ICLG

The International Comparative Legal Guide to:

Anti-Money Laundering 2019

2nd Edition

A practical cross-border insight into anti-money laundering law

Published by Global Legal Group, with contributions from:

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Contributing Editors
Joel M. Cohen and Stephanie Brooker, Gibson, Dunn & Crutcher LLP

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Sales Director
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Caroline Collingwood
Rachel Williams

Sub Editor
Hollie Parker

Group Consulting Editor
Alan Falach

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
May 2019

ISBN 978-1-912509-67-6
ISSN 2515-4192

Strategic Partners

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PREFACE

We hope that you will find this second edition of *The International Comparative Legal Guide to: Anti-Money Laundering* useful and informative.

Money laundering is a persistent and very complex issue. Money laundering has been said to be the lifeblood of all financial crime, including public corruption and the financing of terrorism. Over the last 30 years, governments around the world have come to recognise the importance of strengthening enforcement and harmonising their approaches to ensure that money launderers do not take advantage of weaknesses in the anti-money laundering (AML) controls. Governments have criminalised money laundering and imposed regulatory requirements on financial institutions and other businesses to prevent and detect money laundering. The requirements are continually being refined and interpreted by government authorities. Because of the often international nature of the money laundering process, there are many cross-border issues. Financial institutions and other businesses that fail to comply with legal requirements and evolve their controls to address laundering risk can be subject to significant legal liability and reputational damage.

Gibson, Dunn & Crutcher LLP is pleased to join a group of distinguished colleagues to present several articles we hope you will find of interest on AML topics. This guide also has included chapters written by select law firms in 31 countries discussing the local AML legal and regulatory/administrative requirements and enforcement requirements. Gibson Dunn is pleased to present the chapter on the United States AML regime.

As with all ICLG guides, this guide is organised to help the reader understand the AML landscape globally and in specific countries. ICLG, the editors, and the contributors intend this guide to be a reliable first source when approaching AML requirements and considerations. We encourage you to reach out to the contributors if we can be of further assistance.

Stephanie Brooker & Joel M. Cohen

Gibson, Dunn & Crutcher LLP

Ireland

Darragh Murphy

McCann FitzGerald

Megan Hooper

1 The Crime of Money Laundering and Criminal Enforcement

1.1 What is the legal authority to prosecute money laundering at national level?

The Director of Public Prosecutions ("**DPP**") is responsible for the prosecution of crime in Ireland, including money laundering and terrorist financing.

1.2 What must be proven by the government to establish money laundering as a criminal offence? What money laundering predicate offences are included? Is tax evasion a predicate offence for money laundering?

The criminal offence of money laundering is set out in section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended (the "**AML Act**"). According to that section, to establish the criminal offence of money laundering, the prosecution must prove that the defendant engaged in certain acts in relation to property that is the proceeds of criminal conduct while knowing or believing or being reckless as to whether the property is the proceeds of criminal conduct.

Consequently, the prosecution must prove that the defendant:

a) concealed or disguised the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;

b) converted, transferred, handled, acquired, possessed or used the property; or

c) removed the property from, or brought the property into, Ireland.

According to section 6 of the AML Act, the term "proceeds of criminal conduct" means any property that is directly or indirectly, entirely or partially, derived from or obtained through "criminal conduct". "Criminal conduct" means any conduct that constitutes an offence under Irish law, including tax evasion. It also means certain conduct that occurs outside of Ireland.

According to section 7(5) of the AML Act, a person will be reckless as to whether or not property is the proceeds of criminal conduct if the person disregards, in relation to property, a risk of such a nature and degree that, considering the circumstances in which the person carries out the acts set out above, the disregard of that risk involves culpability of a high degree.

1.3 Is there extraterritorial jurisdiction for the crime of money laundering? Is money laundering of the proceeds of foreign crimes punishable?

Section 8 of the AML Act outlines certain circumstances where there is extraterritorial jurisdiction for the crime of money laundering. In particular, under section 8(1)(c) of the AML Act, an Irish citizen, a person who is an ordinary resident in Ireland, or a company established under Irish law or registered under the Companies Act 2014 will commit the offence of money laundering if that person or company engages in conduct in another jurisdiction in circumstances where the relevant conduct is an offence in the relevant jurisdiction and would be an offence under section 7 of the AML Act if the person engaged in that conduct in Ireland.

