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LEFin

SATC 8 November 2018

Leonard Vijverberg

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# Leonard Vijverberg



Senior Associate

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## **Expertise**

Leonard Vijverberg is a senior associate in Lenz & Staehelin's Private Client group in Geneva since July 2007. His practice includes advising on international estate planning, issues of international private law, international investment and corporate structures as well as international contract and commercial law. Leonard Vijverberg also advises trustees in relation to trusts and has particular expertise in foundation matters.

## **Practice Areas**

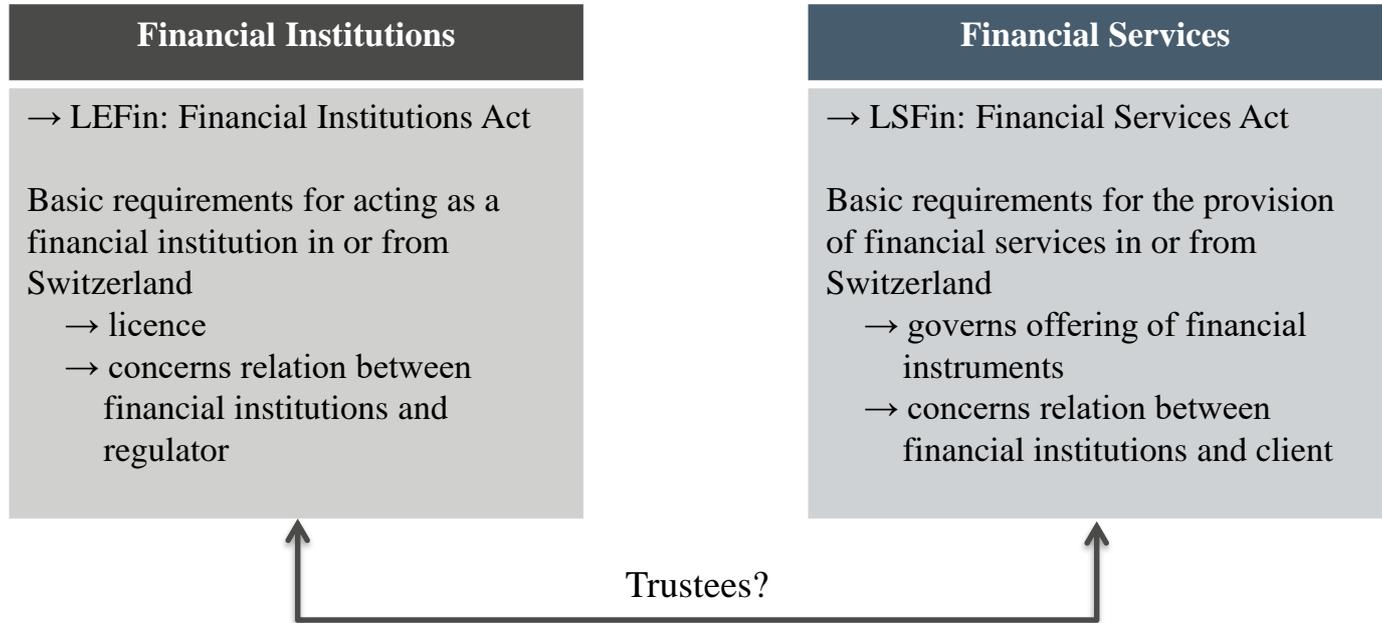
Private Clients, Corporate Law, Contract and Commercial, International Estate and Tax Planning, Private Investment Companies and Funds, Foundations, Litigation and Arbitration, Dispute Resolution.

## **Languages**

Dutch, English, French, German.

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# 1. LEFin - General



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## 2. LEFin – General

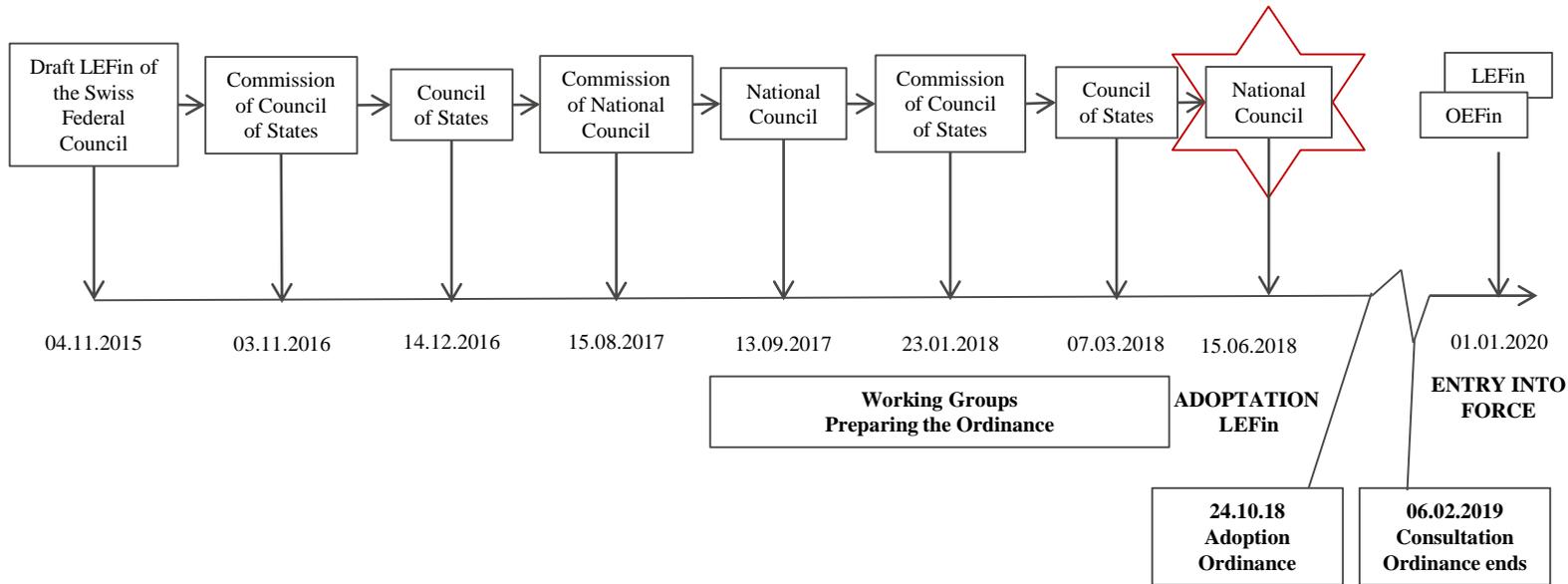
Rapport Explicatif OEFin (art. 13, page 85)

