

# **FINMA Authorisation: Priorities and Risks for Trustees**

FINcontrol Suisse AG - Webinar

Thomas Hirschi / Dorothee Ignatz

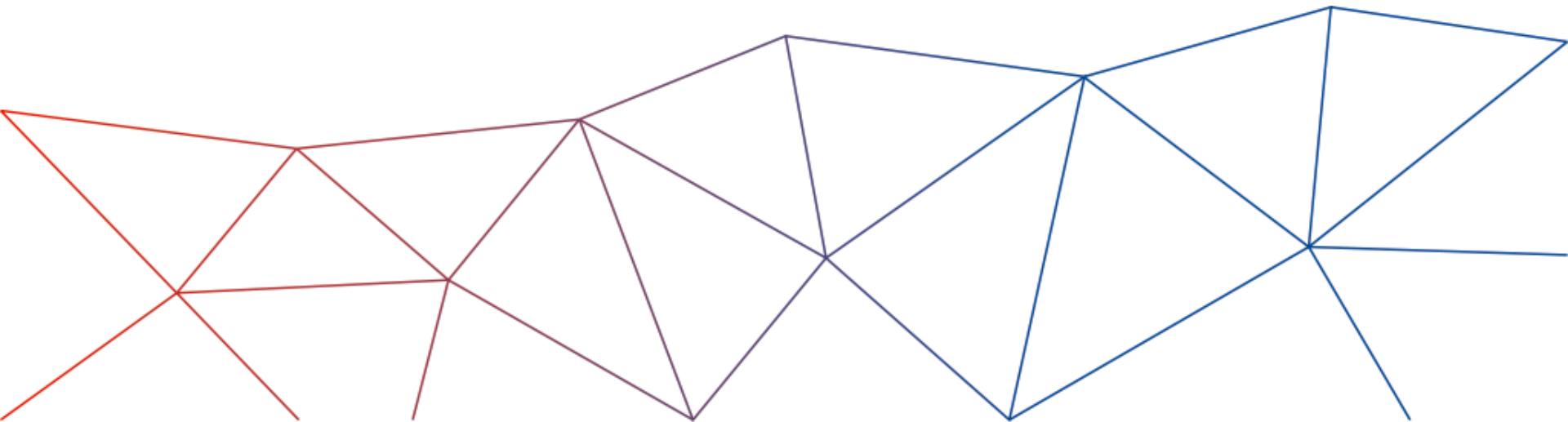
30 November 2021

# Agenda

- I. Introduction
- II. Risk-based authorisation approach
- III. Business models with increased risks
- IV. Trustee requirements and duties
- V. Refresh: Authorisation process

---

# I. Introduction



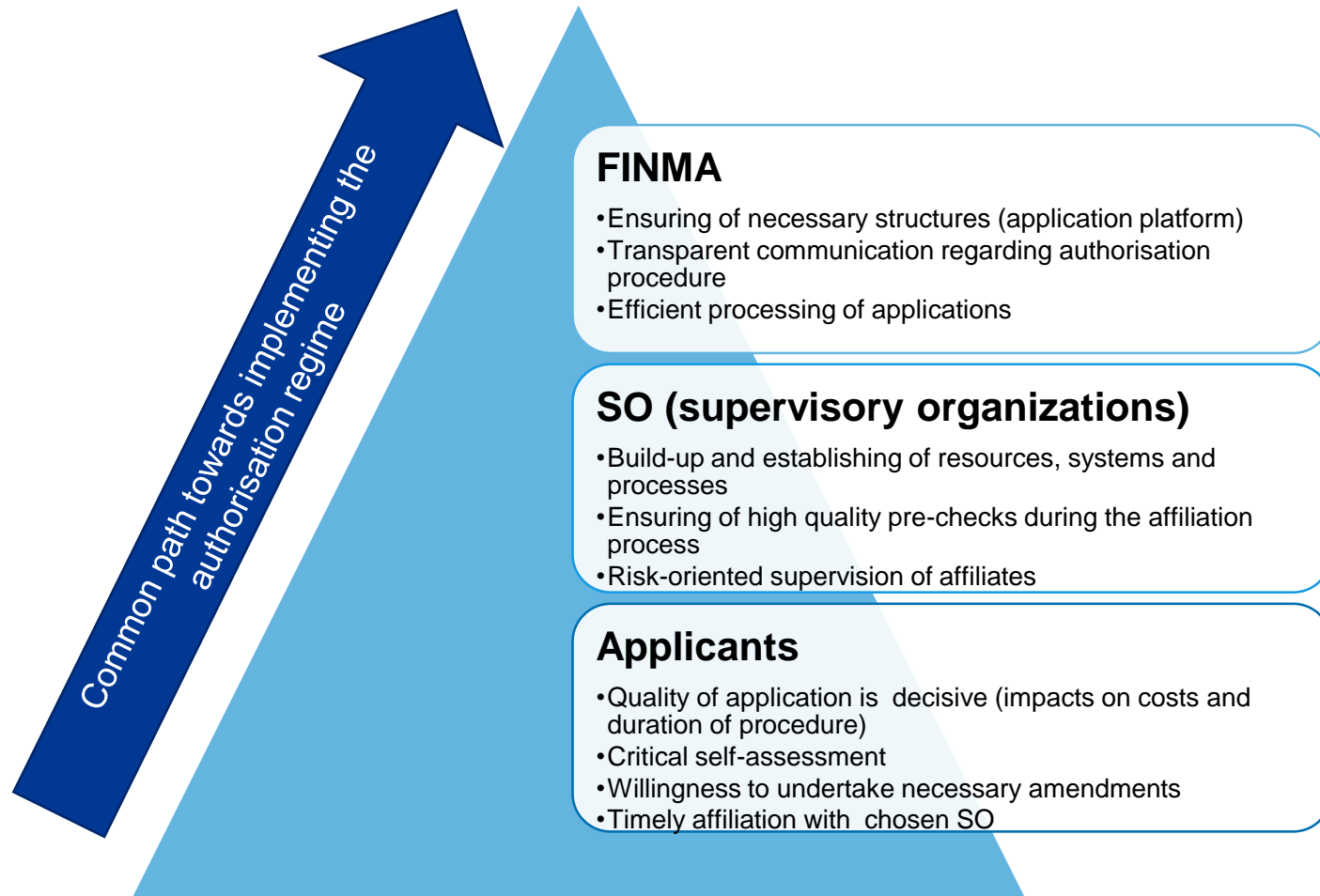
## What happened so far...

