FCPA Update

A Global Anti-Corruption Newsletter

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Roger Ng's Conviction for 1MDB Scheme Tests Scope of FCPA's Internal Controls Provisions

On April 8, 2022, following a nearly two-month jury trial in the Eastern District of New York, former Goldman Sachs ("Goldman") banker Roger Ng was convicted in a rare FCPA-related trial for his role in the 1Malaysia Development Berhad ("1MDB") scheme, including for conspiracy to circumvent internal accounting controls – the first of such charges against an individual to proceed to trial.

The Goldman Settlement

In October 2020, Goldman entered into settlement agreements with DOJ and the SEC to resolve alleged FCPA violations in connection with a scheme to pay over $1.6 billion in bribes and kickbacks to high-ranking government officials in Malaysia and Abu Dhabi to secure bond underwriting business from 1MDB, Malaysia's

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state-owned and controlled investment fund.[1] As part of its settlement with DOJ, Goldman entered into a three-year DPA and its Malaysia-based subsidiary pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions, with a collective, record-breaking fine of $2.3 billion.[2] Goldman's settlement with the SEC included charges that it violated the anti-bribery, books and records, and internal controls provisions of the FCPA.[3]

Individual Prosecutions

DOJ also charged individuals connected to the 1MDB scheme: Low Taek Jho ("Low"), Tim Leissner, and Roger Ng were indicted in 2018. Low, a Malaysian financier with close ties to government officials in Malaysia and Abu Dhabi, allegedly advised on the formation of 1MDB's predecessor entity and acted as an intermediary or finder for various 1MDB transactions, including those involving Goldman.[4] Low remains a fugitive.

Leissner, a managing director and chairman of South East Asia at Goldman at the time of the scheme, attempted allegedly to make Low a formal Goldman client. Although Goldman compliance personnel refused to approve Low as a client, Leissner continued to engage with Low to pay over $1.6 billion in bribes and kickbacks to numerous high-ranking government officials in order to secure Goldman's role on three debt bond issuances by 1MDB.[5] In August 2018, Leissner pleaded guilty to conspiracy to commit money laundering and to violate the FCPA's anti-bribery and internal controls provisions, including by circumventing Goldman's internal accounting controls.[6] He is awaiting sentencing, which will likely be scheduled at the conclusion of his cooperation with DOJ. In December 2019, he also settled SEC charges that alleged that he violated the FCPA's anti-bribery and accounting provisions.[7]

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1. *See* Jane Shvets, et al., "Goldman Sachs' 1MDB Settlement Brings Record-Breaking FCPA Recovery for U.S. Authorities," FCPA Update, Vol. 12, No. 3 at 1 (Oct. 2020), https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020 [hereinafter "October 2020 FCPA Update"].
2. Deferred Prosecution Agreement, United States v. The Goldman Sachs Group, Inc., No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020), https://www.justice.gov/criminal-fraud/file/1329926/download [hereinafter "Goldman DPA"]; *see also* October 2020 FCPA Update at 1, 4.
3. Order, In re The Goldman Sachs Group, Inc., Securities Exchange Act Rel. No. 90243 (Oct. 22, 2020), https://www.sec.gov/litigation/admin/2020/34-90243.pdf [hereinafter "Goldman SEC Order"]; *see also* October 2020 FCPA Update at 5.
4. *See* October 2020 FCPA Update at 2.
5. U.S. Dep't of Justice, "Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion," Press Release No. 20-1143 (Oct. 22, 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion [hereinafter "Oct. 2020 DOJ Press Release"].
6. Information, United States v. Leissner, No. 18-cr-00439-MKB (E.D.N.Y. Aug. 28, 2018), https://www.justice.gov/opa/press-release/file/1106936/download.
7. Order, In re Tim Leissner, Securities Exchange Act Rel. No. 87750 (Dec. 16, 2019), https://www.sec.gov/litigation/admin/2019/34-87750.pdf.

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Charges Against Roger Ng

Ng is a former Goldman managing director who worked with Leissner and who, according to DOJ, conspired with Low and Leissner to secure Goldman's position in the 1MDB bond deals and facilitate an exorbitant amount of bribes and kickbacks to government officials relevant to the deals. Ng was charged with conspiracy to commit money laundering and to violate the FCPA's anti-bribery provisions, and with "knowingly and willfully conspir[ing] . . . to knowingly and willfully circumvent and cause to be circumvented a system of internal accounting controls at Goldman Sachs Group, contrary to the FCPA[.]"[8] Following his arrest in Malaysia in November 2018, Ng pleaded not guilty to all charges and, in a rarity for FCPA cases, proceeded to trial. His nearly two-month trial ended on April 8, 2022 with a guilty verdict on all three counts. Notably, Ng's case appears to be the first instance in which an individual was charged with conspiracy to violate the internal accounting controls provisions of the FCPA and took their case to verdict.[9]

"Ng's case appears to be the first instance in which an individual was charged with conspiracy to violate the internal accounting controls provisions of the FCPA and took their case to verdict."