*"L'activité de trustee, par exemple, tombe sous le coup de la LBA. Ne répondant en revanche pas aux critères de la "gestion de fortune" visée à l'art. 3, let. C, ch. 3, LSFin, elle n'est pas soumise à cette loi"*

In the event Trustee conducts ancillary activities that fall within scope of LSFin: then it should comply with the obligations under LSFin.

# 1. LEFin – General

## › Timing



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## 2. LEFin – Scope

### › Scope

- ✧ The Act regulates the conditions and supervision of Financial Institutions (as defined in LEFin)
- ✧ Financial Institutions that exercise a professional activity: *toute activité économique indépendante exercée en vue d'un revenu régulier* (art. 3 LEFin)
  - LBA criteria: (i) CHF 50'000 annual turnover; (ii) > 20 clients; (iii) > CHF 5 million at disposition; (iv) transactions > CHF 2 million
- ✧ The following Financial Institutions are subject to LEFin:
  - Asset manager
  - Collective asset manager (pension funds)
  - Fund management companies
  - Securities firms
  - Trustees



Any person that professionally manages financial assets on behalf of third parties

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## 2. LEFin - Scope

✧ LEFin does not apply to (art. 2 al. 2 LEFin):

- Persons who only manage the assets of persons with whom they have economic or family ties
- Lawyers and notaries → but only for typical “lawyer/notary” activities (to the extent that activity is subject to professional secrecy):
  - Art 395 SCC } curator
  - Art 398 SCC }
  - Art 517 – 518 SCC → testamentary executor
  - But **NOT** 360 SCC → protection of adults
- Persons that manage participation plans for personnel
- Insurance companies
- Pension funds
- Banks

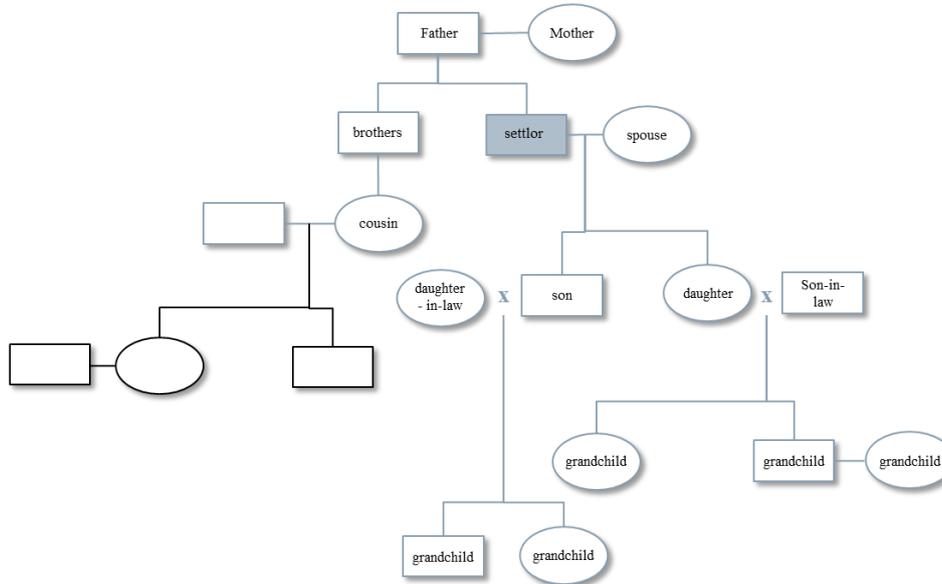
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## 2. LEFin - Scope

✧ Family Office

└ in/out

- Only members of one family ≠ multi family offices



- Managers/trustees can be “outsiders”

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## 3. LEFin - Trustees

✧ Definition (art. 17 (2) LEFin)

