecution in the first place.

315. Again, to the extent that (contrary to the views expressed above) there is uncertainty about whether there would be a breach of section 272, the natural inference is that prosecution would be less likely in such circumstances (see *PIFFS*, supra at [156], and *O v C* at [22(iv)]). Equally (and once again) I reject the suggestion that there is a real risk of prosecution because of any alleged social need to clarify the law in this area on the basis that there is no relevant case law. The suggestion again amounts to mere speculation and, in any event, I consider it inherently unlikely that the DPPO would wish to prosecute for such reason in the context of the uncertainties as to whether any offence has been committed, the matters identified in Nelemans 1, and the terms of the correspondence to which the DPPO is party.

316. There is one additional factor that I consider further reduces the risk of prosecution under section 272 (if that were possible) and that is the question of whether the Dutch court has jurisdiction over Mr Glasenberg in relation to an offence under section 272 in the first place. Once again there is a difference of opinion between the experts.

317. Professor Brouwer refers to jurisdiction in terms of "the doctrine of the constitutive consequence". He notes, relying on an article by W Geelhoed, that "it has been accepted that the principle of prosecutorial discretion should prevent the prosecution in situations where there is a negligible link to the Netherlands" (see paragraph 162 of Brouwer 1). He then identifies that the weight of the alleged conduct did not occur in the Netherlands, involved exclusively non-Dutch persons located outside of the Netherlands and with no apparent ties to the Netherlands.

318. On the other hand, Professor Nelemans at paragraph 148(c) of Nelemans 1 opines that:-

> "the DPPO **may** have jurisdiction with regard to Mr Glasenberg but that this is not certain. I refer to paragraph 114 in relation to jurisdiction and extraterritorial application. In my opinion, the

> DPPO would probably have no interest in prosecuting Mr Glasenberg's counsel".
>
> (emphasis added)

319. This is hardly a confident expression that the Dutch Court would have jurisdiction. However (once again) Professor Nelemans somewhat "firms up" his views in Nelemans 2 in which he states at paragraph 150 (citing a Dutch Supreme Court authority):-

> "As explained in paragraph [71] above, the Supreme Court has indicated when there is a breach. It has not taken a position on where the breach of secrecy occurs. The breach of confidential data occurs where that secret is located. Accordingly, there could be a constitutive consequence in the Netherlands, irrespective of whether the information would be shared from the Netherlands (by De Brauw) to the UK, from Switzerland (by GIAG) to the UK or within the UK (by Glencore). This is also relevant for the MLAT Request, which contains details about the DPPO's investigation, in the sense that a disclosure from a country outside the Netherlands to the UK would result in a breach where the confidential data is located, i.e. in the Netherlands with the Dutch authorities (on their computers or servers), in addition to potential other jurisdictions where the confidential data is located (such as Switzerland)".

320. The views expressed as to where there would or might be a breach seem to be those of Professor Nelemans alone, unsupported by authority. In circumstances in which there appears to be limited links (if not a negligible link) to the Netherlands, I consider that prosecutorial discretion would be likely to prevent a prosecution in such a situation (consistent with the views expressed by Professor Brouwer).

321. In any event, and on any view, there is some uncertainty as to whether the Dutch courts would have jurisdiction, which can only (further) reduce the risk of prosecution.

I.6.3 Conclusion on Risk of Prosecution under Section 272

322. For the reasons set out in Section G, and the further reasons addressed in this Section, I do not consider that there is any risk of prosecution of Mr Glasenberg under section 272 of the DCC, still less a real, or actual, risk of prosecution.

323. Strictly speaking, it suffices for me to find (as I do find) that Mr Glasenberg has not discharged the burden that is upon him to prove that there is a real risk of his prosecution under section 272 of the DCC.

324. In such circumstances, stage 3 and the balancing exercise is not reached, and the Glasenberg Disclosure Application stands to be dismissed.

325. However, as I have heard full argument on stage 3, and lest there be any possibility of a violation of the DCC, and any risk of prosecution, I will also address stage 3 for completeness.

