



# *“GDPR and the Funds Industry”*

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# Agenda

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## Introduction

- Overview of GDPR
- Overview of the Funds Industry in Europe and Ireland
- Application of data protection principles in this context
- Review of the impact of GDPR on funds and recommendations for future action

## Q&A



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# Overview of GDPR

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# EU General Data Protection Regulation

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- Applicable from 25 May 2018
- Regulates the protection of Personal Data within the EU
- Replaces EU Data Privacy Directive from 1995 and member states' national implementation laws
- Legislative Form: Regulation



# Extended Territorial Scope, Art. 3 GDPR

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Data Controllers and Processors with an establishment within the EU

Non-EU established organisations:

- offering goods or services to data subjects in the EU or
- monitoring their behaviour within the EU



# Supervisory Authority, Art. 51 et seq. GDPR

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- Supervision and enforcement of GDPR
- “One-stop-shop” and lead supervisory authority



# Key Principles , Article 5 GDPR

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1. Lawfulness, fairness, and transparency;
2. Purpose Limitation;
3. Data Minimisation;
4. Accuracy;
5. Storage Limitation;
6. Integrity and Confidentiality; and
7. Accountability



# Accountability, Art. 30 GDPR

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- Comply with GDPR and document that you comply
- Data mapping
- Draft and maintain records of processing activities
- Audits by DPA





# Individual Rights, Art. 15-21 GDPR

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- Right of access to personal data and to receive information on data processing activities performed
- Right to rectification of inaccurate data
- Right to erasure (“right to be forgotten”)
- Right to restriction of processing
- Right to data portability
- Right to object at any time to processing of personal data

# Designation of a Data Protection Officer, Art. 37 GDPR

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- New Role required in certain cases
- Regular and systematic monitoring of data subjects on a large scale
- Processing on a large scale of sensitive personal data



# Privacy Policy, Art. 13 GDPR

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- Extended information obligations of data controllers
- Review of existing privacy policy to match GDPR standard



# Transfer of Personal Data outside of the EEA, Art. 44 et seq. GDPR

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- Consent
- Data Transfer Agreements based on EU model clauses
- Binding Corporate Rules
- EU/U.S. Privacy Shield



# Schrems (I) & Schrems (II)

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## Schrems (I) :

- The Irish High Court submitted a request for a preliminary ruling under Article 267 TFEU
- The CJEU declared the Safe Harbor agreement invalid. The main reason for this ruling appeared to be the fact that the CJEU was of the opinion that in adopting Article 3 of the Safe Harbour agreement, the EC exceeded its powers by making a shortcut on the adequacy procedure that should be followed according to Directive 95/46/EC.
- Following the invalidity of the Safe Harbor agreement, the Privacy Shield mechanism was implemented in order to replace the Safe Harbor agreement and to act as an instrument for EU/US data transfer.



# Schrems (I) & Schrems (II)

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## Schrems (II)

- The CJEU declared the Privacy Shield invalid
- CJEU concluded that Standard Contractual Clauses remain an “*appropriate safeguard*” for international data transfers.
- Organisations must verify “*on a case-by-case basis*” that the personal data being transferred will be adequately protected in the destination country in line with the requirements of EU law. That level of protection must be “*essentially equivalent*” to that guaranteed within the European Union by the GDPR.



# Contracts with Data Processors, Art. 28 GDPR

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- GDPR requires that controllers and processors enter into a written agreement
- Contracts with vendors (Data Processors) must contain the provisions and safeguards required by GDPR
- GDPR stipulates that Controllers must only engage Processors which provide sufficient guarantees to implement appropriate technical and organisational measures to comply with GDPR and to protect data subject rights
- In addition to complying with the provisions of the written agreement, Controllers and Processors must also comply with direct obligations of GDPR . For example, record keeping and data security
- Review and amend contracts

# Notification of Data Breaches, Art. 33, 34 GDPR

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- Data breaches which are likely to result in a risk for the rights and freedoms of individuals must be notified to the DPA within 72 hours
- Data subjects must be informed in case of a high risk for their rights and freedoms