- The institutional and regulatory framework for the implementation of FinIA has been established:
  - ✓ **5 supervisory organisations (SO)** for supervision of portfolio managers and trustees have been authorised
  - ✓ **Follow-up regulation** on FinIA has been enacted (FinIO-FINMA)
  - ✓ Processes are in place and applications can be submitted digitally through the **electronic platform (EHP)**
- So far, FINMA received over **200** applications and authorised more than **100 portfolio managers** and so far **3 trustees**
- So far, no application has been rejected, but requested improvements to the substance, organisation or business model have led to the withdrawal of applications in a few cases
- FINMA is in close exchange with associations, deposit banks and the supervisory organisations

## Half time of the transition period

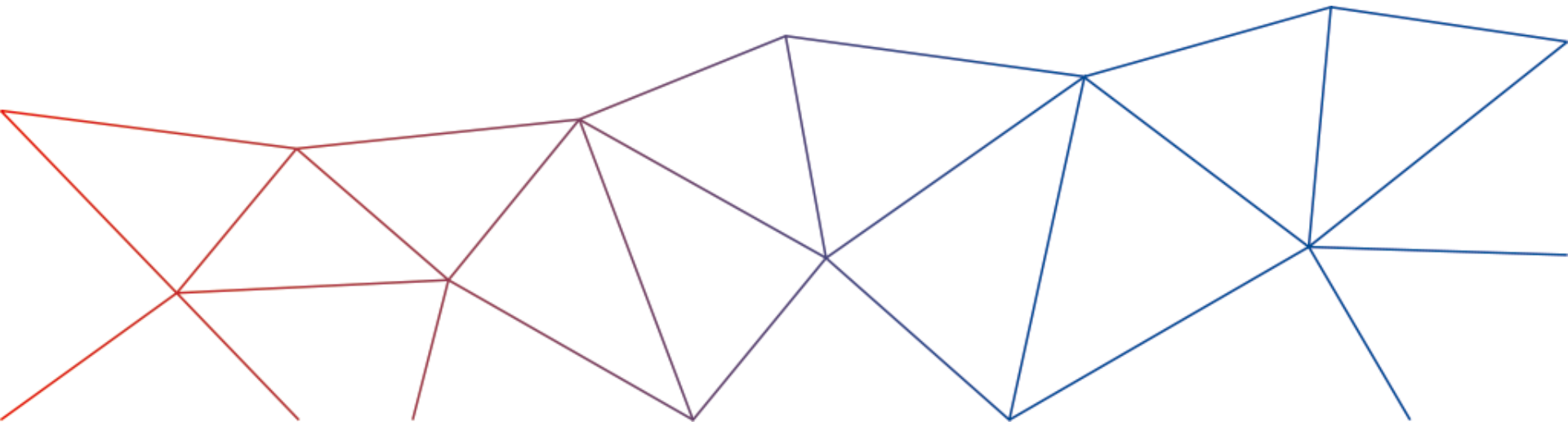
- Announced **2'521 applications** (387 trustees and 6 branch offices of foreign trustees) are being submitted **later than reported**. The volume of applications is supposed to increase strongly in 2022
- It is to be expected that authorisations will be ongoing until 2023 and that the duration of the authorisation procedure will increase
- **No extension** of the deadline planned
- Institutions are responsible for adhering to the deadline. Institutions which **miss the deadline** are engaging in an **unauthorised activity** and take the risk of an intervention by FINMA
- In agreement with the SOs, FINMA recommends that **applicants approach a SO** with their application as soon as possible, but **no later than end of June 2022**
- Institutions which submit their applications on time can continue to perform their activity until a decision has been made concerning authorisation

## Priorities of the authorisation process



---

## II. Risk-based authorisation approach



## Risk-based authorisation approach

- No "one size fits all" approach, but a risk-based assessment of applications in order to ensure a uniform quality standard
- Simple applications/business models ought to be treated in a standardised manner, while complex and risky business models have to be looked at in more depth
- Institutions with risky business models have to implement risk-mitigating measures
- An authorisation implies adequate restriction and control of inherent risks
- No authorisation without implementation of (possible) necessary amendments (build-up of resources, separation of risk and compliance, outsourcing with external service providers)