I.7. STAGE 3 – The Balancing Exercise

I.7.1 General Observations

326. I repeat the general observations in relation to the balancing exercise that I set in Section H.1 above. They are equally applicable at this point.

I.7.2 The Importance of the MLAT Request for the Fair Disposal of the English Proceedings

327. Mr Glasenberg is a Swiss citizen and a resident in Switzerland. He has been given what he admits, is a relevant document, the MLAT Request, by the Swiss prosecution authorities. This was given as part of the Swiss authority's process of considering whether to accede to the Dutch MLAT Request that they have received. The Swiss authorities have been expressly asked by Mr Glasenberg whether they object to his disclosure of the MLAT Request, and they have confirmed that they do not. Mr Glasenberg alleges (though I have found to the contrary) that if he were to give disclosure of this document in the English Proceedings, pursuant to a lawful court order, he would nevertheless face a prosecution in the Netherlands.

328. As the MLAT Request is within his control in the circumstances described, Mr Glasenberg considers the MLAT Request to be a document falling within his disclosure obligations under the CMC2 Order and he duly identified it in his first disclosure certificate.

329. It will be seen therefore that in contradistinction to the stance of Glencore in relation to the FIOD Documents (that they have not seen the three documents concerned and do not even accept that they will necessarily be relevant and disclosable when they review the same), Mr Glasenberg **accepts** that he is required to disclose the MLAT Request pursuant to his existing disclosure obligations.

330. He seeks, however, to downplay the MLAT Request's potential importance and submits that its disclosure is not necessary for a fair trial of the allegations in the English Proceedings including those advanced by the Claimants against Mr Glasenberg. It is said that it is not itself a primary document or evidence in the Swiss OAG investigation that led to the imposition of the summary penalty order on GIAG, or in the related DPPO/FIOD investigation. It is said to be "merely a procedural document: a letter of request from the Dutch authorities to the Swiss authorities seeking assistance with their investigation" and it is said that any underlying documentary or other evidence referred to in or requested pursuant to the MLAT Request could only be obtained by the Claimants via other requests for disclosure (which the Claimants have done by seeking and obtaining production from Glencore of documents from the Swiss OAG investigation that is the subject of the MLAT Request).

331. I do not consider that this categorisation of the MLAT Request bears examination. As a preliminary point, however, the submission advanced by Mr Lodder on Mr Glasenberg's behalf is somewhat contradictory in nature. On the one hand he submits that if there is disclosure and it does affect the Dutch Investigation, there would be a public interest in a prosecution (which rather recognises there being material of considerable importance in the context of the investigation into corruption in the DRC). Yet on the other hand, and in the same breath, he contends that the MLAT Request is a bland and general request for assistance. Whilst Mr Lodder sought to argue that there was no tension between such submissions, I was not convinced. If there was a risk that the content could cause a witness or a suspect to abscond or cause someone to destroy relevant evidence and affect the Dutch Investigations (as posited by Mr Lodder), this vividly illustrates that matters identified in the MLAT Request could be of very considerable importance in the English Proceedings, in terms of identifying individuals and documentation in relation to the central allegations in the English Proceedings (given that both the English Proceedings and the Dutch Investigation concerned corruption in the DRC).

332. The real gravamen of Mr Lodder's submission is that the MLAT Request is (so it is said) a long way from a document that needs to be disclosed for the fair disposal of the English Proceedings, and he asks (rhetorically) whether it is worth requiring Mr Glasenberg to disclose the MLAT Request for inspection if in doing so he is exposed to the risk of criminal prosecution? The difficulty I have with this question (quite apart from the fact that I do not consider there is a risk of criminal prosecution) is that I do not consider that it fairly characterises (1) a request such as the MLAT Request, or (2) the likely importance of matters within the MLAT Request in the context of the English Proceedings.