# Sanctions, Art. 83 GDPR

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- Measures to be ordered by DPA
- Fines up to 4% of annual global turnover of euro 20 million, whichever is higher



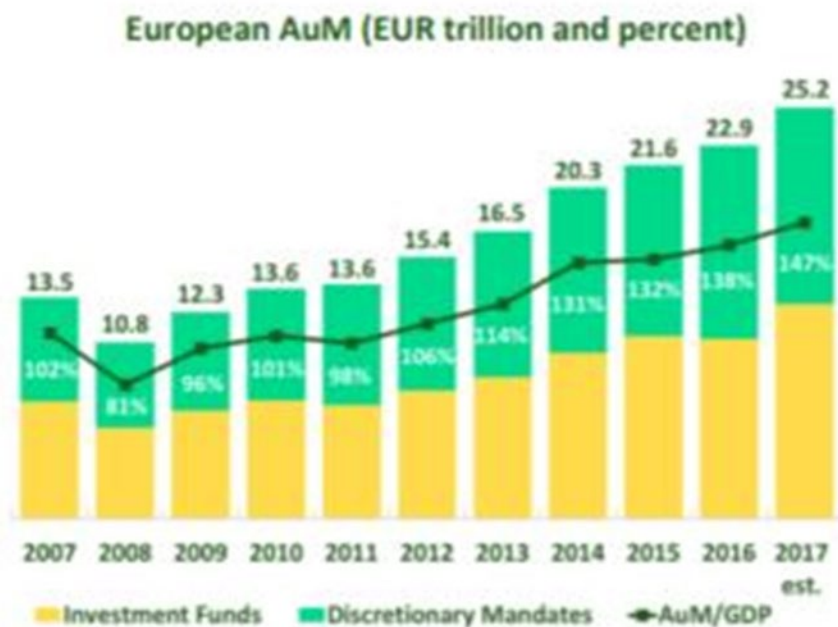
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# Overview of the Funds Industry in Europe and Ireland

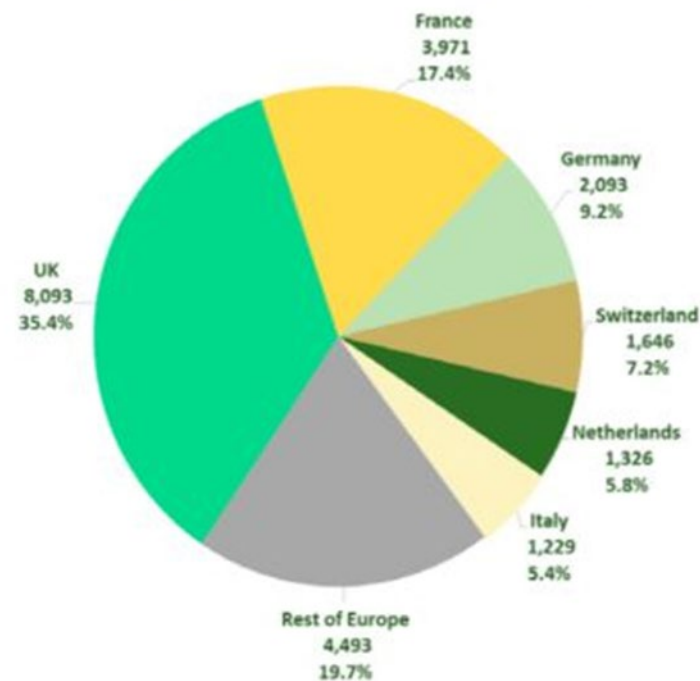
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# European Funds Industry



European AuM at end 2016 (EUR billion and percent of total)