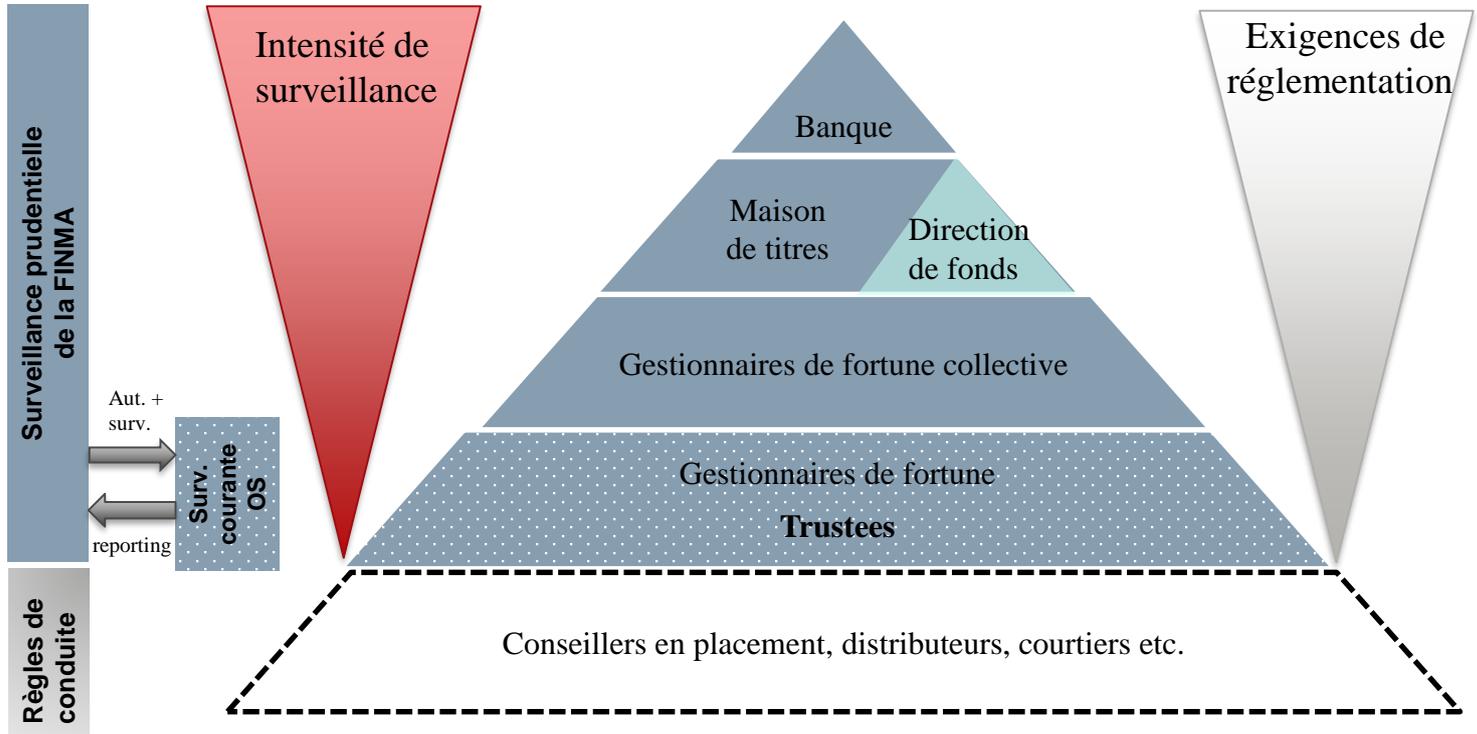
*“a person who, on a professional basis, manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose based on the instrument creating a trust within the meaning of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and the Recognition”*

✧ Duties (art. 19 LEFin; art. 19 (3-5) OEFin)

- manage the separate estate, maintain its value and apply the assets in accordance with the terms of the Trust Deed
- Serve the interests of the beneficiaries, handle with the required "technical" skills (*connaissances techniques*), care (*diligence*) and professionalism (*conscience professionnelle*)
- Take organizational measures to avoid conflicts of interest

# 3. LEFin – Trustees

Autorisation chain and new supervisory framework



Source: Département fédéral des finances DFF

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## 3. LEFin – Trustees

### ✧ Supervision Trustees under LEFin (art. 58/59 LEFin)

- Trustees supervised by FINMA who delegates to Supervisory Organisation
- SO authorisation by FINMA, supervised by FINMA (art. 5 LEFin)
- SO exercises day-to-day supervision over Trustees
- SO audits the Trustees; if not Trustee must engage external auditor to perform audit
  - Frequency: at least every 4 years/depending on risk profile
  - Report: every year a compliance report to SO
- **FINMA:** Grants license, sanctions (termination license)
- **SO:** Reports to FINMA

### ✧ License: “Cascade” System (art. 6 LEFin)

- **Bank:** security firms, manager of collective assets, asset managers, trustee
- **Securities Firm:** managers of collective assets, asset managers, trustees
- **Manager of Collective Assets:** asset manager
- **Trustees:** trustee
- **Asset Manager:** asset manager

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## 4. LEFin – Common Requirements

### ✧ License Requirements (art. 7 LEFin)

**If you comply, you are entitled to a license**

1. Common requirements
2. Special requirements → specific for Financial Institutions
3. Additional requirements → imposed by Federal Council to comply with international standards

### ✧ Relevant changes (art. 8 LEFin)

- Relevant changes → notification to FINMA
- Non-relevant changes → notification to SO → notifies FINMA

### ✧ Internal Organisation/Governance (art. 9 LEFin; art. 6 OEFin)

- Internal organisation so that it can assume duties/obligations
- Should identify risks (e.g. legal risks, credit risks, market risks, reputational risks)

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## 4. LEFin – Common Requirements

- ✧ Effective place of Management (art. 10 LEFin)
  - Principle: Effective management must be in CH
  - Exception: Group structures → general directives/surveillance group
  - Directors: resident in a place which allows them to exercise the management
  