333. In this regard Mr Glasenberg's (alleged) knowledge of the alleged DRC corruption is a very significant issue in the English Proceedings as a whole. As such any bearing on that personal knowledge, as may be revealed in the MLAT Request is itself of considerable importance so as to ensure the fair disposal of the English Proceedings. This can be illustrated by reference to paragraph 41.3B of Glencore's Defence which relies on what Mr Glasenberg did personally:-

> "Glencore understands that, after Mr Glasenberg was introduced to Mr Gertler in 2007, and at various times thereafter, Mr Glasenberg personally made enquiries into Mr Gertler and that, as a result of these enquiries, Mr Glasenberg was satisfied that there was no credible evidence that Mr Gertler had used, or would use, Corrupt Means in the DRC. Any such enquiries as were made by Mr Glasenberg in this regard were made on behalf of Glencore, and Glencore will therefore rely on such matters as Mr Glasenberg may plead and prove in this regard".

334. If nothing else, this shows the central importance of Mr Glasenberg's knowledge and any enquiries he may have made in relation to, and any interaction he may have had with, Mr Gertler (shedding light on such knowledge). Given that the MLAT Request was a request which included a request for mutual assistance concerning Mr Glasenberg (it is being made to the Swiss authorities who had interviewed Mr Glasenberg), it has the potential to

contain information of considerable importance in relation to Mr Glasenberg's knowledge. In this regard (and as previously noted) sight should not be lost of that fact that the Dutch authorities were conducting their own investigation (and so may have had their own sources of information and documentation) that are not necessarily confined to matters within Glencore's knowledge or within the scope of the Swiss OAG investigation.

335. The reality is that the knowledge of Mr Glasenberg is at the very heart of the Claimants' claim, as was amply demonstrated by Mr Mott during the course of his commendable oral submissions made by reference to the Claimants' pleaded case and in particular paragraphs 30, 42, 44.1, 57, 59.4(e) and 62 thereof. It is clear that the Claimants' case is that the knowledge of the corrupt arrangement between Glencore and Mr Gertler went direct to the top of Glencore in the form of Mr Glasenberg and his personal management of the relationship with Mr Gertler, and Mr Glasenberg's knowledge of the alleged DRC corruption is, on any view, a very significant issue in the Claimants' case as a whole. Self-evidently, any document bearing on the personal knowledge of Mr Glasenberg would be of key importance.

336. I also consider that in submitting that it is "inherently unlikely the MLAT Request is important" and characterising it as "merely a procedural document" and "merely an intergovernmental letter of request" those acting on behalf of Mr Glasenberg mischaracterise the nature of requests for mutual legal assistance and their likely importance, and the likely importance of the MLAT Request itself.

337. In this regard I have been referred to a Mutual Legal Assistance Manual 2013 produced under the auspices of the Council of Europe (the "Manual"). That presents a very different picture as to the nature of requests for mutual legal assistance and their likely content than that sought to be portrayed on behalf of Mr Glasenberg in relation to the MLAT Request. The Manual provides, amongst other matters, as follows:-

> "The Form of the Letter of Request
>
> The requesting authority should compile a letter that is a stand-alone document. It should provide the requested State with all the information needed to decide whether assistance should be given and to undertake the requested enquiries.
>
> …
>
> Principal conditions to be satisfied within the Letter of Request
>
> …
>
> The letter must contain a description of the facts which form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary.

> …
>
> Requests made to a foreign state
>
> Where national authorities extend a letter of request to a foreign authority, or submit a request without a formal letter, they will be obliged to approach such foreign authority expressing its utmost respect and reverence, to enter the file number of their case, elaborate and describe in detail all the facts ...
>
> …
>
> It is necessary to give a very detailed description of reasons and grounds for reasonable doubt, in order to avoid the return of the letter of request as incomplete
>
> …
>
> Matters for the Prosecutor or Judicial Authority to Have in Mind Before Issuing the Letter
>
> …
>
> Has enough factual information about the case been given to provide a proper basis for the assistance to be sought?
>
> …
>
> Does the assistance to be sought amount to little more than a fishing expedition?".