# European Funds Industry

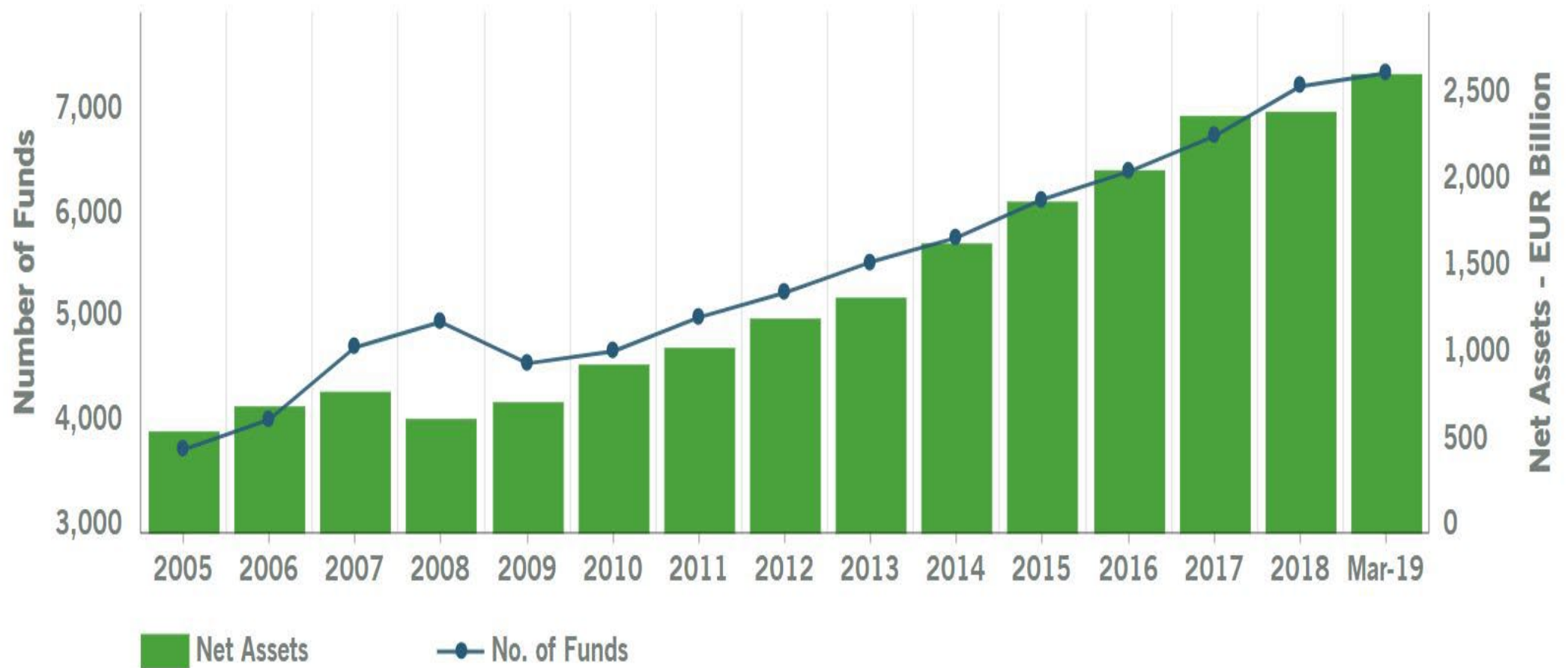
Number of Asset Management Companies <sup>1</sup>

Country	2016	Country	2016
Austria	26	Liechtenstein	16
Belgium	64	Luxembourg	314
Bulgaria	31	Malta	120
Croatia	21	Netherlands	224
Cyprus	102	Norway	31
Czech Republic	22	Portugal	72
Denmark	50	Romania	21
Finland	25	Slovakia	9
France	630	Slovenia	7
Germany	325	Spain	101
Greece	52	Sweden	100
Hungary	27	Switzerland	190
Ireland	253	Turkey	50
Italy	261	United Kingdom	1,050
Europe			4,194