## **Authorisation condition - risk management**

### **Organisation**

- Adequate risk management and efficient internal controls are in place
- Guaranteed compliance with legal and internal rules and regulations
- Sufficient qualified personnel or delegation to qualified external service providers

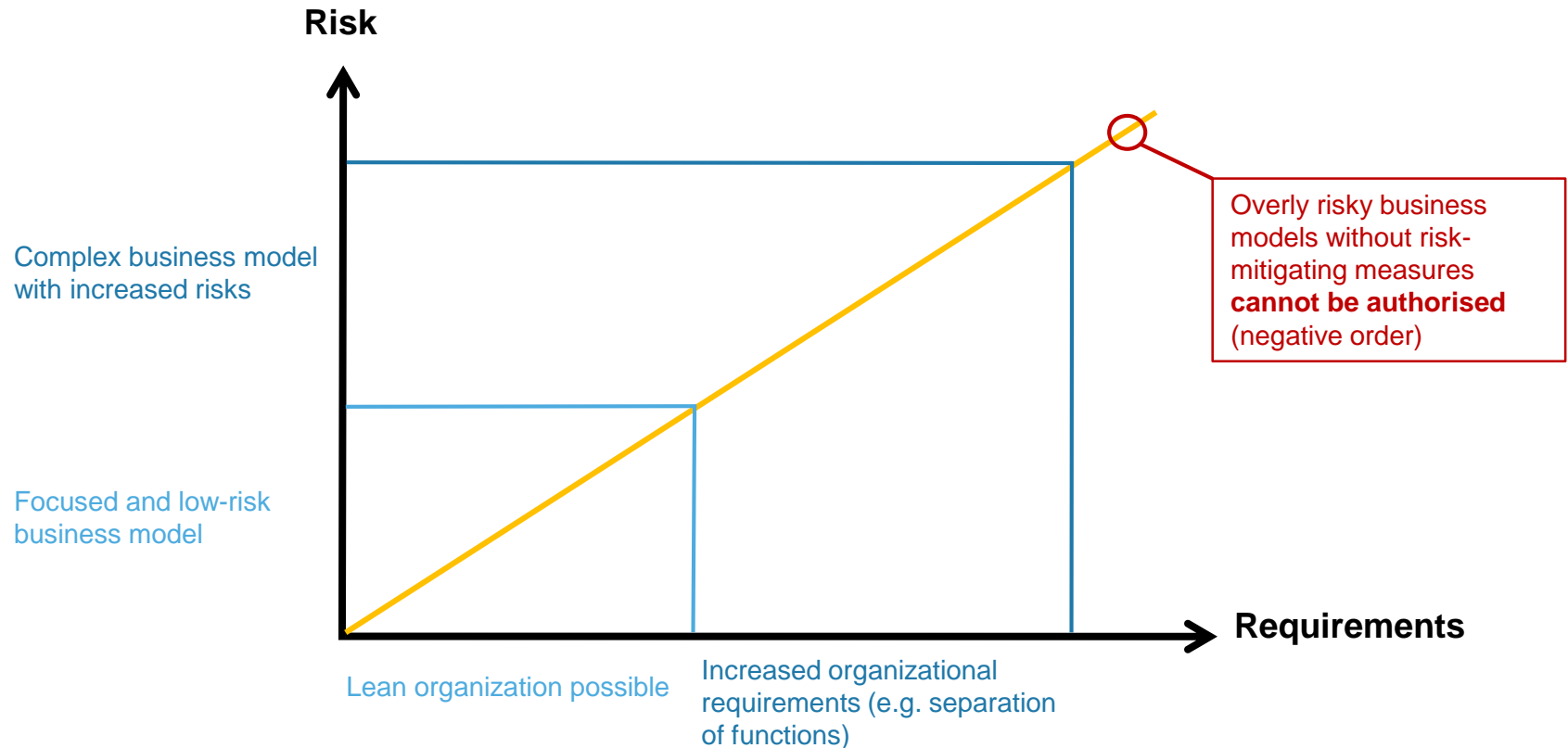
### **Qualitative requirements**

- Main features of risk management and determination of risk tolerance recorded
- Covering the entire business activity
- Major risks are effectively limited and supervised

### **Independence**

- Principle of separation of functions
- Independence of risk management is not required, if the institution
  - a) has five or less FTE or yearly gross proceeds of less than two million Swiss francs; and
  - b) adheres to a non-high-risk business model

## Appropriateness of risk management



**The higher the inherent risks of a business model, the higher the requirements for authorisation**

i.a. relating to an adequate organization, internal processes, directives, trainings, risk-control functions, risk management and compliance, etc.