Circumvention of Internal Accounting Controls

The internal accounting controls provisions require, in relevant part, an issuer of a security to have a system of internal accounting controls to ensure that transactions are executed with management's authorization and access to assets is only permitted with management's authorization.[10] It is a crime for any person to "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in" the internal accounting controls provisions.[11]

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8. Second Superseding Indictment at 29, *United States v. Ng Chong Hwa*, No. 18-538 (S-2) (MKB) (E.D.N.Y. Dec. 20, 2021), ECF No. 105 (charging Ng under 15 U.S.C. §§ 78m(b)(2)(B)(i) and (iii), 78m(b)(5), 78ff(a)).
9. *Id.*
10. 15 U.S.C. § 78m(b)(2)(B)(i) and (iii).
11. 15 U.S.C. § 78m(b)(5).

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According to the government, Ng *circumvented* Goldman's controls when he obtained authorization for the bond deals from the relevant Goldman financial transaction committees by withholding accurate information about: (1) identities of intermediaries and key players for 1MDB; (2) substantial monetary payments 1MDB may need to make; and (3) the personal financial interests of deal team members in the transactions.[12] As a result of such conduct, "the information [he] withheld from Goldman's committees materially changed the economic structure of the deal."[13] The government alleged that Ng's conduct violated Goldman's internal policy that had been explicitly crafted to comply with the FCPA's internal accounting provisions.[14] Specifically, this policy required a "Deal Captain" to ensure transactions had proper approval and authorization from management committees before execution and to lay out which Goldman committees had the power to authorize these transactions.[15]

Following the close of the government's case, Ng moved to dismiss the count charging him with conspiracy to circumvent Goldman's internal accounting controls on the grounds that the government improperly attempted to expand the accounting controls provisions of the FCPA and failed to meet its burden of proof with regards to the meaning of circumvention.[16] In their briefs, both Ng and the government argued that the plain meaning of the statute and legislative history of the internal accounting controls provisions were in their favor.

Internal Accounting Controls as Limited to Financial Statements (Defense Position)

Ng argued that the government failed to distinguish between "controls" and "internal accounting controls," improperly broadening the scope of the statute into an "undefined corporate fraud statute" that would cover the most basic compliance violations and any false statement an employee may make, such as using a personal email at work, failing to identify the employer of a lunch guest on a receipt submitted for reimbursement, or misstating employment history.[17]

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12. Gov't Opp'n to Rule 29 Mot. at 3, *United States v. Ng Chong Hwa*, No. 18-538 (S-2) (MKB) (E.D.N.Y. Mar. 27, 2022), ECF No. 189 [hereinafter "Gov't Opp'n"].
13. *Id.* at 5.
14. Gov't Opp'n at 2, *United States v. Ng Chong Hwa*, No. 18-538 (S-2) (MKB) (E.D.N.Y. Mar. 27, 2022), ECF No. 189; *see also* Anna Bianca Roach, "DOJ's Accounting Theory is not Overly Broad, says Brooklyn Judge" (Apr. 11, 2022), https://globalinvestigationsreview.com/just-anti-corruption/fcpa/dojs-fcpa-accounting-theory-has-broader-reach-says-brooklyn-judge.
15. Gov't Opp'n at 2–3.
16. Def. Rule 29 Mot. at 1–3, United States v. Ng Chong Hwa, No. 18-538 (S-2) (MKB) (E.D.N.Y. Mar. 26, 2022), ECF No. 186 [hereinafter "Def. Rule 29 Mot."].
17. *Id.* at 2, 6.