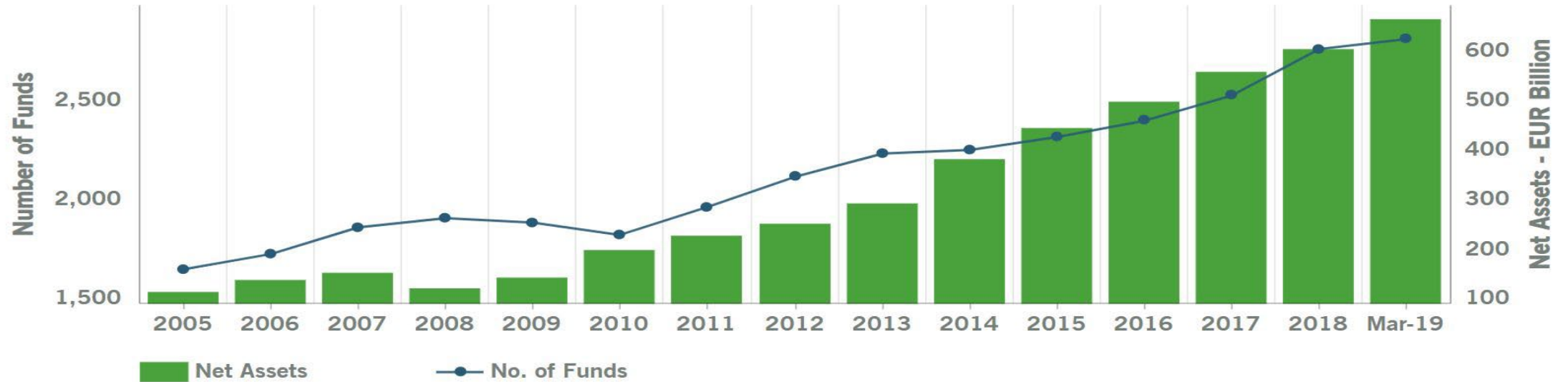
Direct Employment in European Asset Management Companies in 2016



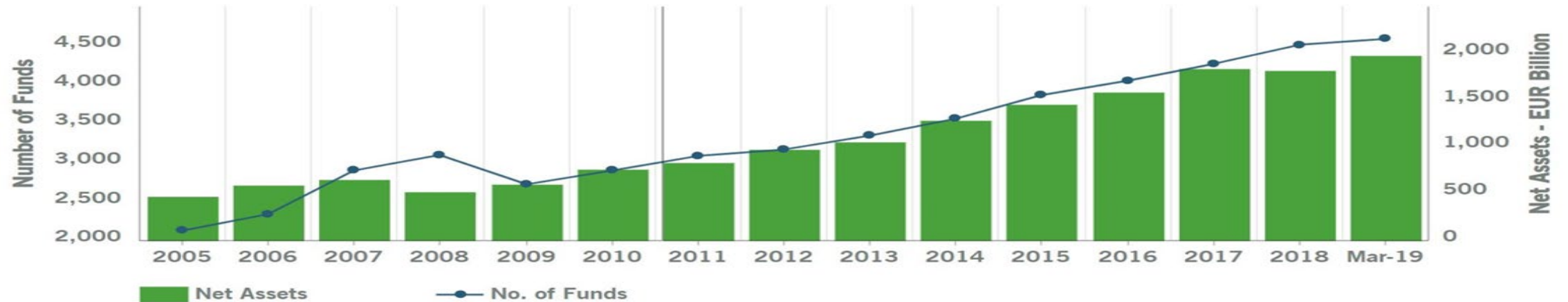
## Irish Domiciled Funds, Total Net Assets & No. of Funds



## Irish Domiciled AIFs Funds, Total Net Assets & No of Funds



## Irish Domiciled UCITS Funds, Total Net Assets & No. of Funds



## The Facts

SOURCE: Central Bank of Ireland, Morningstar Insight Ireland Survey 2018 and Irish Funds (net assets and number of funds valued as of December 2018)