Money laundering of the proceeds of foreign offences is punishable as long as that conduct: a) is an offence in the place where it occurred, and would be an offence if it occurred in Ireland; or b) involves the bribery of a foreign public official under the Criminal Justice (Corruption Offences) Act 2018 (irrespective of whether it is considered to be bribery in the place where it occurred).

1.4 Which government authorities are responsible for investigating and prosecuting money laundering criminal offences?

The Garda Síochána (Gardaí), which is the Irish national police force, is responsible for investigating money laundering criminal offences. Within the Gardaí, the Garda National Economic Crime Bureau ("**GNECB**") is responsible for investigating serious and complex economic crimes as well as the investigation of financial crimes which are of major public concern. It also provides support and assistance to local and regional investigators, among other things. Ireland's Financial Intelligence Unit ("**FIU**") is embedded within the GNECB, which also houses two Money Laundering Investigation Units.

The DPP is responsible for prosecuting money laundering and terrorist financing offences. The Gardaí may decide to prosecute in less serious crimes, however, the prosecution is still taken in the name of the DPP and the DPP has the right to tell the Gardaí how to deal with the case.

1.5 Is there corporate criminal liability or only liability for natural persons?

Under Irish law, both natural persons and corporates can be held criminally liable. There is, however, some uncertainty about the test to be applied to determine how corporates can be held to account for criminal offences.

Section 111 of the AML Act provides for a form of derivative managerial responsibility which makes it possible to impose criminal liability on specified natural persons in circumstances where a body corporate commits a money laundering offence and it is proved that the offence was committed with the consent or connivance or is attributable to the wilful neglect of the relevant person. This section applies to:

(a) a director, manager, secretary or other officer of the body, or a person purporting to act in that capacity; and

(b) a member of the management committee or other controlling authority of the body, or a person purporting to act in that capacity.

1.6 What are the maximum penalties applicable to individuals and legal entities convicted of money laundering?

The maximum penalty applicable to individuals and legal entities convicted of money laundering under section 7 of the AML Act is up to 14 years' imprisonment and/or an unlimited fine.

1.7 What is the statute of limitations for money laundering crimes?

Under Irish law, there is no statute of limitations for offences that are prosecuted on indictment (i.e. trial by jury).

1.8 Is enforcement only at national level? Are there parallel state or provincial criminal offences?

Enforcement is only at national level. Ireland does not have parallel state or provincial criminal offences.

1.9 Are there related forfeiture/confiscation authorities? What property is subject to confiscation? Under what circumstances can there be confiscation against funds or property if there has been no criminal conviction, i.e., non-criminal confiscation or civil forfeiture?

Ireland has a strong legislative framework for asset confiscation on both a criminal and non-criminal basis. Confiscation of the proceeds of crime is governed by the Criminal Justice Act 1994 (as amended), which empowers the DPP to apply to court for a confiscation order where the defendant has been convicted of certain offences including money laundering and terrorist offences.

Under the Proceeds of Crime Act 1996–2016, the Criminal Assets Bureau ("**CAB**") can freeze and seize assets which it shows to the High Court are the proceeds of criminal conduct, on the balance of probabilities. CAB is a statutory, multi-agency body established under the Criminal Assets Bureau Act 1996 which consists of police officers, customs officers, tax officers and benefit agency personnel.

1.10 Have banks or other regulated financial institutions or their directors, officers or employees been convicted of money laundering?

While there have been a number of convictions for money laundering, information about the defendants in those cases is not easily accessible. We are not aware of situations where banks or other regulated financial institutions have been convicted of money laundering.

1.11 How are criminal actions resolved or settled if not through the judicial process? Are records of the fact and terms of such settlements public?

The DPP decides whether or not to prosecute a person for committing an offence and what the charge should be. For example, the DPP may decide not to prosecute an offence because of insufficient evidence, or because the prosecution is not in the public interest. The DPP cannot settle cases with an accused or engage in plea bargaining.

2 Anti-Money Laundering Regulatory/ Administrative Requirements and Enforcement

2.1 What are the legal or administrative authorities for imposing anti-money laundering requirements on financial institutions and other businesses? Please provide the details of such anti-money laundering requirements.