## Proportionality in reviewing applications

### Complex business model with increased risks

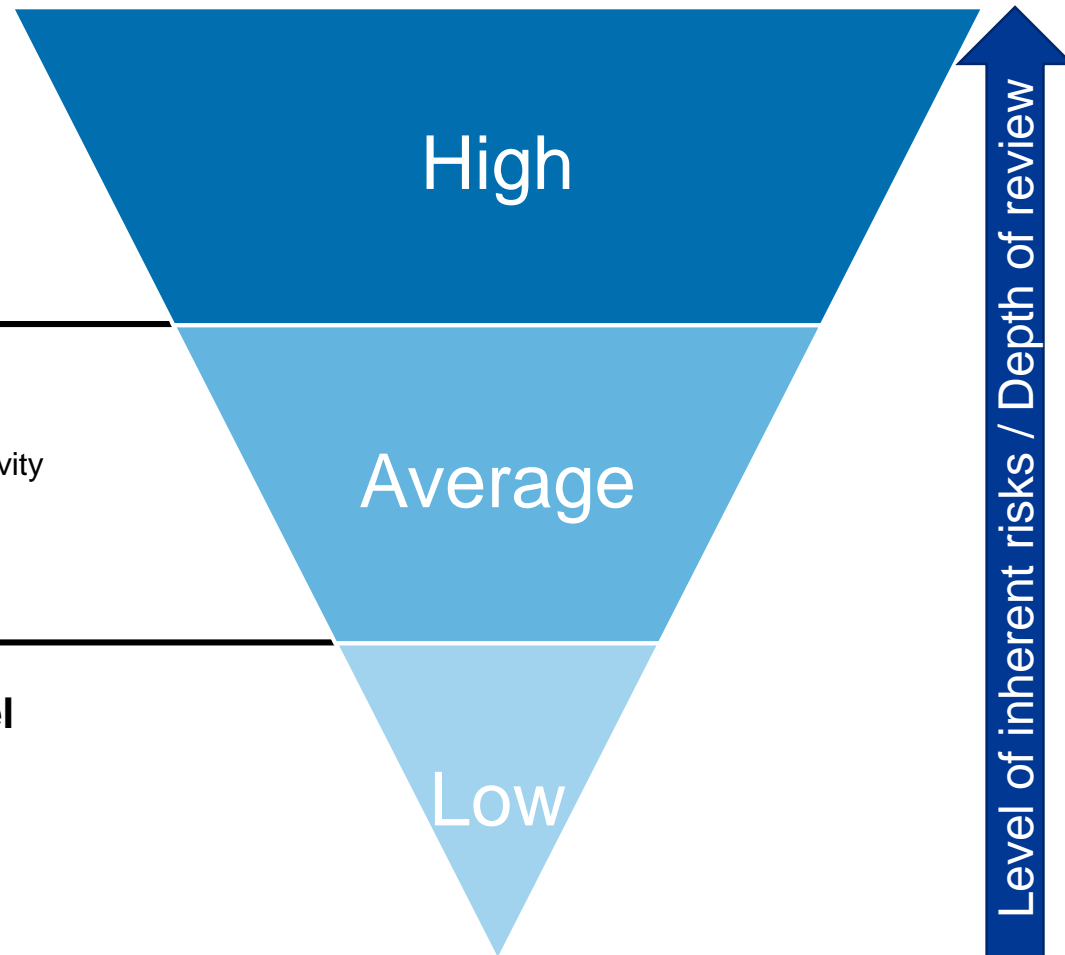
- majority of governing body independent
- separation of control function
- Detailed directives and control framework
- increased requirements regarding professional qualifications

### Standard business model with significant risks

- appropriate and qualified staff for business activity
- business model correlating with the financial possibilities and organization of the business
- principle of separated risk control function

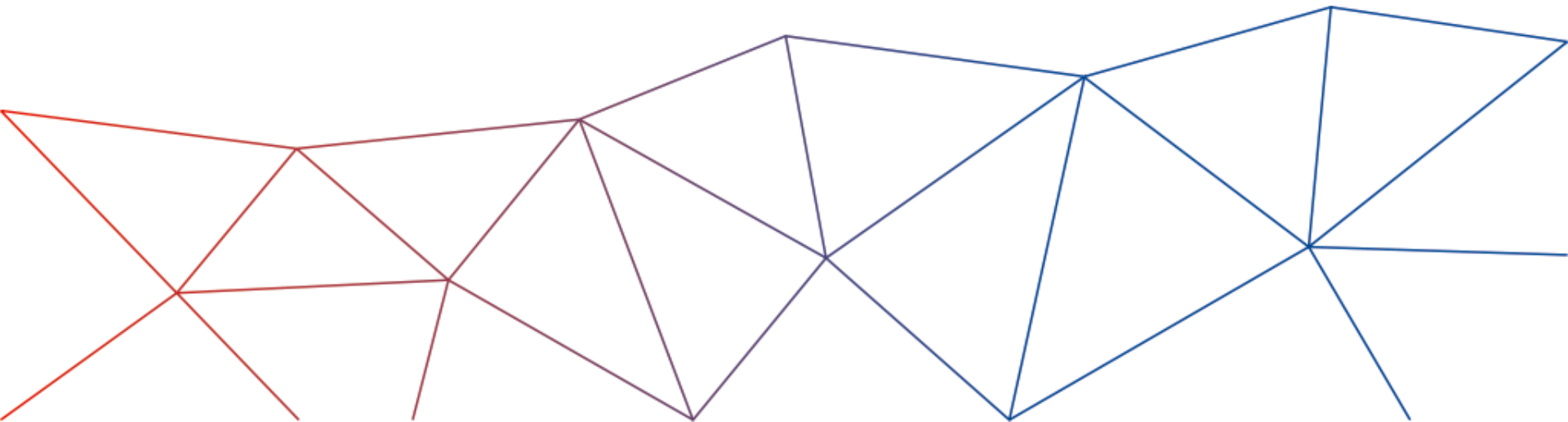
### Simple and low-risk business model

- one-man company possible
- lean system of directives and control function
- accumulation of functions possible