- ✧ Guarantee of proper business conduct (*activité irréprochable*) (art. 11 LEFin; art. 7 OEFin)
  - The Financial Institution → *activité irréprochable*
  - Directors/Managers → *activité irréprochable*, and have a good reputation and have the professional qualifications required
  - Controller\* → have a good reputation and not exercise influence to detriment of a prudent and safe management

\* A person holding directly or indirectly  $\geq 10\%$  of the (share) capital or voting rights or otherwise exercises a material influence

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## 4. LEFin – Common Requirements

- ✧ Protection against confusion (art. 13 LEFin)
  - The name of the Financial Institution should not create confusion/be misleading
  - Only trustees that hold a license may use the terms “trustee”
    - └ Sanction: CHF 500'000 (art. 70 LEFin)
  
- ✧ Delegation (art. 14 LEFin; art. 9 OEFin)
  - Agent: relevant capacity, experience and knowledge + necessary authorization
  - Instructions:
    - In writing
    - In the interest of the client
    - Financial Institution remains responsible for compliance LEFin
    - Financial Institution should “remain in control”
  - Delegation abroad: ensure compliance with Data Protection Act and Professional Confidentiality
  - Delegation yes; but no empty shells

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## 4. LEFin – Common Requirements

- ✧ Foreign activities (art. 15 LEFin; art. 10 OEFin)
  - Financial Institution should inform in advance FINMA when it
    - Creates, acquires or disposes of a subsidiary, branch or representative office abroad;
    - Acquires or disposes of a qualified participation in a foreign company
  
- ✧ Mediator (art. 16 LEFin)
  - Financial Institution obliged to affiliate to a mediator
  
  - Issue for Trustees?

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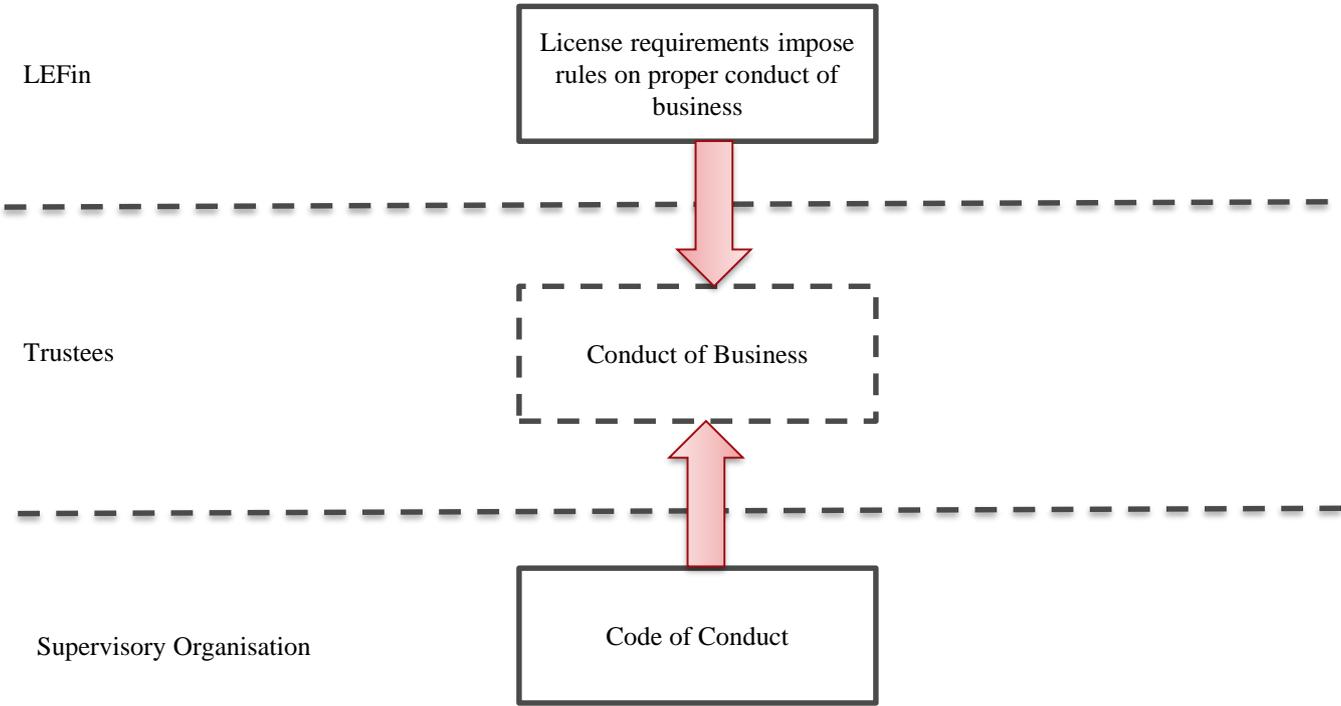
## 5. LEFin – Requirements Trustee

### › Supervision/Regulation

		Regulation	Supervision
Current	Trustees	LBA	SRO or FINMA
Future	Trustees	LEFin LBA <i>[LSFin; only if ancillary activities]</i>	FINMA and SO

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# 5. LEFin –Requirements Trustee