338. It is clear, therefore, that a request for mutual legal assistance, such as the MLAT Request, is required to include a very detailed description of the facts which form the basis of the investigations/proceedings and all the information is needed to decide whether assistance should be given and to undertake the requested enquiries.

339. The same can be seen from the Guide on Requesting Mutual Legal Assistance in Criminal Matters from the Netherlands' (2023), to which I have also been referred, which identifies the Netherlands' approach in relation to requests for mutual assistance made to it. This provides, amongst other matters:-

> "**Step 4: SUMMARIZE THE CASE**
>
> Provide a detailed outline of the case under investigation or prosecution, including a summary of the evidence that supports the investigation/prosecution. This summary should clearly link the facts of the case and the assistance requested, as well as the importance of the evidence requested for the investigation. Where possible, the identity and nationality of the person concerned should include."

It is an appropriate inference to draw that the MLAT Request itself would include such matters, including a summary of the evidence that supports the investigation, given that those drafting the MLAT Request would be familiar with the Netherlands own requirements in relation to such requests and it would be logical to include the same in any request made by the Netherlands.

340. Here, the MLAT Request relates to the Dutch authorities' investigation into Glencore's (and other individuals) suspected involvement in DRC corruption. The MLAT Request was clearly considered to be necessary to further such investigation and it needed to include a very detailed description of the facts which formed the basis of the investigation (as well as a summary of the evidence that supports the investigation per the Netherlands' own approach). In this regard it is telling that the MLAT Request was not rejected as incomplete or inadequate by the Swiss authorities.

341. It is also clear from what the DPPO itself has said in the correspondence to which reference has been made, that the DPPO declined to give permission to Glencore and Mr Glasenberg to disclose the documents because it is "**information from our investigation**" (emphasis added) which shows that the Dutch authorities have conducted their own investigation and that the MLAT Request contains information from the Dutch Investigation.

342. In such circumstances, and in setting out a very detailed description of the facts which form the basis of the investigations/proceedings and all the information that is needed to decide whether assistance should be given and to undertake the requested enquiries, the MLAT Request will (by its very nature) contain information from the Dutch Investigation, and a summary of the evidence that supports the investigation. In this regard there is also no basis for assuming that such investigation, and associated sources of material, are limited to material from Glencore (very much the reverse as one would envisage that a prosecuting authority would undertake its own investigation in relation to all sources that were available to it).

343. Further, and as already noted, Mr Glasenberg's lawyers have acknowledged that the MLAT Request is relevant and thus disclosable. They do not resile from that. Equally, Osborne 1 did not assert that the MLAT Request is, although relevant, likely peripheral, or duplicative of primary documents that will be disclosed. In this regard it is telling to note what Ms Osborne does and does not state at paragraph 15 of her witness statement. What she states is as follows:-

> "Based on [Nelemans 1] I understand that there are restrictions under Dutch law on (i) the ability of the DPPO to give Mr. Glasenberg permission ... and (ii) the ability of Mr. Glasenberg or his counsel to permit inspection of the MLAT Request, which would be a crime under section 272 of the [DCC] and arguably also section 184 of the Dutch Criminal Code. I also understand from the Dutch Expert Report that there is a risk that Mr. Glasenberg would be prosecuted for any such violation."

344. What she does not state is that the contents of the MLAT Request are not of any relevance or importance to the issues arising in the English Proceedings (and in

giving disclosure the former is acknowledged). Had that been the view of those acting for Mr Glasenberg something along such lines would be expected (even if chapter and verse could not be given due to confidentiality concerns).

345. As already addressed the reality is that the knowledge of Mr Glasenberg is at the very heart of the Claimants' claim, and documents bearing on the personal knowledge of Mr Glasenberg would be of key importance. By the very nature of the MLAT Request, relating as it did to a Dutch investigation, the MLAT Request will contain information from the Dutch Investigation, and a summary of the evidence that supports the investigation, and Mr Glasenberg is at the heart of matters not only in relation to the Claimants' case, but also knowledge of matters in the DRC and Mr Gertler. In such circumstances I consider that the MLAT Request is likely to be of importance and significance for the fair disposal of the English Proceedings having regard to its subject matter and likely content.