The AML Act imposes anti-money laundering requirements on certain "designated persons" including financial institutions. The Central Bank of Ireland (the "**Central Bank**") is responsible for monitoring compliance with the anti-money laundering requirements imposed on credit and financial institutions.

Each designated person must carry out and document a business risk assessment, to identify and assess the money laundering and terrorist financing ("**ML/TF**") risks involved in carrying on its business activities, taking into account the risk factors set out in Section 30A of the AML Act. It must also carry out a customer risk assessment in order to determine the type of customer due diligence to apply.

A designated person must also comply with customer due diligence requirements. Specifically, it must identify and verify the identity of its customers, their beneficial owners and persons purporting to act on behalf of a customer. Moreover, in the case of a business relationship, it must obtain information reasonably warranted by the risk of money laundering or terrorist financing on the purpose and intended nature of the business relationship, and monitor that relationship on an ongoing basis. A designated person must also examine the background and purpose of all complex or unusually large transactions and all unusual patters of transactions, which have no apparent economic or lawful purpose.

A designated person must report suspicious transactions to the Gardaí and Revenue.

The AML Act also requires each designated person to: put in place anti-money laundering policies and procedures; train staff on compliance with their anti-money laundering obligations; and keep records evidencing the designated person's AML compliance.

2.2 Are there any anti-money laundering requirements imposed by self-regulatory organisations or professional associations?

Generally, anti-money laundering requirements are set out in the AML Act; however, some self-regulatory organisations or professional associations have published guidance regarding these requirements.

2.3 Are self-regulatory organisations or professional associations responsible for anti-money laundering compliance and enforcement against their members?

Yes, in some instances. The AML Act specifies the competent authorities responsible for monitoring specific categories of designated persons as well as empowering the Minister for Justice to prescribe a competent authority for a class of designated persons. Competent authorities include the Law Society of Ireland for solicitors and the designated accountancy bodies for auditors, external accountants or tax advisers.

2.4 Are there requirements only at national level?

Yes, the AML requirements apply at national level and there are no additional regional requirements.

2.5 Which government agencies/competent authorities are responsible for examination for compliance and enforcement of anti-money laundering requirements? If so, are the criteria for examination publicly available?

The AML Act sets out the competent authorities that are responsible for monitoring compliance with the anti-money laundering requirements, including the Central Bank which is the competent authority for credit and financial institutions. While failing to comply with anti-money laundering requirements is an offence, the Central Bank also has the power to impose administrative sanctions for infringement of the anti-money laundering requirements.

The AML Act sets out what is required by way of compliance with anti-money laundering requirements and some competent authorities have supplemented these requirements with publicly available guidance. For example, the Central Bank publishes an Anti-Money Laundering Bulletin setting out its expectations regarding aspects of anti-money laundering. It has also published a number of sectoral reports setting out its observations and expectations in relation to anti-money laundering compliance, following on from on-site inspections conducted by the Central Bank.

2.6 Is there a government Financial Intelligence Unit ("FIU") responsible for analysing information reported by financial institutions and businesses subject to anti-money laundering requirements?

Yes, there is an FIU, which is responsible for analysing information reported by financial institutions and businesses subject to anti-money laundering requirements and which is embedded within the GNECB.

2.7 What is the applicable statute of limitations for competent authorities to bring enforcement actions?

There is no statute of limitations for offences that are prosecuted on indictment. Nevertheless, the Irish Constitution affords every accused the right to an expeditious trial. If there is inordinate or unconstitutional delay in the prosecution of a serious offence to the extent that there is a real risk of an unfair trial, a court may refuse to proceed with a prosecution.

2.8 What are the maximum penalties for failure to comply with the regulatory/administrative anti-money laundering requirements and what failures are subject to the penalty provisions?

Failure to comply with the anti-money laundering requirements is a criminal offence. For example, failure to identify and verify a customer can result in a fine and/or up to five years' imprisonment. Moreover, failure to comply with the anti-money laundering requirements by a regulated financial services provider ("**RFSP**") may also be subject to an administrative sanctions procedure. For example, under the Central Bank Act 1942, as amended (the "**1942 Act**"), the Central Bank has the power to impose fines of up to €10,000,000 or 10% of turnover on an RFSP and a fine of up to €1 million on a natural person involved in the failure to comply on the part of the RFSP.