## 5. LEFin – Requirements Trustee

### › Trustee vs Asset Manager

	Gestionnaire de fortune	Trustee
<b>Définitions</b> (art. 17 LEFin)	Quiconque peut, sur la base d'un mandat, disposer à titre professionnel de valeurs patrimoniales au nom et pour le compte de clients	Quiconque administre ou dispose à titre professionnel du patrimoine distinct en faveur du bénéficiaire ou dans un but déterminé sur la base de l'acte constitutif du trust au sens de la Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance
<b>Forme juridique</b> <b>Siège/domicile CH</b> (art. 18 LEFin)	entreprise individuelle } société commerciale } IRC obligatoire société coopérative }	
<b>Tâches</b> (art. 19 LEFin)	gère des portefeuilles individuels	gère la fortune distincte, veille au maintien de sa valeur et l'utilise conformément à son affectation
	conseil en placement analyse de portefeuille offre d'instruments financiers	

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## 5. LEFin – Requirements Trustee

### Conditions for License

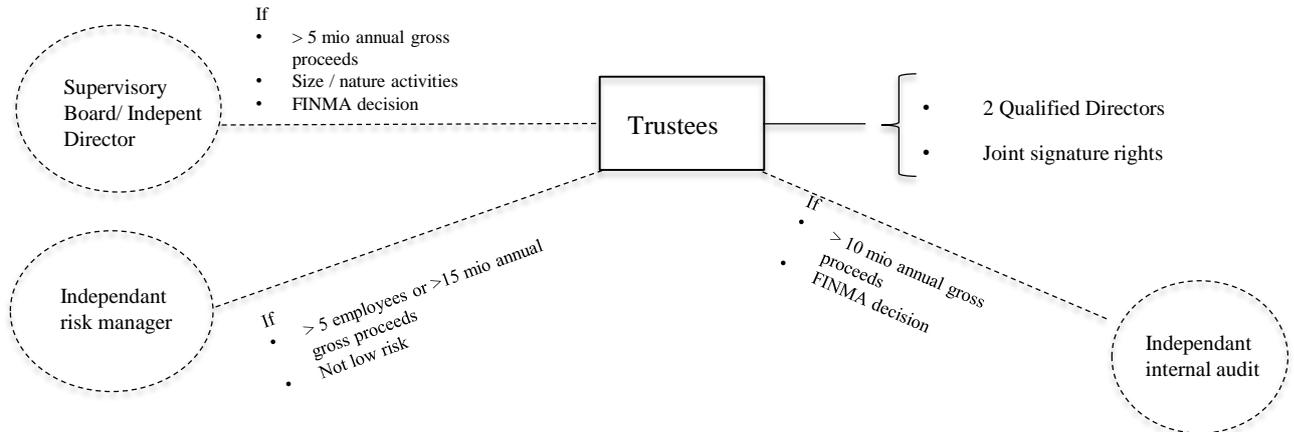
- ✧ Affiliated to a supervisory organisation (“*Aufsichtsorgan*”, “*Organisme de Surveillance*”) (“SO”).

If Trustee complies with legal requirements, they are entitled to affiliation to SO (art. 13 OEFin)

- ✧ Qualified Directors (art. 20 LEFin/ art. 18 OEFin; Art. 9 LEFin/ art. 15 OEFin)
  - Principle: Dual qualified directors; joint signatures
  - Exception: Only 1 director remains possible, provided he guarantees continuity
  - Qualified: Director “*formation adequate*” + relevant professional experience
    - 5 years experience in relation to trusts (*dans le cadre de trusts*)
    - An education in relation to trusts that is equivalent to the experience required to effect an audit of Trustees

# 5. LEFin – Requirements Trustee

## › Organisation Trust Company



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## 5. LEFin – Requirements Trustee

### Conditions for License

- ✧ Organisation (art. 9 LEFin/ art. 15 OEFin; art. 21 LEFin/ art. 19 OEFin)
  - Competent Employees
  - Risk management
    - No need for internal supervisory/control board
    - If annual gross proceeds >CHF 5 million: FINMA can require such body corporate (majority of independent members)
  - Internal Control Systems
    - Should be independent, unless
      - (a) < 5 employees or < CHF 1.5 million annual turnover; and
      - (b) affair do not represent high risk
    - If annual gross proceeds >CHF 10 million: FINMA can require an independent internal audit

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## 5. LEFin – Requirements Trustee

### Conditions for License

- ✧ Minimum Capital Requirement (art. 22 LEFin/ 20 - 24 OEFin)
  - Minimum capital:  $\geq$  CHF 100'000; paid in cash
  - Insurance: adequate collateral or professional liability insurance
    - Insurance should cover: misuse of funds, *abus de confiance* resulting from illegal acts by body corporate or employee, responsibility pursuant corporate law
    - Insurance can cover 50% of the company's *fonds propres*

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# 5. LEFin – Requirements Trustee

## Conditions for License

### ✧ Minimum Capital Requirement (art. 22 LEFin/ 20 -24 OEFin)

- Own funds (*fonds propres*): at all times equal to  $\frac{1}{4}$  of fixed annual costs → max. CHF 10 million
  - Fixed costs: (i) salaries; (ii) operational costs; (iii) amortization of immovable property; (iv) revaluation reserves etc
  - Companies can take into account (i) fully paid up capital; (ii) legal reserves; (iii) undistributed profits; (iv) latent/hidden reserves etc
  - Companies can take into account subordinated loans (minimal duration 5 years)
  - Companies should deduct: (i) goodwill; (ii) book value of participations; (iii) 20% of the subordinated loan during the 5 years preceding reimbursement etc

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## 5. LEFin – Requirements Trustee