346. I would add again that, as is clear from the *EuroChem* case itself, which concerned a single document, an individual document can, in and of itself, be important. I consider this to be particularly so in the context of a document that was itself a request for mutual legal assistance, given what such a request should include. It is a document generated by an investigating authority themselves and may (indeed in relation to a request for mutual assistance is likely to be) the product of "all their own work".

347. I consider that the likely importance and significance of the MLAT Request weighs very heavily in the balance (in reality overwhelmingly so given the limited risk of prosecution even if there were, contrary to my findings, a real risk of prosecution).

348. Again there are the comity considerations. I consider that these also weigh heavily in the balance and in favour of disclosure at stage 3 (as well at stage 2). This Court can, and should, reasonably expect that considerations of comity will influence the foreign state (here the Netherlands) in deciding whether or not to prosecute Mr Glasenberg (see *Bank Mellat* at [63(vi)]) not least given that the whole purpose of disclosure and inspection is to further the fair trial of English Proceedings which are themselves concerned with alleged international bribery and corruption, the prevention of which is no doubt a shared goal in both jurisdictions.

349. Yet further, and again weighing heavily in the balance and in favour of disclosure, is that this Court can and will, craft its Order (including the recitals thereto) in a manner which will reduce, so far as possible, any risk of exposing Mr Glasenberg to prosecution, and I am satisfied that an Order in the terms of Annex A hereto (as finalised upon hand down) will further that aim, and is likely to do so.

350. Equally, I consider that the Confidentiality Club that I will impose, will ensure that the MLAT Request is not publicly available, and will go some considerable further way to ensure that disclosure will not impede the ongoing Dutch Investigation.

351. For all the above reasons I consider that undertaking the balancing exercise between (i) the risk of prosecution in the Netherlands (even if such risk is real, in contradistinction to my findings) and (ii) the importance of the document of which inspection is ordered to the fair disposal of the proceedings (coupled with the comity considerations and the terms of the Order I propose), the later far outweighs the former.

352. Accordingly, Mr Glasenberg's disclosure and inspection obligations in the English Proceedings in relation to the MLAT Request remain, and the Glasenberg Disclosure Restriction Application is dismissed.

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST

Claim Nos: FL-2022-000024
FL-2022-000025
FL-2022-000026
FL-2022-000027
FL-2023-000004
FL-2023-000009
FL-2023-000024

BEFORE THE HON. MR JUSTICE BRYAN

DATED:

BETWEEN:

(1) AABAR HOLDINGS S.À.R.L
& OTHERS

Claimants

- and -

(1) GLENCORE PLC

(2) MR IVAN GLASENBERG
& OTHERS

Defendants

ANNEX A

[DRAFT] ORDER

UPON the applications by the First Defendant and the Second Defendant dated 28 February 2025 (the "**Application(s)**")

AND UPON READING the seventh witness statement of Luke Richard Tolaini ("**Tolaini 7**") dated 28 February 2025, the eleventh witness statement of Luke Richard Tolaini dated 2 May 2025, the first witness statement of Zoe Osborne dated 28 February 2025 ("**Osborne 1**") and the second witness statement of Elaina Bailes dated 17 April 2025

AND HAVING REGARD TO the Order of the Hon. Mr Justice Bryan dated 23 May 2024 (the "**CMC 1 Order**"), the Orders of the Hon. Mr Justice Butcher dated 31 October 2024 and 13 November 2024 and the Order of the Hon. Mr Justice Picken

dated 28 November 2024 (the "**CMC 2 Order**") (the definitions in the CMC 1 Order, Tolaini 7 and Osborne 1 being adopted herein)

AND HAVING REGARD TO Stewarts' 4 April 2025 letter on behalf of the Claimants to the First and Second Defendants, as well as Clifford Chance's 9 April 2025 letter on behalf of the Defendants to the Claimants

