

The licensing cascade and its exceptions

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Article 2 paragraph 1 FinIA lists five types of financial institution: portfolio managers, trustees, managers of collective assets, fund management companies and securities firms. Article 6 FinIA establishes a cascade of licences. A banking licence entitles its holder to act as securities firm, manager of collective assets, portfolio manager and trustee. A securities firm licence covers the activities of a manager of collective assets, a portfolio manager and a trustee. A fund management company may also act as manager of collective assets and portfolio manager. A manager of collective assets may also manage individual portfolios.¹ A licensed portfolio manager may therefore extend his business upwards only by applying for a higher licence.

Article 2 paragraph 2 FinIA excludes several groups from the scope of the Act. Persons who manage assets only for persons with whom they have family or business ties are not subject to FinIA. The same applies to persons who manage assets within employee participation schemes, persons who manage assets under a legal mandate, lawyers and notaries for activities covered by professional secrecy, and the Swiss National Bank, pension funds, social security institutions, insurance companies and banks for their own regulated activities.² The family exception is important in Ticino, where many fiduciari manage the assets of their own relatives and of the families of business partners. It does not protect a manager who also serves other clients on a commercial basis.

1 The commercial basis test

FinIA applies only to persons who act on a commercial basis. FINMA applies the criteria of the ordinance. A portfolio manager or trustee acts on a commercial basis if, in a calendar year, he achieves a gross revenue of more than CHF 50,000, establishes or maintains business relationships with more than twenty contracting parties, or has unlimited power of

disposal over assets of third parties exceeding CHF 5 million at any time. Assets of persons with family ties are not counted.³ The thresholds are low. A fiduciario who manages the portfolio of a single Italian family with CHF 6 million in Lugano exceeds the third threshold even if he earns less than CHF 50,000 from the mandate. Below the thresholds the activity remains unlicensed under FinIA, but the anti-money laundering rules may still apply. The conduct rules of FinSA apply in any case to every financial service provider who acts on a commercial basis.

2 The conduct rules of FinSA

FinSA imposes on every portfolio manager a set of conduct duties that were previously found partly in civil case law and partly in self-regulation. The manager must classify each client as retail, professional or institutional, with the possibility of opting out or in (Art. 4–5 FinSA). He must inform the client about himself, the service, the risks and the costs (Art. 8–9 FinSA). He must assess the suitability of each portfolio management mandate in the light of the client's knowledge, experience, financial situation and investment objectives (Art. 10–14 FinSA), and must document the agreed services and the information obtained and render account to the client of the services provided (Art. 15–16 FinSA). He must execute orders on the best possible terms (Art. 18 FinSA) and organize himself to avoid or disclose conflicts of interest (Art. 25 FinSA).⁴ Article 26 FinSA, discussed in the section on retrocessions below, governs remuneration received from third parties. Unless it serves exclusively professional or institutional clients, every financial service provider must also join an ombudsman office recognized by the Federal Department of Finance, at the latest when it commences its activity (Art. 74, 77 and 84 FinSA).⁵

The client adviser register created by FinSA does not apply to the employees of licensed portfolio managers, since they are supervised. It applies to client advisers of Swiss financial service providers that are not supervised and to client advisers of foreign providers who serve clients in Switzerland (Art. 28 FinSA). FINMA licensed BX Swiss AG as the first registration body on 20 July 2020 and PolyReg Services GmbH as the third in October 2020. Client advisers who were already active had to register by 20 January 2021.⁶ For Lugano the register matters mainly in the opposite direction from the Italian market. Italian advisers who visit clients in Ticino must register in Switzerland, while Swiss managers who visit clients in Italy face the Italian rules described in Chapter E.IV.

For the practitioner. Questions to answer before a Lugano fiduciario continues to manage assets: - Does the client relationship involve family or business ties within the meaning of Article 2 paragraph 2 FinIA, or does the fiduciario act on a commercial basis? - Are any of the thresholds exceeded: gross revenue above CHF 50,000, more than twenty contracting parties, power of disposal over more than CHF 5 million? - Does the fiduciario only execute administrative acts (payments, correspondence) or does he take investment decisions? - Does he act as director or signatory of domiciliary companies, which triggers antimoney laundering duties independently of FinIA? - Which activities remain subject to the cantonal LFid, and who in the firm holds the personal cantonal authorization?

3 Notes

1. FinIA (above), Art. 2 para. 1 and Art. 6. ↩
2. FinIA (above), Art. 2 para. 2. ↩
3. FINMA, "Vermögensverwalter", <https://www.finma.ch/bewilligung/vermoegensverwalter-und-trustees/vermoegensverwalter/>, and "Trustees", <https://www.finma.ch/bewilligung/vermoegensverwalter-und-trustees/trustees/>; the criteria are set out in Art. 19 FinIO, <https://www.droit-bilingue.ch/en-it/9/95/954.11-19-22.html>. ↩
4. Federal Act of 15 June 2018 on Financial Services (Financial Services Act, FinSA), SR 950.1, Art. 4–5, 8–16, 18 and 25, article headings as shown at <https://www.droit-bilingue.ch/en-it/9/95/950.1-index.html>. ↩
5. FinSA (above), Art. 74, 77 and 84, <https://www.droit-bilingue.ch/en-it/9/95/950.1-77-80.html> and <https://www.droit-bilingue.ch/en-it/9/95/950.1-84-87.html>. ↩
6. FINMA, press release of 7 July 2020 on the authorization of the first supervisory organisations and the first registration body, <https://www.finma.ch/news/2020/07/20200707-mm-ao-bewilligung/>; FINMA, press release of 28 October 2020, <https://www.finma.ch/de/news/2020/10/20201028-mm-finig-fidleg/>; FinSA (above), Art. 28, <https://www.droit-bilingue.ch/en-it/9/95/950.1-28-31.html>. ↩

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Online version: helveticaregister.com/lugano-the-licensing-cascade-and-its-exceptions

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