### Branches

- ✧ Foreign Trustee establishes branch (art. 52/53 LEFin; art. 69/70 OEFin)
  - Prior authorization FINMA
  - Branch subject to supervision FINMA / SO
  - Conditions authorization:
    - Foreign Trustee subject to equivalent supervision in "home state" which covers the branch
    - The foreign supervisory authority does not object against branch
    - Foreign supervisory authority undertakes to keep FINMA informed
    - Branch should comply with art. 9 (organization), 10 (place of directors) and 11 (proper business requirement)
    - 2 qualified directors
    - Foreign Trustee should comply with art. 22 (minimum capital) and 23 (own funds)
  - Specific conditions:
    - FINMA may require a reciprocity declaration
    - FINMA may require a guarantee

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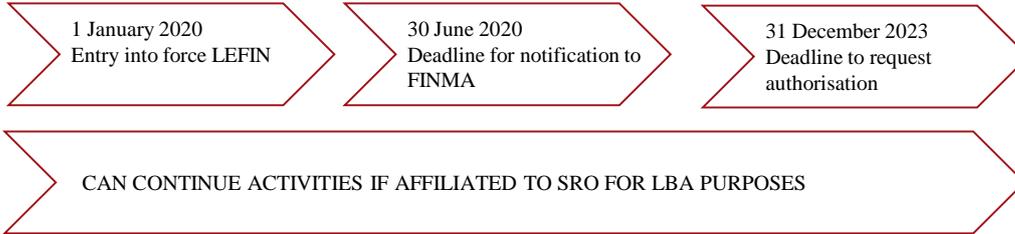
## 5. LEFin – Requirements Trustee

### Transition

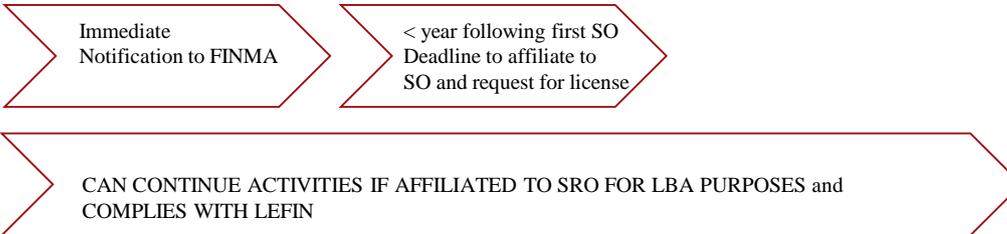
- ✧ **Existing Trustees** (art. 74(2) LEFin)
  - Notification to FINMA within 6 months after entry into force
  - Apply for license/compliance under LEFin within 3 years after entry into force
  - Continue activities until decision FINMA on license, provided affiliation to SRO under LBA
  
- ✧ **New Trustees; start activity during year following entry into force** (art. 74(3) LEFin)
  - Immediate notification to FINMA
  - Comply with license requirements from the beginning of its activities
  - Affiliation to SO and apply for license < 1 year after authorization (first) SO by FINMA
  - Start activities until decision on license, provided affiliated to SRO under LBA
  
- ✧ **New Trustees; after 01.01.2021**
  - Immediate notification to FINMA
  - Apply for license/affiliation SO
  - Start activities after decision on license