AND UPON the First and Second Defendants adducing expert evidence of Dutch law in support of the Applications, and the First Defendant adducing evidence of Canadian and Swiss law in support of its Application, at material expense to themselves

AND UPON the Court considering that the First Defendant has taken all reasonable steps and advanced all arguments properly available to it in seeking to resist production of the FIOD Documents and the DPPO/FIOD Correspondence (and the Claimants having confirmed that they will not pursue any further challenge to the First Defendant's non-production of the DPPO/FIOD Correspondence)

AND UPON the Court considering that the Second Defendant has taken all reasonable steps and advanced all arguments properly available to him in seeking to resist production of the MLAT Request

AND UPON the Court having had regard to those arguments by the First and Second Defendants and to the evidence filed regarding the FIOD Documents and MLAT Request, including as to (1) the position taken by the DPPO in correspondence, including that the DPPO repeatedly refused to permit disclosure and that the sharing of those documents with third parties would be harmful to an ongoing criminal investigations, and (2) whether prosecution by the DPPO would be likely in the event that the First Defendant produces the FIOD Documents and/or the Second Defendant produces the MLAT Request.

AND UPON the Court hearing the Applications over more than two full days of Court time, hearing from Counsel for the Claimants, Counsel for the First Defendant, and Counsel for the Second Defendant, and reserving judgment

AND UPON the Court having regard to the fact that a person who disobeys a court order may be held in contempt of court and punished by a fine, imprisonment,

confiscation of assets or other punishment.

AND UPON the Court concluding that the FIOD Documents and the MLAT Request are likely to be of importance for the fair disposal of the English Proceedings.

AND UPON the Court further concluding that the MLAT Request and any FIOD Documents that fall to be produced pursuant to an order of the Court in these Proceedings should (subject to further Order of the Court) be subject to appropriate confidentiality ring provisions, including so as to minimise the risk of disclosed information being disseminated to persons under investigation by the DPPO.

IT IS ORDERED THAT:

DPPO Category 2 Documents

1. The First Defendant is not required to give disclosure of documents (if any) within the DPPO/FIOD Correspondence that would otherwise be disclosable in accordance with paragraphs 22(a) and 24 of the CMC 1 Order or for any other reason.

2. The First Defendant's application for an order that its disclosure obligations be varied such that it is not required to disclose the DPPO Documents, in light of its evidence as to Dutch law and the position taken by the DPPO, is otherwise dismissed. Accordingly, subject to paragraph 1 of this order, the First Defendant shall provide disclosure in accordance with paragraphs 22(a) and 24 of the CMC 1 Order (and paragraph 4 below) of documents (if any) within the DPPO Documents (including the FIOD Documents) that fall to be disclosed pursuant to an Order of the Court in these proceedings by [14 or 28 days' time]. For the avoidance of doubt, such documents may be appropriately redacted to remove irrelevant confidential or personal information.

3. The Second Defendant's application for an order that his disclosure obligations be varied such that he be permitted to withhold inspection of the MLAT Request, made in reliance on his expert evidence as to Dutch law and the position taken by the DPPO, is dismissed. Accordingly, the Second Defendant shall produce the MLAT Request in accordance with paragraphs 18 and 19 of the CMC 2 Order (and paragraph 4 below) by [14 or 28 days' time].

4. Any production of the FIOD Documents and MLAT Request is to be in accordance with the confidentiality ring provisions set out in Annex 1 to this Order, subject to further Order of the Court.

OSC Category 2 Documents

5. Insofar as the First Defendant's Application concerns its obligation to provide disclosure of documents (if any) within the OSC Category 2 Documents that would otherwise be disclosable in accordance with paragraphs 22(a) and 24 of the CMC 1 Order or for any other reason, that aspect of the Application is adjourned.

OAG Category 2 Documents

6. The First Defendant is not required to provide disclosure of documents (if any) within the OAG AP Documents that would otherwise be disclosable in accordance with paragraphs 22(a) and 24 of the CMC 1 Order or for any other reason.

7. Liberty to apply.