2.9 What other types of sanction can be imposed on individuals and legal entities besides monetary fines and penalties?

Under the 1942 Act, the Central Bank can impose a wide range of administrative sanctions on an RFSP including a:

- caution or reprimand;
- direction to refund or withhold all or part of the money charged or paid, or to be charged or paid, for the provision of a financial service by a RFSP;
- in the case of a RFSP which is not authorised by the European Central Bank under the Single Supervisory Mechanism Regulations, suspension or revocation of the authorisation of that RFSP;
- in the case of a RFSP which is authorised by the European Central Bank under the Single Supervisory Mechanism Regulations, the submission of a proposal to the European Central Bank to suspend or revoke the authorisation of that RFSP;
- in the case of a natural person, a direction disqualifying the person from being concerned in the management of a RFSP for a prescribed period of time;
- direction to cease a contravention, if it is found the contravention is continuing; and
- direction to pay the Central Bank all or part of the costs incurred by the Central Bank in holding an inquiry and in investigating the matter to which the inquiry relates.

2.10 Are the penalties only administrative/civil? Are violations of anti-money laundering obligations also subject to criminal sanctions?

Violations of anti-money laundering obligations may be subject to criminal and administrative sanctions. However, provisions against double jeopardy may apply.

2.11 What is the process for assessment and collection of sanctions and appeal of administrative decisions? a) Are all resolutions of penalty actions by competent authorities public? b) Have financial institutions challenged penalty assessments in judicial or administrative proceedings?

The process of assessment and collection of sanctions and appeal of administration decisions depends on the relevant competent

authority. In the case of the Central Bank, the relevant process is set out in the 1942 Act. The Central Bank publishes resolutions of penalty actions, including settlements. We are not aware of instances where financial institutions have challenged AML-related penalty assessments in judicial proceedings.

3 Anti-Money Laundering Requirements for Financial Institutions and Other Designated Businesses

3.1 What financial institutions and other businesses are subject to anti-money laundering requirements? Describe which professional activities are subject to such requirements and the obligations of the financial institutions and other businesses.

The AML Act imposes anti-money laundering obligations on "designated persons" when acting in Ireland, in the course of business carried on in Ireland. The term "designated persons" is defined to include a "financial institution", which in turn is defined to include banks, investment firms, insurers, insurance intermediaries, and collective investment undertakings.

The term "financial institution" also covers undertakings carrying on specified types of activities, such as lending, financial leasing, payment services, guarantees and commitments, trading in certain types of instruments, participating in securities issues and providing related services, money broking, portfolio management, safekeeping and administration of securities, safe custody services and issuing electronic money.

Certain non-financial institutions are also subject to anti-money laundering requirements, including, for example, property service providers, casinos as well as to any persons trading in goods in respect of transactions involving payments in cash of a total of at least €10,000.

The obligations imposed on designated persons are set out above. In addition to those obligations, section 108A of the AML Act requires financial institutions and persons that carry on the business of a cheque cashing office that are not authorised or licenced by the Central Bank to register with the bank.

3.2 To what extent have anti-money laundering requirements been applied to the cryptocurrency industry?

The anti-money laundering requirements do not specifically apply to the cryptocurrency industry. They do, however, apply to those entities involved in cryptocurrency to the extent that the relevant entity falls within the definition of a designated person for the purpose of the AML Act. Moreover, Ireland is in the process of transposing the EU's Fifth Money Laundering Directive 2018/843 ("**MLD5**") into Irish law, which extends AML requirements to cover certain virtual currency exchanges and custodian wallet providers.

3.3 Are certain financial institutions or designated businesses required to maintain compliance programmes? What are the required elements of the programmes?