# 5. LEFin – Requirements Trustee

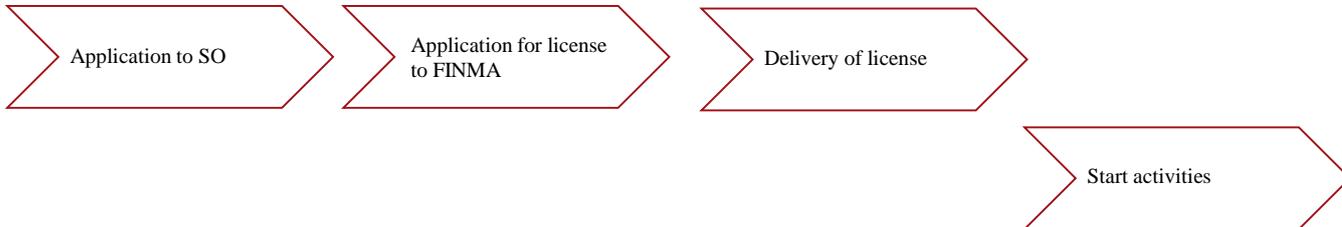
## Existing Trustees



## New Trustees (between 01/01/2020 – 31/12/2020)

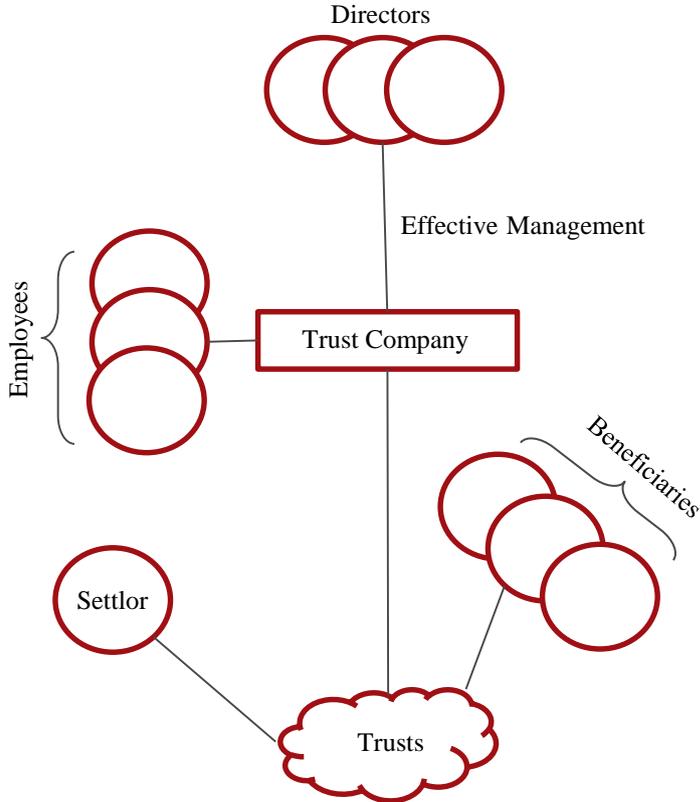


## New Trustees (after 01/01/2021)



## Foreign

## Switzerland



- *Financial Institutions carrying out their activities within or from Switzerland (Art. 2 OEIF)*

**Swiss licence: No**



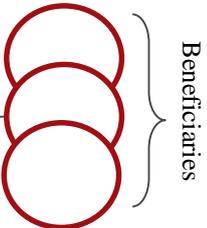
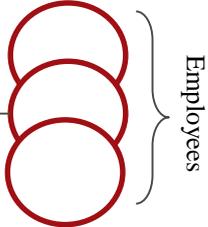
Foreign

Switzerland

Directors



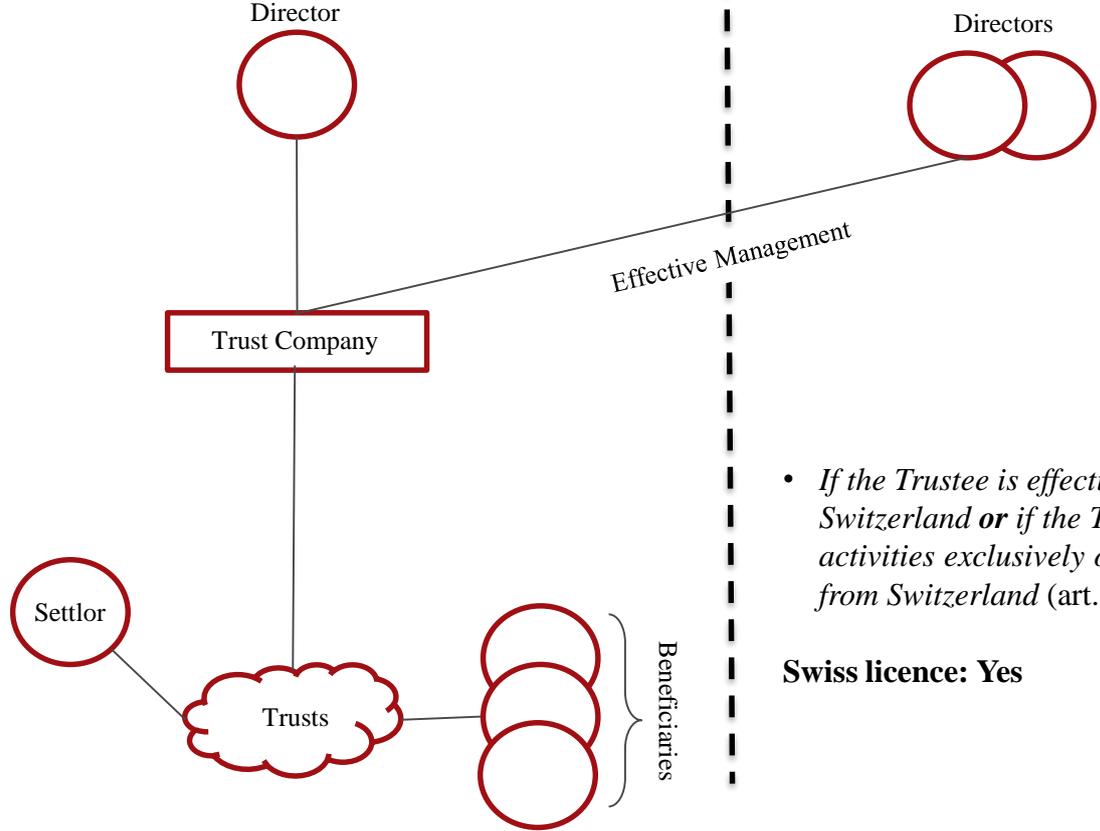
Trust Company



- *Financial Institutions carrying out their activities within or from Switzerland (Art. 2 OEIF)*
- *See also: ATF 2A.91/2005*