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Ng proposed a narrower reading of the statute, arguing that accounting controls are "a limited and defined set of controls," *i.e.*, those related to accounting standards and preparation of financial statements, which are "only one aspect of a company's total control system."[18] In support of this argument, Ng pointed to a Senate Report that noted that the internal accounting controls provisions were adopted in response to companies manipulating their books, and intended to reflect matters "of accounting and auditing, and not broadly a legal, compliance or other controls matter."[19] Ng also highlighted the SEC's interpretation of "internal control" in its final rule implementing the Sarbanes-Oxley Act that requires companies to maintain internal controls over financial reporting.[20] In the final rule, the SEC rejected a broader definition of "internal controls," and instead explicitly noted that its definition of "internal control over financial reporting" provided "reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles," and was consistent with the FCPA.[21]

Internal Accounting Controls as Management's Control Over Assets (Government's Position)

The government, in turn, argued that internal controls under the statute cover "both controls to ensure that a company's financial statements are prepared in conformity with generally accepted accounting principles *and* controls to address the aspect of management stewardship responsibility that provides shareholders with reasonable assurances that the business is adequately controlled."[22] Countering Ng's argument that the government's interpretation of the statute would sweep in the most basic compliance violations, the government explained that the hypothetical scenarios Ng described, such as the use of a personal email at work, did not apply to the case at hand because the information Ng "withheld from the committees materially changed the economic structure of the deal."[23]

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18. *Id.* at 10–13.
19. *Id.* at 10.
20. *Id.* at 14.
21. *Id.* (citing 15 U.S.C. § 7262, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act period Reports, Exchange Act Release No. 34-47986, 80 SEC Docket 1014 (June 5, 2003); 17 C.F.R. § 240.13a-15(f)).
22. Gov't Requests to Charge at 32, ECF No. 177, *United States v. Ng Chong Hwa*, No. 18-538 (S-2) (MKB) (E.D.N.Y. Mar. 18, 2022), ECF No. 186 (citing *World-Wide Coin*, 567 F. Supp. 724, 749—50 (N.D. Ga. 1983)) (emphasis added).
23. Gov't Opp'n at 5.

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In support of its arguments, the government relied both on legislative history and a 1983 Georgia district court's interpretation of the internal accounting controls provisions. The government explained that the Senate Report "underscore[d] the importance of 'management's stewardship responsibility' and the need both 'to provide shareholders with reasonable assurances that the business is adequately controlled' and 'to furnish shareholders and potential investors with reliable financial information.'"[24] The government also relied on *SEC v. World-Wide Coin Investments, Ltd.*,[25] which focused on the same aforementioned purposes of the internal accounting controls provisions: "the need (1) for 'safeguards against the unauthorized use or disposition of company assets' and (2) to assure that 'financial records and accounts are sufficiently reliable for purposes of external reporting.'"[26] Ng disagreed with the government's interpretation of *World-Wide Coin*, arguing that the language on which the government relied was "simply summarizing the internal accounting controls provision" and that the court did not indicate that the internal accounting controls provisions included a "broader set of risk, compliance or other controls."[27]

What Does it Mean to "Circumvent" a Control?

Ng and the government also disagreed over what it meant to circumvent those controls in the first place. Ng argued that "circumvention" should be interpreted as avoiding the authorization process altogether, either by executing a transaction in secret or falsifying approvals, rather than any fraudulent or deceitful conduct employed to obtain management authorization for transactions.[28] In response, the government argued that the plain meaning of the word "circumvent," as used in the Senate Report, encompasses making false representations to or withholding information from management to gain access to assets, and does not require that the control process be avoided altogether.[29] It further argued that its interpretation is in line with the legislative history of the FCPA, "which makes clear that Congress intended for criminal penalties to apply to 'conduct calculated to evade the internal controls requirement.'"[30] According to the government, adopting Ng's

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24. *Id.* at 4.
25. 567 F. Supp. 724 (N.D. Ga. 1983).
26. Gov't Opp'n at 4 (citing *World-Wide Coin*, 567 F. Supp. at 750).
27. Def. Rule 29 Mot. at 12–13.
28. *Id.* at 3–4.
29. S. Rep. 95-114 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100; Gov't Opp'n at 4 ("The plain, everyday meaning of 'circumvent' is 'to manage to get around especially by ingenuity or stratagem.'") (citing Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/circumvent).
30. Gov't Opp'n at 4 (citing H.R. Conf. Report. No. 100-576, 917 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1950).

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interpretation of the statute would lead to an "absurd result" because if employees could circumvent the authorization requirement only by avoiding the authorization process entirely, employees would be incentivized to "obtain authorization through fraud or deceit" given such conduct would be beyond the reach of the statute.[31]

The District Court's Decision

In a decision issued on April 8, 2022, the court agreed with the government's interpretation of the internal controls provisions, finding that: (1) "the plain language of the statute encompasses the conduct in this case" and "the statute is not vague as applied";[32] and (2) "circumvention" of an authorization system includes attempts to "circumvent management's informed authorization for transactions" and does not require the falsification of a book or record.[33] The court ruled that the requirement that issuers "devise and maintain a system of internal accounting controls," while not expressly defined, could not be taken to mean for "the statute to apply only to a limited subset of controls specifically related to accounting."[34]

"This precedent demonstrates that even if a company has a system that is not sufficient to catch the requisite red flags, an individual nevertheless may be found guilty of at least conspiring to circumvent such insufficient controls."