The Central Bank is not empowered to impose a compliance programme on a financial institution or designated business, however, having such a programme is typically a condition of authorisation. In addition, the Central Bank may apply additional supervisory measures to firms and sectors to further mitigate against the risk of the financial services industry being exploited for ML/TF purposes. For example, the Central Bank has appointed Relationship Managers to certain firms and sectors in order to ensure appropriate responses and timely interventions to matters that arise. In addition, the Central Bank may meet with key control functions within firms, e.g., CEO, CRO, Internal Audit, Independent Non-Executive Directors, as well as attending board meetings in order to determine that firms are aware of ML/TF risks and that appropriate measures are being taken to mitigate those risks.

3.4 What are the requirements for recordkeeping or reporting large currency transactions? When must reports be filed and at what thresholds?

There are no specific requirements applicable to large currency transactions or record-keeping in relation to such transactions.

3.5 Are there any requirements to report routinely transactions other than large cash transactions? If so, please describe the types of transactions, where reports should be filed and at what thresholds, and any exceptions.

There are no such cash transaction reporting requirements.

3.6 Are there cross-border transactions reporting requirements? Who is subject to the requirements and what must be reported under what circumstances?

There are no such requirements.

3.7 Describe the customer identification and due diligence requirements for financial institutions and other businesses subject to the anti-money laundering requirements. Are there any special or enhanced due diligence requirements for certain types of customers?

Each Designated Person must identify its customer and any person purporting to act on its customers behalf and verify their respective identities on the basis of documents or information that it has reasonable grounds to believe is reliable. In addition, a Designated Person must identify any beneficial owner connected with the customer and take measures reasonably warranted by the risk of money laundering and/or terrorist financing to verify the beneficial owner's identity to the extent necessary to ensure that the designated person has reasonable grounds to believe that it knows who the customer's beneficial owners are. Where the beneficial owner is a legal person, the Designated Person must take the measures reasonably warranted to understand the ownership and control structure of the entity or arrangement concerned.

A Designated Person must obtain information reasonably warranted by the risk of money laundering or terrorist financing on the purpose and intended nature of a business relationship with a customer prior to establishing the relationship. It must also monitor any business relationship with a customer to the extent reasonably warranted by the risk of money laundering or terrorist financing. A Designated Person must examine the background and purpose of all complex or unusually large transactions, and all unusual patterns of transactions, which have no apparent economic or lawful purpose.

A Designated Person must apply enhanced customer due diligence to:

- a correspondent banking relationship with another credit institution located outside of the EU;

- a business relationship or transaction with a Politically Exposed Person (a "**PEP**");
- customers resident in high-risk third countries; and
- a situation where a high-risk customer or business scenario is identified and there is a suspicion of money laundering or terrorist financing.

A Designated Person must obtain senior management approval before entering into or continuing a business relationship with a PEP or before entering into a correspondent banking relationship.

3.8 Are financial institution accounts for foreign shell banks (banks with no physical presence in the countries where they are licensed and no effective supervision) prohibited? Which types of financial institutions are subject to the prohibition?

Section 59(1) of the AML Act prohibits credit institutions and financial institutions from entering into a correspondent relationship with a shell bank.

3.9 What is the criteria for reporting suspicious activity?

A Designated Person must report suspicious activity where it knows, suspects or has reasonable grounds to suspect, on the basis of information obtained in the course of carrying on business as a designated person, that another person has been or is engaged in the offence of money laundering or terrorist financing.

3.10 Does the government maintain current and adequate information about legal entities and their management and ownership, i.e., corporate registries to assist financial institutions with their anti-money laundering customer due diligence responsibilities, including obtaining current beneficial ownership information about legal entity customers?

The EU (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the "2019 Regulations") require an in-scope corporate entity to file its beneficial ownership information with the Register of Beneficial Ownership of Companies and Industrial Provident Societies, from 23 June 2019.

Corporate entities were previously required to keep a beneficial ownership register containing adequate, accurate and current information on their beneficial owners under the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016. These regulations have now been replaced with the 2019 Regulations, with effect from 22 March 2019.

A similar obligation to keep a beneficial ownership register is imposed on a trustee of an express trust under the European Union (Anti-Money Laundering Beneficial Ownership of Trusts) Regulations 2019. In order for this obligation to apply, either the trustee must be resident in Ireland or the trust must be otherwise administered in Ireland.

3.11 Is it a requirement that accurate information about originators and beneficiaries be included in payment orders for a funds transfer? Should such information also be included in payment instructions to other financial institutions?