**986 Fund Promoters**  
(532 promoters of Irish Domiciled Funds)

### Irish Investment Funds Industry

**€4.2**

TRILLION TOTAL AUA

**€2.4**

TRILLION DOMICILED AUA

DISTRIBUTION TO OVER

**90 COUNTRIES**

**13,914** TOTAL FUNDS

**7,290** IRISH DOMICILED

**6,624** NONDOMICILED

LAWYERS  
ACCOUNTANTS  
LISTING BROKERS

ADMINISTRATORS  
DEPOSITARIES

ASSET  
MANAGERS



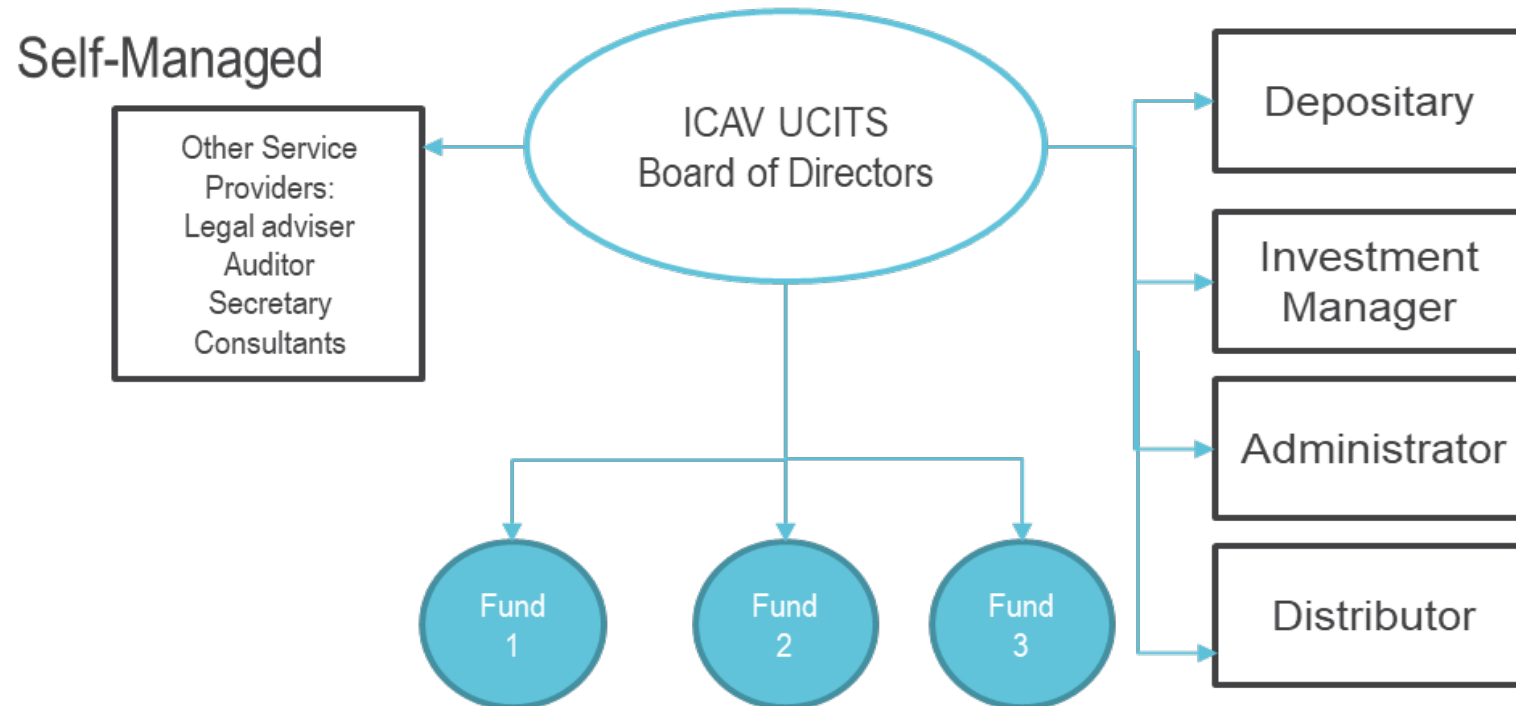
SOURCE: Central  
Bank of Ireland,  
December 2018