Moreover, the court found that the statute "does not sweep so broadly as to criminalize the 'most basic compliance violation,' such as the use of a personal email address at work, as Ng suggests."[35] The court rejected Ng's argument that the government's interpretation of the statute to include conduct that does not have a "proven effect on . . . financial statements" would be "void for vagueness as applied" to him and thus unconstitutionally vague,[36] and observed that Ng's knowing

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31. *Id.* at 5.
32. Rule 29 Order at 10, 14, *United States v. Ng Chong Hwa*, No. 18-538 (S-2) (MKB) (E.D.N.Y. Apr. 8, 2022), ECF No. 202 [hereinafter "Rule 29 Order"].
33. Rule 29 Order at 12–13.
34. Rule 29 Order at 12.
35. *Id.* at 17.
36. Def. Rule 29 Mot. at 26.

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concealment of information from Goldman's internal committees did in fact impact financial statements, in that the committees would not have approved the bond deals in question "if they were presented with full and accurate information."[37]

Ng will almost certainly appeal the district court's decision following sentencing.

Implications of the Conviction and the Court's Decision

Aside from being one of the most high-profile cases to go to trial in the past couple of years, Ng's case is notable as one of the relatively rare examples of a trial involving an individual charged with FCPA violations. But it is most noteworthy for being the first trial involving an individual charged with conspiracy to violate the internal accounting controls provisions of the FCPA.

Although the government prevailed at the trial court and Ng's conviction was upheld, the government's interpretation of the internal controls provisions of the FPCA will continue to be tested as the case is reviewed on appeal. And whatever the appellate court's decision, it will serve as a seminal case. If the appeals court also agrees with the government's interpretation of "circumvention" and the scope of the meaning of internal accounting controls, it is likely that the DOJ will be emboldened in bringing similar charges against individuals, including in instances where there is no option of charging the anti-bribery provisions of the FCPA.

The Ng trial also presents a guiding example of the type of company policies that individuals with compliance obligations must be well-informed of and adhere to, as – at present – it can form the basis of a criminal charge. Policies that may not have an obvious outward connection to the FCPA, such as one that lays out a team's deal process, may well still be squarely in scope. This reflects a growing discourse in the breadth, reach, and appropriateness of the use of employer policies, which are fundamentally contractual agreements, in the course of criminal proceedings, a trend that is not limited to the interpretation of the FCPA.[38]

Finally, the case highlights an imbalance that may arise in charging and settlement documents involving both corporate and individual charges. Ng was charged with conspiracy to circumvent Goldman's internal accounting controls, yet Goldman's DPA involved no such charge.[39] Additionally, Ng circumvented Goldman controls

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37. Rule 29 Order at 17–18.

38. The Supreme Court recently took up the issue of criminal unauthorized access to a computer under the Computer Fraud and Abuse Act, and rejected a definition that would sweep in routine employer policies such as sending a personal email. *Van Buren v. United States*, 141 S. Ct. 1648 (2021).

39. *See* October 2020 FCPA Update; Goldman DPA.

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that the SEC found to be inadequate in the first place.[40] According to the SEC's Order, Goldman's approval processes for the commitment of firm capital in large transactions did not include adequate documentation of the committee's processes, due diligence, and follow-up regarding concerns raised about the bond deals.[41] This precedent demonstrates that even if a company has a system that is not sufficient to catch the requisite red flags, an individual nevertheless may be found guilty of at least conspiring to circumvent such insufficient controls.

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40. Goldman SEC Order at 2.

41. *Id.* at 9.

France Beefs Up Whistleblower Protections

On March 21, 2022, France enacted a multipartisan law on whistleblower protection,[1] just after the French Constitutional Court had cleared some of its provisions.[2] The new law implements the EU Whistleblowing Directive of 2019,[3] going beyond its minimum requirements and improving the whistleblower protection regime already in place in France since the Sapin II Law of December 16, 2016.

Background

Under the Sapin II Law of 2016, whistleblowers were defined as natural persons reporting, in a selfless manner and in good faith, crimes, serious and manifest breaches of international or French laws or serious threats to the general interest, of which they had personal knowledge.