Under Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds (the Wire Transfer Regulation) the payer's payment service provider ("**PSP**") must ensure that transfers of funds are accompanied by: the payer's name; the payer's payment account number; and the payer's address, official personal document number, customer identification number or date and place of birth. The payer's PSP must also ensure that transfers of funds are accompanied by the payee's name and payment account number.

The Regulation applies to transfers of funds, in any currency that are sent or received by a PSP or an intermediary PSP established in the EU. The term "funds" is defined in Article 3(8) of the Wire Transfer Regulation to mean banknotes and coins, scriptural money and electronic money.

3.12 Is ownership of legal entities in the form of bearer shares permitted?

The Companies Act 2014 prohibits bearer shares in respect of private companies.

3.13 Are there specific anti-money laundering requirements applied to non-financial institution businesses, e.g., currency reporting?

Certain non-financial institutions are subject to anti-money laundering requirements, including, for example, property service providers, casinos as well as to any persons trading in goods in respect of transactions involving payments in cash of a total of at least €10,000.

3.14 Are there anti-money laundering requirements applicable to certain business sectors, such as persons engaged in international trade or persons in certain geographic areas such as free trade zones?

There are no specific anti-money laundering requirements imposed on such business and sectors.

4 General

4.1 If not outlined above, what additional anti-money laundering measures are proposed or under consideration?

As outlined above, the Irish government is currently transposing MLD5 into Irish law.

4.2 Are there any significant ways in which the anti-money laundering regime of your country fails to meet the recommendations of the Financial Action Task Force ("FATF")? What are the impediments to compliance?

According to the FATF's most recent evaluation, Ireland has a sound and substantially effective regime to tackle money laundering and terrorist financing, but could do more to obtain money laundering and terrorist financing convictions and demonstrate its effectiveness in confiscating proceeds of crime.

4.3 Has your country's anti-money laundering regime been subject to evaluation by an outside organisation, such as the FATF, regional FATFs, Council of Europe (Moneyval) or IMF? If so, when was the last review?

Ireland's anti-money laundering regime was last evaluated by the FATF in September 2017.

4.4 Please provide information for how to obtain relevant anti-money laundering laws, regulations, administrative decrees and guidance from the Internet. Are the materials publicly available in English?

The Electronic Irish Statute Book includes the Acts of the Oireachtas (Parliament) and statutory instruments. Material published by the Central Bank may be obtained on its website. The materials are publicly available in English.

Darragh Murphy
McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Grand Canal Dock
Dublin 2, D02 X576
Ireland

Tel: +353 1 607 1433
Email: Darragh.Murphy@mccanfitzgerald.com
URL: www.mccannfitzgerald.com

Darragh specialises in advising on regulatory and commercial matters relevant to financial services businesses, including insurance undertakings, investment management operations, fund promoters, banking entities and payment service providers.

Darragh's practice covers all aspects of carrying on regulated financial services activities in Ireland whether in relation to the authorisation of entities in this sector, their ongoing business requirements (customer, counterparty and/or regulator facing) and/or problem resolution. He advises extensively on anti-money laundering compliance and his clients include both regulated and unregulated entities.

Megan Hooper
McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Grand Canal Dock
Dublin 2, D02 X576
Ireland

Tel: +353 1 611 9158
Email: Megan.Hooper@mccannfitzgerald.com
URL: www.mccannfitzgerald.com

Megan is an experienced commercial litigation solicitor, advising companies and financial institutions on corporate disputes, internal investigations, as well as on regulatory and other statutory investigations and inquiries. She deals with dispute resolution through Commercial Court litigation and mediation. Since February 2009, she has acted as lead adviser to two financial institutions in relation to regulatory and criminal investigations arising from legacy issues.

She has expert knowledge about the procedures of the Garda National Economic Crime Bureau, the Director of Public Prosecutions and regulatory bodies such as the Chartered Accountants Regulatory Board, the Central Bank of Ireland and the Office of the Director of Corporate Enforcement. She has experience advising on suspicious transaction reports and responding to orders and statutory requests under the Central Bank Administrative Sanctions Procedure as well as other legislation. Megan also has experience dealing with data protection and customer confidentiality issues.

McCann FitzGerald

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com