

FINMA Guidance 03/2023

Status of the licensing process for and supervision of portfolio managers and trustees

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Contents

1	Status of the licensing process.....	3
1.1	Latest figures.....	3
1.2	Features of the licensed population	4
1.3	Prioritisation of licence applications	4
1.4	Updating confirmation of application status	4
1.5	Non-responsive companies.....	5
2	Supervisory measures	5
3	Supervision	6
3.1	Supervision of portfolio managers and trustees.....	6
3.2	Oversight of supervisory organisations.....	6

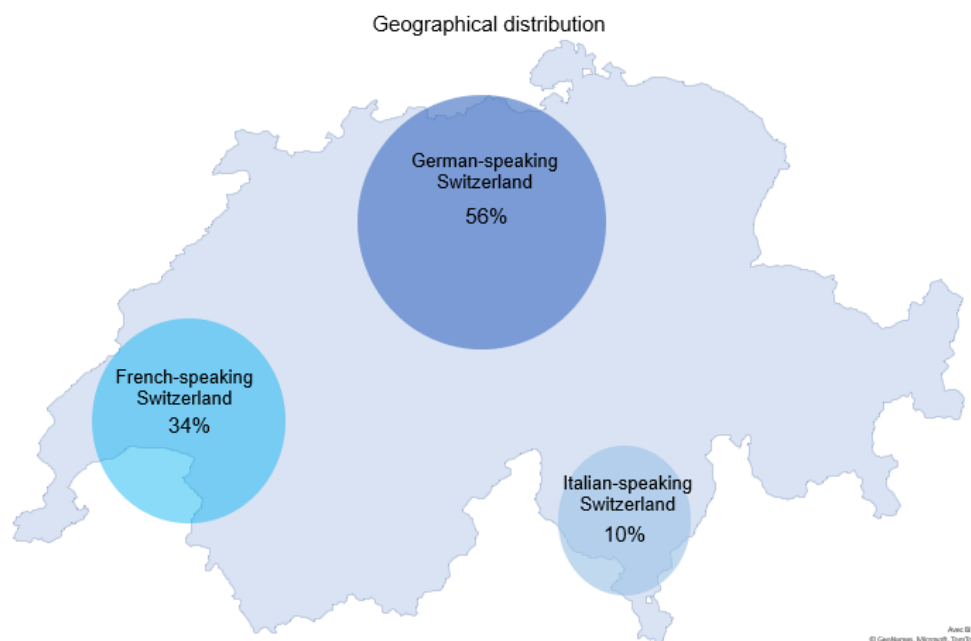
1 Status of the licensing process

1.1 Latest figures

FINMA Guidance 02/2023 provided an initial picture of the situation following the expiry of the transitional period. By the end of 2022, FINMA had received a total of 1,699 licence applications, 1,534 of which were from portfolio managers and 165 from trustees.

Since the beginning of 2023, FINMA has received 50 licence applications representing new entrants onto the market, with 44 of these submitted by portfolio managers and 6 from trustees.

In geographical terms, the portfolio managers and trustees which submitted all the applications received by 30 June 2023 can be broken down as follows:



By 30 June 2023, 950 licences had been granted to 941 institutions¹, with 9 of these having been granted licences as both portfolio managers and trustees. This can be broken down as follows:

- 931 institutions (888 portfolio managers, 43 trustees), of which 8 institutions licensed as both portfolio managers and trustees, out of the 1,699 licence applications received by the end of 2022; as well as
- 10 institutions, with one institution licensed as both portfolio manager and trustee, out of the 50 licence applications received since the beginning of 2023.

¹ For more details please consult the following lists, which are updated on a regular basis:

- the list of portfolio managers and trustees licensed by FINMA and monitored by a supervisory organisation, and
- the list of portfolio managers licensed and supervised by FINMA (domestic group companies under FinIA),

at www.finma.ch > Authorisation > Portfolio managers and trustees.

1.2 Features of the licensed population

The majority of the portfolio managers and trustees licensed are microenterprises in the legal form of an *Aktiengesellschaft* (company limited by shares) with fewer than three full-time positions. Across all legal forms, the total amount of the licensed institutions' assets under management was CHF 177 billion as at 30 June 2023. This corresponds to a median figure of CHF 61 million per institution, although there are major differences from one institution to another.

The legislation applicable to portfolio managers and trustees provides for organisational reliefs in accordance with the principles of proportionality and risk orientation. These reliefs go further than for other types of supervised institutions, for example banks or managers of collective assets. This concerns notably requirements in terms of risk management and internal control; in other words, the second (risk & compliance) and third (audit) lines of defence. On the other hand, when – for reasons relating to risks or the size of the institution – risk management and internal control need to be independent of income-generating activities, FINMA notes that almost half the portfolio managers and trustees choose to implement this organisational requirement by delegating control functions to external service providers.

1.3 Prioritisation of licence applications

Given that a large number of requests were submitted to FINMA at the end of the transitional period of three years, processing this substantial volume of licence applications will require some time yet. The time needed to process the applications received at the end of 2022 is intrinsically linked to the quality and complexity of these applications. Applications are processed on a first come, first served basis. Nevertheless, a decision was taken to prioritise three types of applications in line with a risk-based approach:

- Applications presenting an element of overindebtedness (Art. 725b Swiss Code of Obligations) or of insufficient coverage of minimum capital requirements (Art. 22 para. 1 FinIA in connection with Art. 27 FinIO).
- Applications involving a large number of clients, in terms of assets either under management or trust.
- New applications. Since they have no claim to any transitional period, priority is likewise given to new entrants onto the market, i.e. newly founded institutions and institutions on the point of crossing for the first time the thresholds for carrying out an activity on a professional basis.