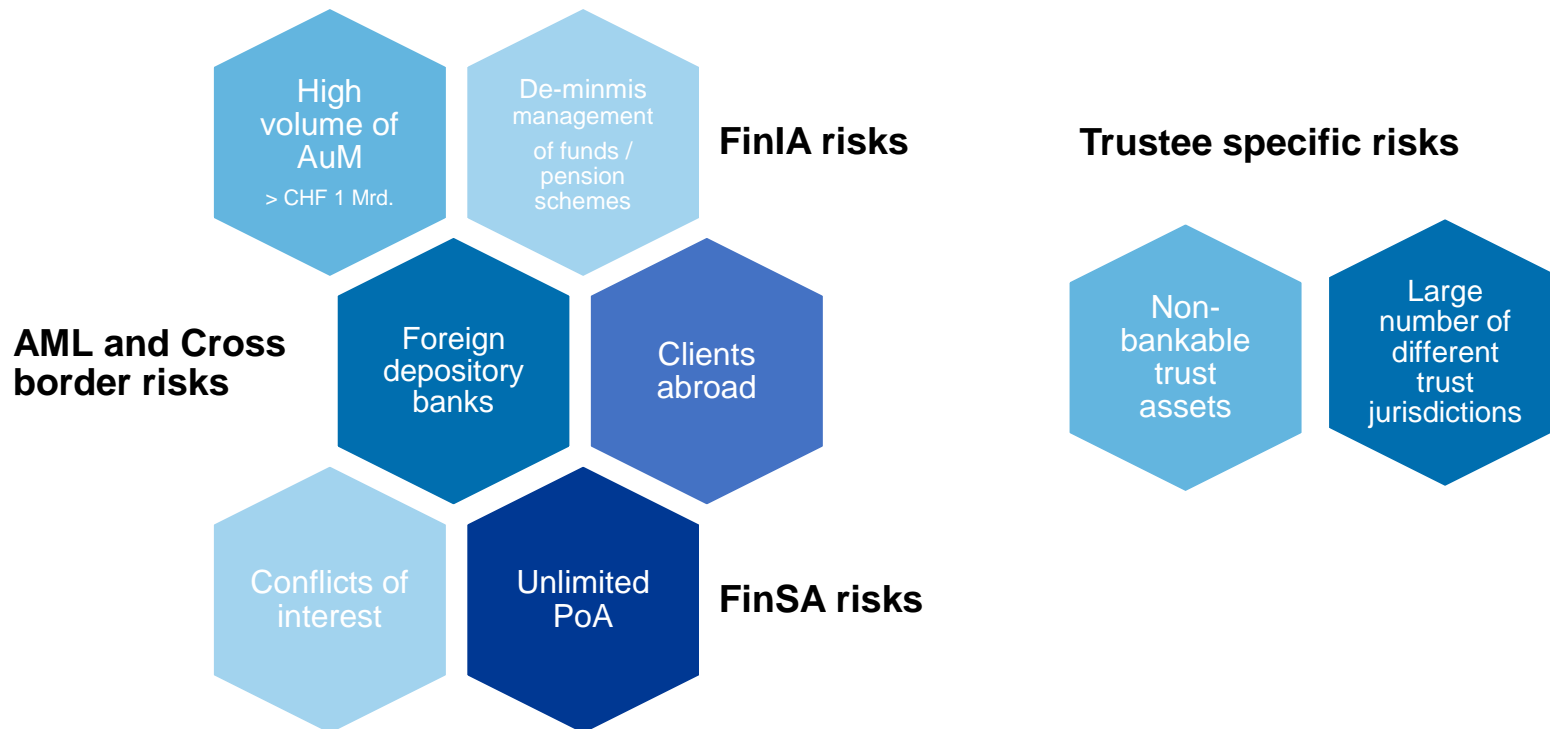
---

# III. Business models with increased risks



## Business models with increased risks

FINMA has the duty to interpret the term "business model with increased risks". Notably, the following specific circumstances account as risky – even if within the thresholds of art. 26 para. 2 FinIO:



→ In principle separation of risk control from operational units

## First insights

Trustee-specific risky business models include:

- Trust assets invested in non-bankable assets, e.g.
  - operational businesses
  - real estate
  - exotic tangible assets (e.g. ships, aircraft, works of art, etc.)
- Large number of different trust jurisdictions and / or domiciles of settlors and beneficiaries

**Depending on the business model and amount and kind of risks, FINMA expects appropriate know-how and eventual amendments within the organization**

## **Non-bankable trust assets (operative companies, real estate, exotic tangible assets)**

### ***Risks***

- Trustee holds the assets and therewith the responsibility for decisions of the board of directors of the business, resp. for the maintenance of the real estate or exotic tangible asset. Risk, that trustee can be sued for breach of trust