### Irish Domiciled Funds Breakdown by type





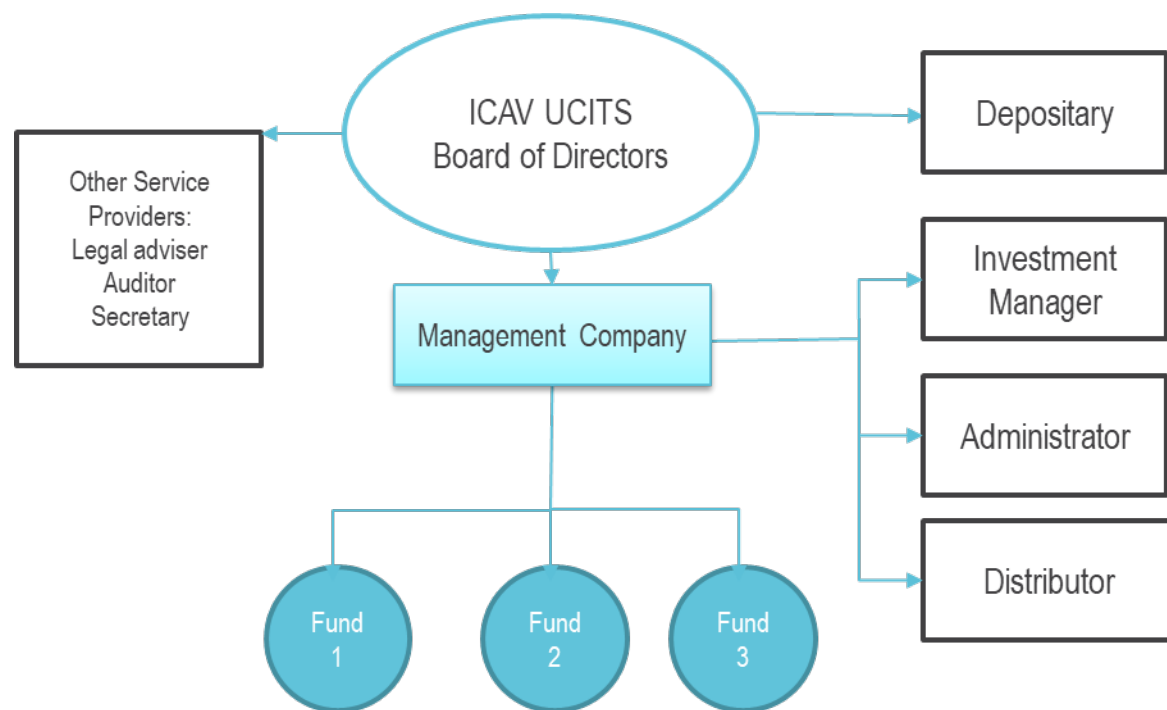
# Irish Legal Structures - ICAV





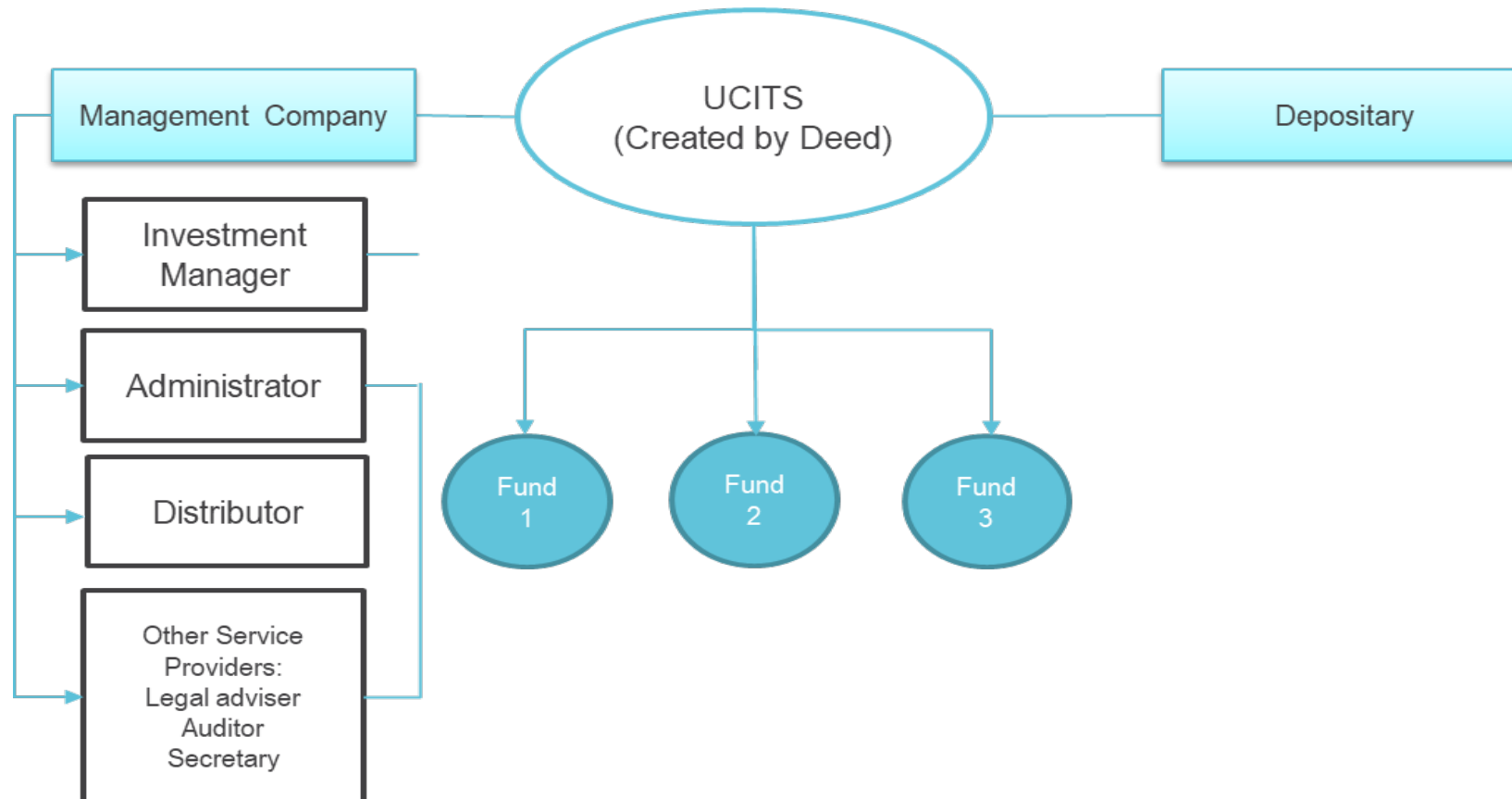


# Irish Legal Structures – ICAV





# Irish Legal Structures – Unit Trusts & CCFs



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# Application of Data Protection Concepts in the asset management and funds context

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# Data Protection in the Funds Context

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## Data Controller

*“data controller” means a person who, either alone or with others, controls the contents and use of personal data.*

- Fund
- Management Company
- Promoter/Investment Manager
- Distributor
- Depositary



# Data Protection in the Funds Context

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## Data Processor

*“data processor” means a person who processes personal data on behalf of a data controller but does not include an employee of a data controller who processes such data in the course of his employment.*

- Administrator
- Transfer Agent
- Distributor
- Depositary



# Data Protection in the Funds Context

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## Registration

- Requirement on certain data controllers and processors acting on their behalf to register with Data Protection authority
- Public Registers
- Processing sensitive information.



# Data Protection in the Funds Context

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## Sensitive Personal Data

*“data that relates to a subject’s:*

- Racial or ethnic origin, political opinions, religious or philosophical beliefs;*
- Trade union membership;*
- Physical or mental health or condition, or sexual life; and*
- The commission or alleged commission of any offence, or related proceedings, disposal of proceedings or sentence.*



# Data Protection in the Funds Context

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## Sensitive Personal Data

- Sharia Funds
- Socially responsible investing
- Ethical investing
- Restricted Share Classes





# Data Protection in the Funds Context

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## Consent

- Implied, explicit and informed consent
- Burden of proof on data controller to illustrate consent was obtained prior to processing.
  - Prospectus disclosures
  - Subscription documentation



# Data Protection in the Funds Context

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## Excessive Information

- only minimum necessary personal data should be sought and used to allow for the performance of the function to which it relates.
- data controller must be able to show that each piece of personal data sought from a person is needed for a legitimate reason.
- Where data is not needed for the reason for which it was sought this would constitute a breach of the Data Protection Acts.
  - Subscription Forms
  - Other sources of data