1.4 Updating confirmation of application status

Processing the applications submitted toward the end of the transitional period will require some time yet. Consequently, it is completely normal that some of the portfolio managers and trustees which submitted their application at the end of 2022 and are thus still covered by the transitional period have not yet heard from FINMA. If an institution that is still affiliated with a self-regulatory organisation (SRO) submitted its licence application to FINMA together with evidence of its affiliation with a supervisory organisation (SO) before the end of the transitional

period, it may continue to carry out its activity until a decision has been communicated with regard to the issuing of a licence.

As set out in FINMA Guidance 02/2023, the institutions have the possibility of autonomously generating and then downloading as a PDF up-to-date status confirmation of their application on the survey and application platform (“EHP”). This confirmation is proof for the various parties involved that a licence application is being processed by FINMA.

1.5 Non-responsive companies

In mid-May 2023, with a view to assessing compliance with the transitional period of three years as stipulated in Article 74 para. 2 FinIA, FINMA contacted 300 institutions which had registered as portfolio managers or trustees on the EHP but who had neither submitted a licence application nor communicated their intention of not submitting a licence application. Of this number, 213 institutions followed up on the contact by FINMA, while 87 failed to react to the letters sent, even after a reminder. Where institutions have failed to react to FINMA’s requests within the time period set and where it can be assumed that they are carrying out their activities as portfolio manager or trustee without being in possession of the necessary authorisation, FINMA’s Enforcement division carries out the necessary investigations.

If, in the course of the Enforcement division’s investigations, the institutions concerned fail to comply with their duty to provide information and it is therefore not possible to eradicate the suspicion that they are engaging in activities without the requisite authorisation, they will be placed on FINMA’s warning list². If FINMA’s investigations confirm that activities are being carried out in the absence of authorisation, the institutions and persons responsible face supervisory measures and penalties under criminal law.

2 Supervisory measures

Since 2020, FINMA has initiated 393 investigations in connection with suspicions of activities as portfolio manager or trustee being engaged in without the requisite licence. In addition, in mid-2023 it filed 38 criminal complaints with the Federal Department of Finance (FDF) on grounds of suspicions of unauthorised activities. FINMA also placed 189 institutions on its warning list, which it uses to alert investors to institutions which have failed to comply with their duty to disclose information to FINMA and are operating without the requisite licence.

Furthermore, since January 2023 – i.e. after expiry of the transitional periods – the institutions active in a professional capacity that were late in submitting a licence application to FINMA have been asked to confirm that they will restrict their activity as portfolio manager or trustee to those actions that are strictly necessary for the purposes of the safekeeping of assets. Having been informed that FINMA would not continue assessing the applications until it was in receipt of the confirmation

² www.finma.ch > Authorisation > Warning list

regarding the activities engaged in without authorisation, the four institutions concerned then followed up on the matter.

3 Supervision

3.1 Supervision of portfolio managers and trustees

The supervisory model for portfolio managers and trustees is structured as follows:

- FINMA is responsible for granting a licence, as well as for approving any changes to license-related conditions.
- Ongoing supervision (including audit activity) of the supervised institutions is carried out by the SOs, except where FINMA supervises domestic group companies pursuant to Article 83 FinIO.
- FINMA is responsible for intensive supervision of the supervised institutions and enforcement when the SOs have exhausted without success all measures of ordinary supervision available to them.

The SOs monitor licensed portfolio managers and trustees on the basis of risk. If they themselves do not audit the supervised institutions, the SOs may appoint an audit expert or auditor (licensed by the Federal Audit Oversight Authority, FAOA, but not under the oversight of such as far as the audit of the portfolio managers and trustees is concerned). For each institution subject to their supervision, the SOs apply supervisory measures that are proportionate to the level of risk determined, in particular as regards the frequency of regular audits, and – if necessary – will conduct supervisory interviews with an institution or carry out on site inspections at an institution's premises. The SOs determine the level of risk (rating) for each institution supervised, based on the evaluation of audit reports and other elements resulting from regular monitoring. They may take into account information provided by third parties, notably the media, the authorities or clients. The SOs may change the rating whenever deemed necessary.

If an SO ascertains any breaches of the legislation governing the financial markets or if it becomes aware of any other irregularities, it will grant the supervised institution a suitable period of time in which to remedy the situation. If this deadline is not met, the SO will notify FINMA immediately. It will also notify FINMA if the deadline is met but an orderly state of affairs has not been restored. Furthermore, FINMA is notified of any serious breaches of supervisory law or irregularities for which the setting of a deadline for remediation does not seem appropriate.

3.2 Supervision of supervisory organisations

The SOs are authorised and supervised by FINMA. Within the framework of this monitoring, FINMA ensures that the SOs provide the necessary organisational and financial guarantees. The information required for this purpose is provided by the SOs as part of the annual report they submit to FINMA. FINMA also issues the SOs with standard requirements for supervising portfolio managers and trustees.

The model used to evaluate supervised institutions' risks is laid down by FINMA. This model encompasses a risk evaluation based on each applicable body of legislation (3 partial ratings FinIA, FinSA, AMLA) taken together to produce a final rating. The SOs are obliged to put in place an IT system capable of accommodating these requirements.