Whistleblowers were offered some level of protection against retaliation measures, provided they did not run afoul of a three-step reporting process: (i) they had to report within their organization first; (ii) in the absence of reaction within a "reasonable period of time," they could report externally to French authorities; and (iii) in the absence of reaction within three months, only then could they disclose the issue publicly.

That stringent reporting process and the lack of financial assistance were largely seen as dissuading whistleblowers from actually acting. Drawing on the minimum requirements imposed by the EU Whistleblowing Directive, the new law gives more teeth to whistleblower protections.

New Definition of Whistleblower

Under the new law, protections apply to whistleblowers defined as follows:

> a natural person who reports or discloses, without direct financial compensation and in good faith, information concerning a crime, an offence, a threat or harm to the general interest, a violation or an attempt to conceal a violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, or of the laws and regulations of the European Union. When the information was not obtained in the context of professional activities […], the whistleblower must have had personal knowledge of it.

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1. Laws No 2022-400 and 2022-401 of March 21, 2022.
2. French Constitutional Court, Decisions No. 2022-838 DC and 2022-839 DC of March 17, 2022.
3. Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report breaches of Union law.

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That updated definition still encompasses a wide range of crimes, threats and violations, but it now clarifies that whistleblowers cannot receive "direct financial compensation." It now also provides that whistleblowers must have had "personal knowledge" of the information not obtained in the context of professional activities.

Importantly, the protection does not apply to information and documents covered by national defense secrets, medical secrets, attorney-client privilege and the secrecy of police/judicial investigations.

Revamped Reporting Process

One of the most salient changes has to do with the way whistleblowers may now report breaches if they want to receive protection: they are no longer compelled to report within their organization first; rather, they can now choose to report directly to French authorities.

Whistleblowers can now also make a public disclosure in three situations:

- when authorities do not react within a certain period of time (still to be decided by the French government);
- when there is a "serious and imminent danger" (even without prior reporting to authorities); or
- when reporting to authorities would create a risk of retaliation, where it would not effectively address the breach at stake or where there are serious reasons to believe that authorities may be in collusion with the perpetrator of the breach or involved in the breach.

  While internal reporting now becomes optional for whistleblowers, companies with 50 or more employees in France still have to put in place procedures for internal reporting and for follow-up. Interestingly, the new law now provides for the possibility that such procedures be shared by companies of a group.

Enhanced Protections

The law improves whistleblowers' protection against a number of retaliation measures such as layoffs, intimidation or damage to reputation on social media. The law now also offers the following protections:

- Whistleblowers challenging retaliation measures in court may now be granted provisional payments for their expected legal costs. If their financial situation has "seriously deteriorated," they may also be granted a provisional allowance. Such provisional payments are ordered by courts and paid by defendants. Whistleblowers eventually losing their claims may not always have to refund these amounts.

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- Whistleblowers facing "abusive or dilatory" court proceedings may now be granted a civil fine of up to 60,000 Euros (in addition to any damages).
- Whistleblowers cannot face civil liability for the harm caused by their reporting if they had reasonable grounds to believe that acting was necessary.
- Whistleblowers cannot face criminal liability for disclosing protected information if doing so was "necessary and proportionate."
- Whistleblowers cannot face criminal liability for stealing documents (or any other format of information), provided they had a prior lawful knowledge of their content. French MPs provided the following example: "One cannot wiretap their boss' office to find out whether there is anything to find out and disclose. However, if you are shown a report proving that a factory is dumping mercury into a river, you have the right to steal it to prove the facts of which you have lawful knowledge."

"The law creates a new landscape where whistleblowers enjoy better protections and can now report information directly to authorities."

Protection Extended to Others

These protections will apply not only to whistleblowers but also to natural persons and non-profit legal entities assisting whistleblowers in their reporting process (the so-called "facilitators"). They will also apply to natural persons connected with whistleblowers who may face retaliation measures in a work-related context.

Takeaways

The law creates a new landscape where whistleblowers enjoy better protections and can now report information directly to authorities. These important changes may well increase the number of reports made to authorities without businesses being even aware of them in the first place. That may well in turn impact the French corporate enforcement landscape.

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Companies should therefore pursue their efforts to put in place robust reporting channels and follow-up procedures. Addressing reported issues in a timely and effective manner is of course paramount to encourage the use of internal channels.

The new law will enter into force on September 1, 2022. That timeline will give time for the French government to adopt decrees providing more practical details about some aspects of the law. It will hopefully also give enough time for companies to put in place – or update – their internal reporting channels and follow-up procedures.

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