### ***Expectations***

- ✓ Exemption from liability, e.g. with an anti-Bartlett clause. Trustee has to demonstrate knowledge and experience with the maintenance of the asset, resp. outsource this task to an eligible qualified service provider
- ✓ Recording of risks in the risk analysis and formalizing of controls in the internal control system
- ✓ In principle, separation of risk management and internal controls from the operational units

## **Large number of different trust jurisdictions and / or domiciles of settlors and beneficiaries**

### ***Risks***

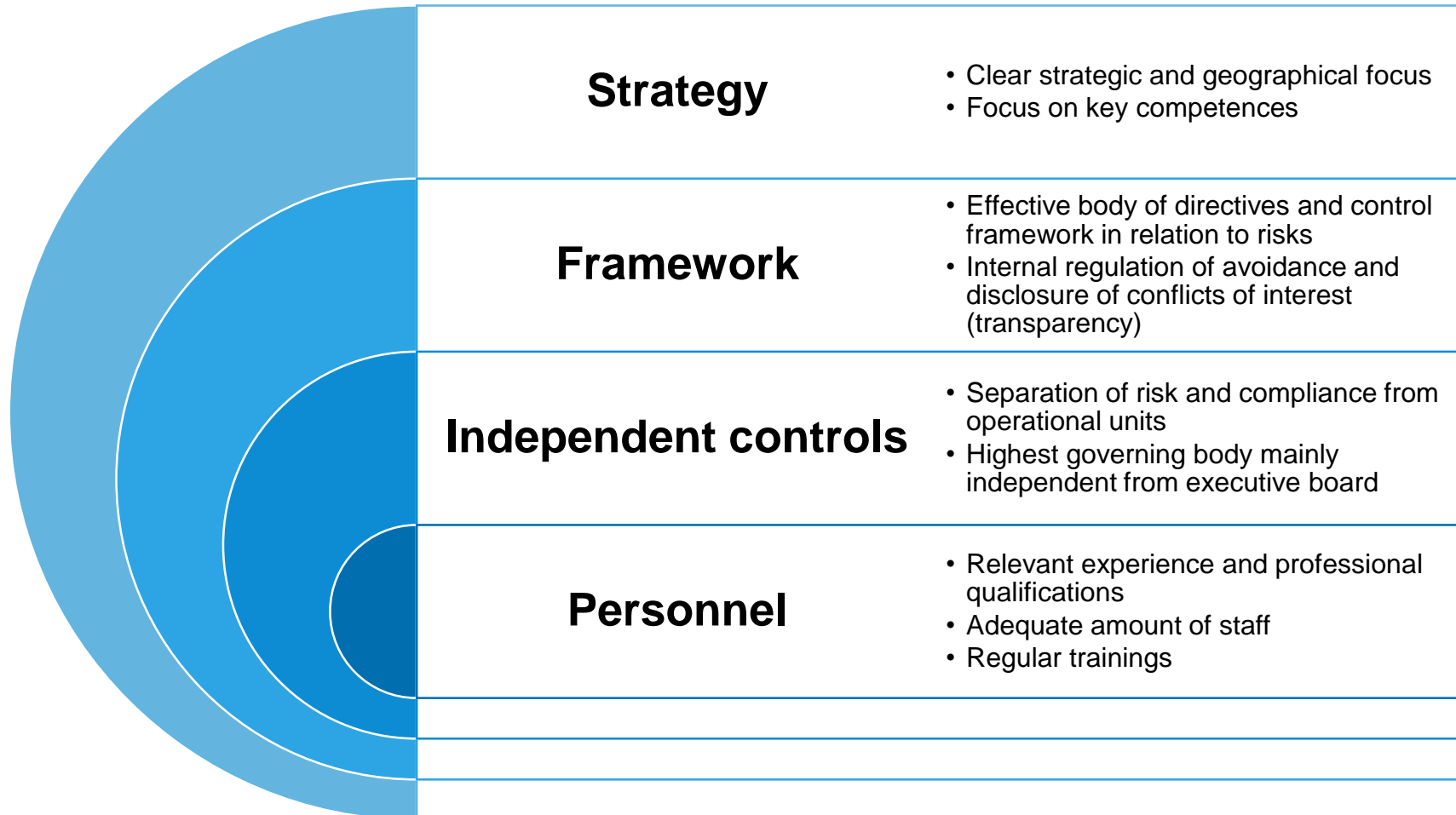
- Trust laws are diverging, i.e. specific knowledge is needed for each trust jurisdiction
- Trustees always have to act in the interest of the beneficiaries, i.e. they for instance have to take into account tax implications when distributing assets (next to cross-border considerations)

### ***Expectations***

- ✓ Trustee has to demonstrate in the application that there is access to specialists from the relevant trust jurisdictions as well as to tax experts
- ✓ Separation of risk management and internal controls from the operational units