**Swiss licence: Yes**

Foreign | Switzerland

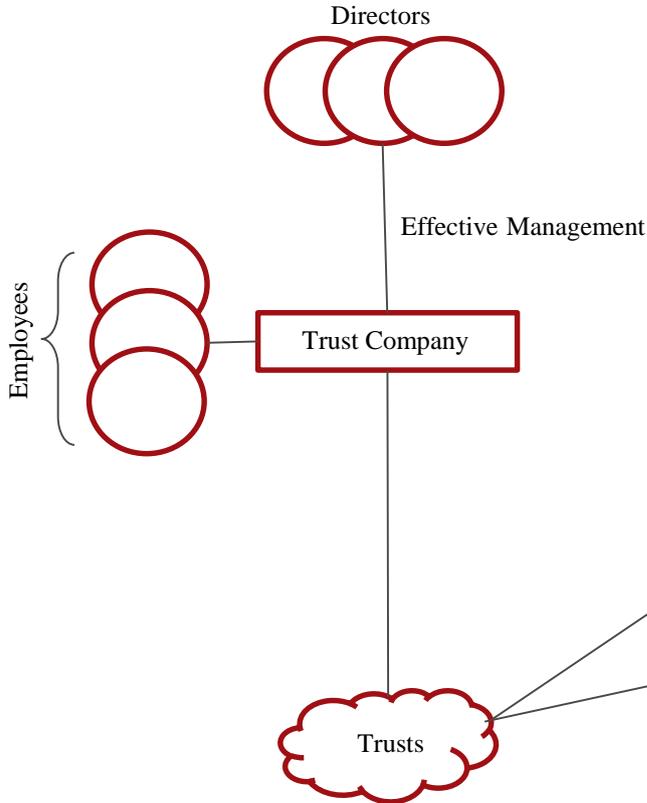


- *If the Trustee is effectively managed in Switzerland or if the Trustee carries out its activities exclusively or principally within or from Switzerland (art. 69(2) OEFin)*

**Swiss licence: Yes**

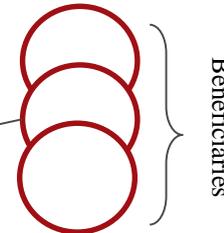
## Foreign

## Switzerland

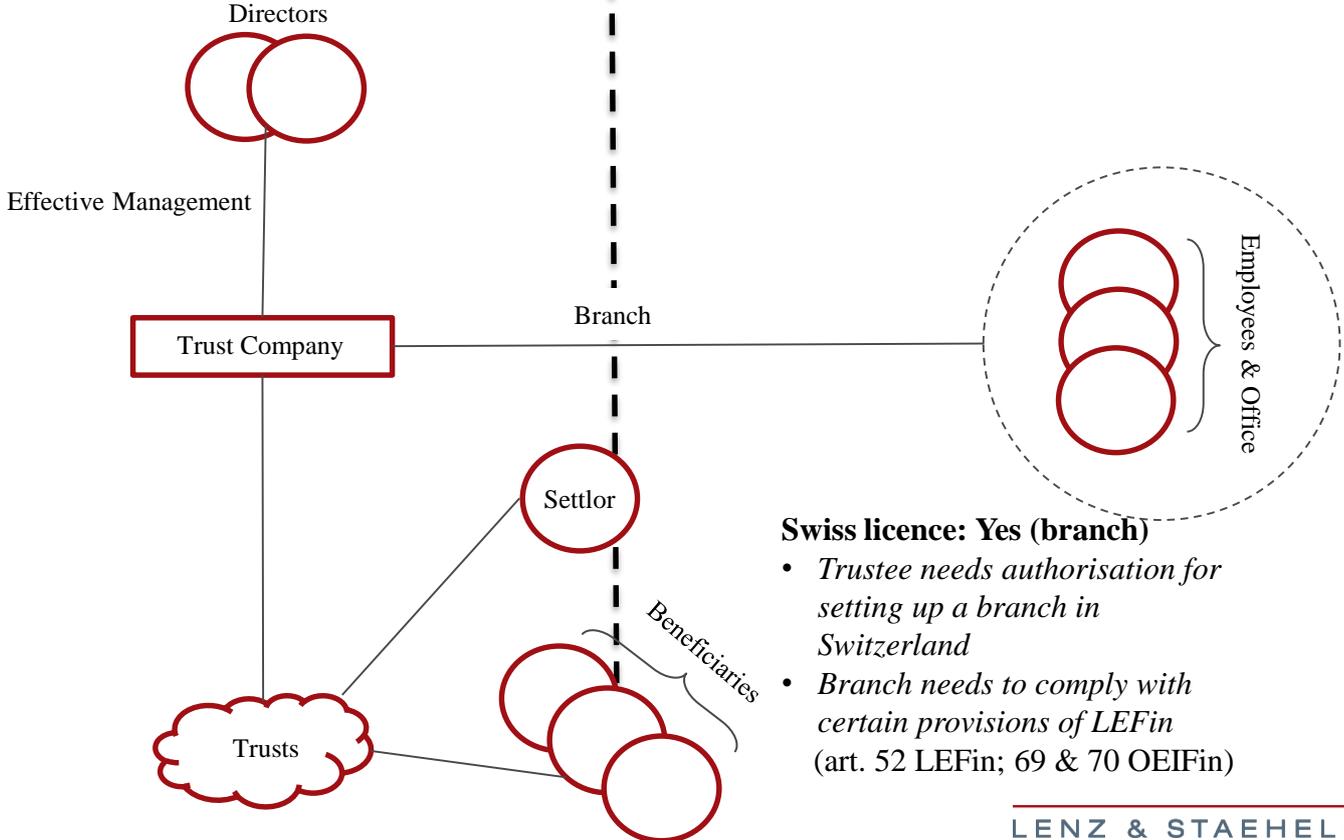


- *Financial Institutions carrying out their activities within or from Switzerland (Art. 2 OEIF)*
- *Persons providing "ancillary services" are not Financial Institutions (Rapport explicative p. 80)*

**Swiss licence:** No, but under circumstances perhaps representation office in Switzerland (art. 58 LEFin)



Foreign | Switzerland



**Swiss licence: Yes (branch)**

- *Trustee needs authorisation for setting up a branch in Switzerland*
- *Branch needs to comply with certain provisions of LEFin (art. 52 LEFin; 69 & 70 OEIFin)*