# Data Protection in the Funds Context

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## Consent

- Implied, explicit and informed consent
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  - Prospectus disclosures
  - Subscription documentation



# Data Protection in the Funds Context

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## Further Processing

- Identification of a lawful basis before processing personal data.
- Profiling
- Marketing

## Storage and Retention

- data shall not be kept for longer than necessary for such purpose
- Shareholding
- Audit holdback
- Litigation
- Tax



# Data Protection in the Funds Context

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## International Transfers

- Internal group transfers are within scope
- Outsourcing

Data controller or processor may utilise the following measures:

- standard clauses in the contract underlying the transfer;
- Utilise contractual clauses pre-approved by supervisory authority;
- Corporate rules to include essential principles and enforceable rights to ensure safeguards for transfer.



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# Review of the impact of GDPR on funds and recommendations for future action

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# GDPR Impact and Practical Steps

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Disproportionate impact on certain industries

Asset Management is amongst these due to:

- International nature
- Multiple parties
- Outsourced business models
- Intangible product ideal for online sales
- Other potentially conflicting regulatory requirements

*Example : MiFID II recording obligations regarding steps leading to a transaction versus GDPR obligations regarding privacy, consent,*



# GDPR Impact and Practical Steps

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*Compliance by:*

- *Funds*
- *Service Providers*
  - *Investment Manager*
  - *Administrator*
  - *Transfer Agent*
  - *Distributors*





# GDPR Impact and Practical Steps

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## *Compliance by Funds:*

- *Update of documentation:*
  - *Prospectus*
  - *Subscription agreement*
  - *Agreements with Service Providers*
  - *Policies and Procedures Manual*
  - *Business Plan*
- *Confirmations from Service Providers*
- *Ongoing actions*



# Consent

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- Consent must be *“freely given, specific, informed and unambiguous.”*
- Data subject must be aware of the extent to which he/she has given consent.
- Must be granular if given for more than one purpose.
- Cannot be inferred from silence or pre-ticked boxes.
- Controllers must be able to demonstrate valid consent was given.
- Funds and Fund Management Companies and service providers must ensure consent meets GDPR requirements.



# GDPR Impact and Practical Steps

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## *Compliance by Service Providers to Funds:*

- *Update of internal documentation:*
  - *Policies and Procedures*
  - *Contractual Agreements*
  - *Delegation and outsourcing agreements*
- *Additional issues*



# Changes to the Data Protection Policy

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- *Increased Territorial Scope*
- *Data Protection Officer*
- *Data Analysis- implications*
- *Consent*
- *Breach Notification*
- *Enhanced Rights of Subjects (Access etc)*
- *Privacy by Design*
- *Data Mapping*
- *Privacy Notices*

# Requirement to Appoint a Data Protection Officer

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The requirement applies to both controllers and processors.

The Data Protection Officer should:

- Provide advice and guidance to entity and its employees;
- Monitor the organisation's compliance;  
Be consulted and provide advice during Data Protection Impact Assessments; and
- Be the point of contact for data subjects.

Similar in many respects to role of MLRO



# Data Mapping

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## Understand the information flow

- Transfer of information from one location to another, within groups e.g. inside to outside the EU.

## Describe the information flow

- Identify unforeseen or unintended uses of data;
- Consult people using the information on practical implications; and
- Consider future potential use of information collected.

## Identify key elements

- Data items, formats, transfer methods, location, accountability and access.



# Privacy by Design

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Benefits of “privacy by design” approach:

- Potential problems are identified at an early stage i.e. simpler and less costly to address;
- Increased awareness of privacy and data protection across an organisation;
- Organisation are more likely to meet their legal obligations; and
- Actions are less likely to be privacy intrusive and have negative impact on individuals.



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# Questions

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Mark is a Partner and Head of Asset Management and Funds in Clerkin Lynch LLP. He has in excess of 15 years experience as a solicitor advising on the establishment, launch and ongoing operations of investment funds.

His experience covers both funds authorised as UCITS and under the AIFMD. In addition to Dublin, he has worked in some of the other key international fund domiciles including the Cayman Islands and Luxembourg.

ESG is one of his particular areas of focus.