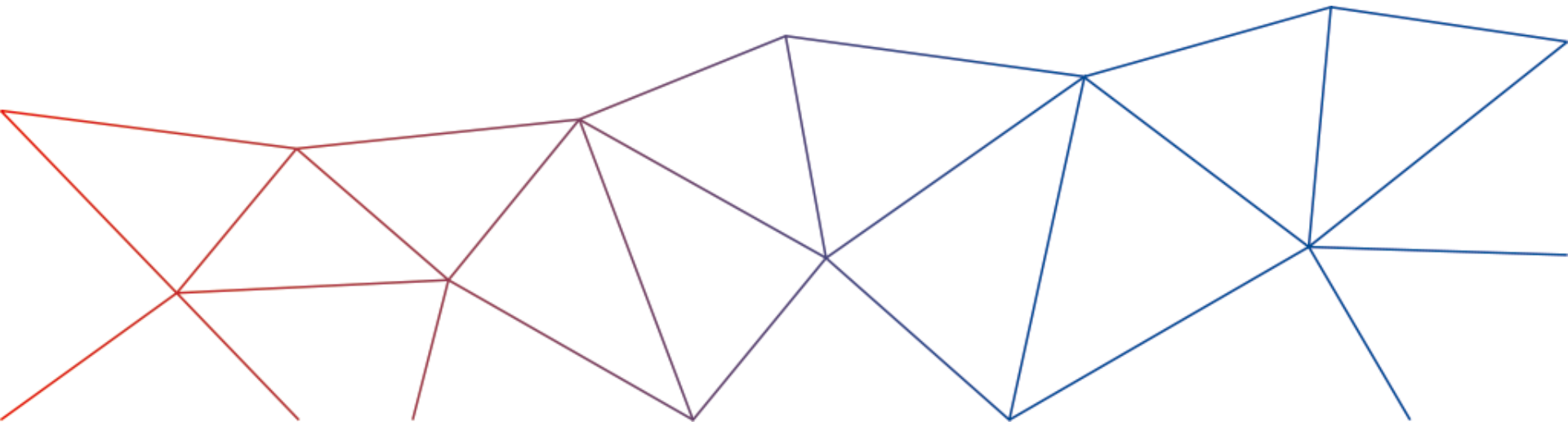


## Risk-mitigating measures



---

# IV. Trustee requirements and duties



## Condition of authorisation: minimal substance

- **Empty shell companies shall not be authorised under FinIA\***
- At least **one qualified manager** who is hired by **employment contract** per institution. In case a broader executive board is foreseen, all its members shall also be hired by employment contract
- The role of the qualified manager cannot be delegated. It is possible though, that a qualified manager is employed by several institutions – potential conflicts of interest have to be addressed adequately
- Further, an institution must have **personnel in place who are appropriately and suitably qualified** to perform their business activities
- **Material tasks can be delegated**, if the appropriateness of the operational organisation is not impaired. The institution remains responsible for supervisory duties
- Material tasks **typically delegated** by trustees are **portfolio management and trust accounting**

## Authorisation condition - trustee duties

Art. 24 para. 4 FinIO refers to trustee duties emanating from the relevant trust jurisdiction and sets their fulfilment as a condition of authorisation:

*"Paragraph 2 applies by analogy to trustees. Moreover, trustees must, within the framework of the applicable law to the trust:*

*a) act in the best possible interests of beneficiaries and with the required level of skill, care, and diligence;*

*b) take appropriate organizational precautions to avoid conflicts of interest or disadvantages for beneficiaries as a result of conflict of interests."*

Based on art. 24 para. 4 FinIO, applicants have to implement **elementary trustee duties - consisting of duties of care and loyalty as well as organizational requirements - into their directives**

## Duties of care and loyalty

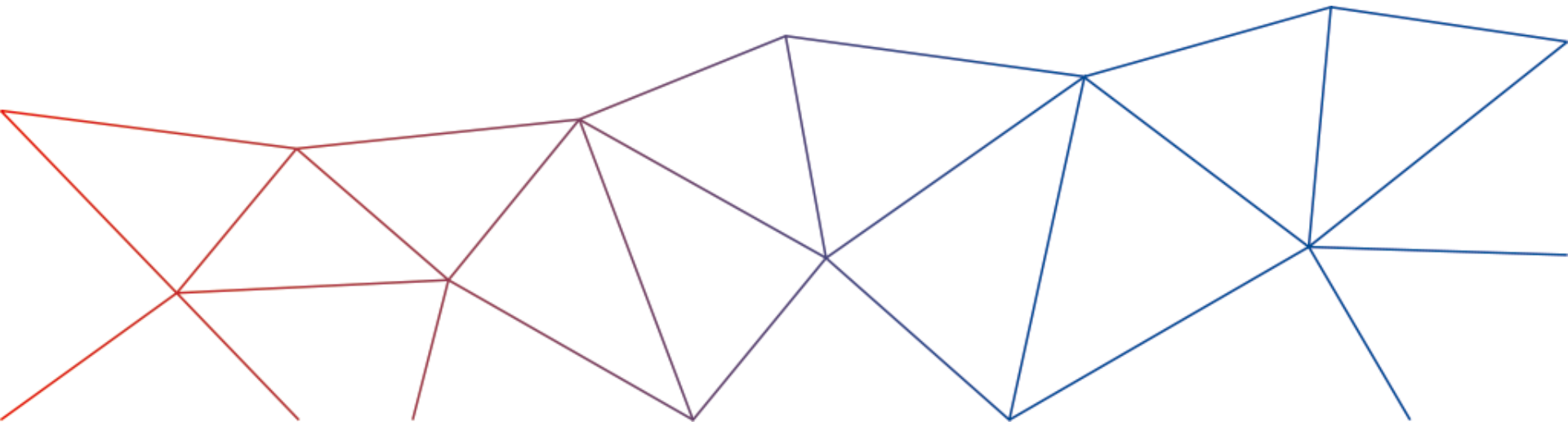
- The trustee **manages the trust fund**, ensures its value is maintained and increased and employs it for the specified purposes. The trustee further ensures that the **trust deed** is put down **in writing**
- The trustee undertakes to **invest the trust fund** within the framework of the law applicable to the trust and the terms of the trust deed
- Within the framework of the law applicable to the trust, the trustee undertakes to act solely in the **interests of the beneficiaries** and to **avoid potential conflicts of interest**
- Within the framework of the law applicable to the trust and the trust deed, the trustee undertakes to **act impartially towards beneficiaries** and to respect variable interests (notably such of beneficiaries) adequately when disposing of discretionary powers

## Organisational requirements

- The trustee ensures to **keep the trust fund separate** from his own funds as well as other trust funds administered by him
- The trustee ensures to have **access to specialists** from relevant jurisdictions (trust lawyers from relevant trust jurisdictions for drafting trust deeds, tax experts for distributions, accountants, portfolio managers, etc. ) in case the latter shall be necessary while performing trustee duties
- The trustee ensures that he is **capable of providing relevant information** to involved parties (mainly beneficiaries) relating to the trust fund, his business activity and possible vested and contingent entitlements (in principle **trust accounting** required)
- The trustee ensures that he always has **current contact details** of relevant parties (settlor, beneficiaries, protector) on file

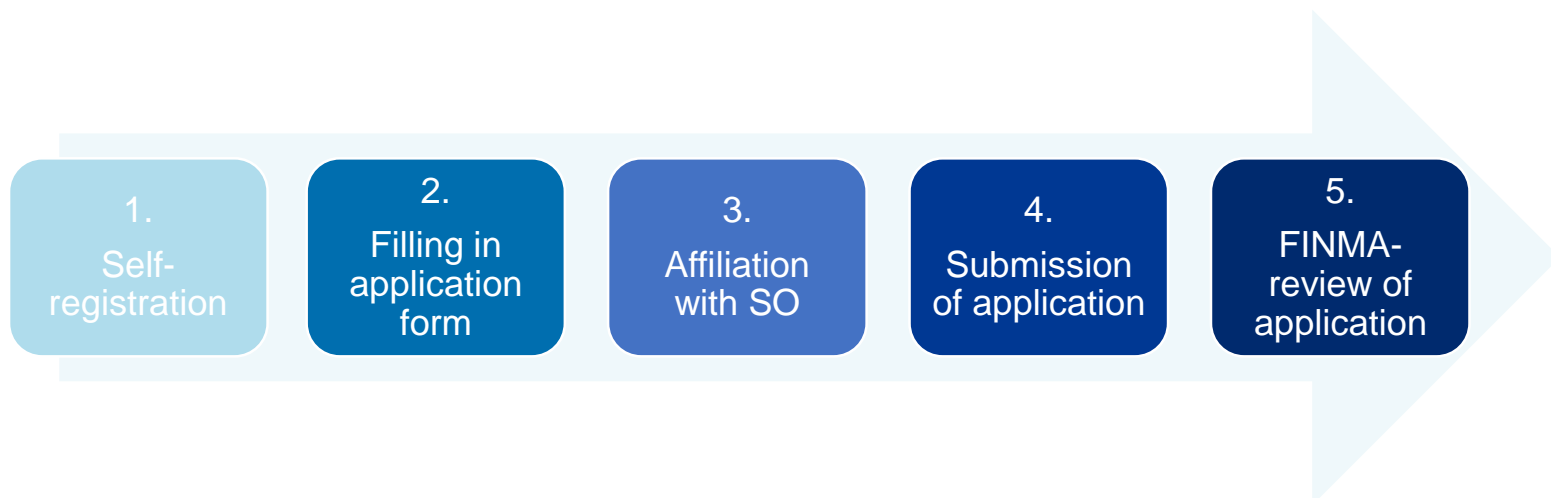
---

# V. Refresh: Authorisation process



## Authorisation process

- From **1 October 2021** onwards, **version 2.0** of the application form has to be used
- No voluntary authorisation → authorisation requires a licensed activity
- No umbrella authorisation → authorisation only granted on entity level
- Only after receipt of **a confirmation of affiliation from a SO**, the applicant can send the complete application to FINMA through EHP
- Entirely electronic submission without signature is possible





## Questions?

Are there questions...

...professional questions?

→ [FIDLEG-FINIG@finma.ch](mailto:FIDLEG-FINIG@finma.ch)

...questions relating to EHP or IT?

→ [www.finma.ch/ehp-support](http://www.finma.ch/ehp-support)

Eidgenössische Finanzmarktaufsicht FINMA

Laupenstrasse 27

CH-3003 Bern

[www.finma.ch](http://www.finma.ch)

---

THANK YOU!