



NEWSLETTER OCTOBER 2016

## NO COMPROMISE WHEN IT COMES TO THE SWISS CROSS AND SWISS MADE

THE NEW “SWISSNESS” LEGISLATION IS DUE TO COME INTO EFFECT ON 1 JANUARY 2017. IT STIPULATES HIGHER REQUIREMENTS REGARDING THE ACCURATE INDICATION OF ORIGIN, BUT ALSO PROVIDES NEW OPPORTUNITIES

A study has found that products originating from Switzerland invoke very positive associations among consumers, both domestically and internationally, with regard to exclusivity, tradition and quality. Consumers are therefore content to pay higher prices (so-called “Swissness” premium; Feige et al., Swissness Worldwide 2016, study by the Institute for Marketing, University of St. Gallen). For companies producing in Switzerland it is consequently sensible to label their products with a reference to their Swiss origin. The indication of origin qualifies as a distinguishing feature, and the “Swissness” premium may partly cover higher production costs. Conversely, producers may be tempted to free ride and decorate themselves with the “Swiss brand”, although their offering is, in actual fact, not Swiss. Such misleading indications are suited to undermine consumer trust in the indication of origin.

### The three principles of “Swissness”

Swissness should not mislead  
Swissness is voluntary and free  
Swissness does not require a permit

### New possibilities

The Swiss cross may now be used on goods and their packaging for business purposes; also, it may now be registered as part of a trademark for goods. The Swiss coat of arms along with other community crests are reserved, however, in principle for the authorities. A right to continued use is granted, however, within narrow limits.



If the requirements for an indication of origin are not met, there is the option to make reference to the fact that research, design or other specific activities were conducted at a specific location (e.g. “designed in Switzerland”, “Swiss Research and Development”, “Swiss Engineering”). For such a “**Swissness light**”, however, that the activities in question need to take place there in full. The references further not to be highlighted from the remaining text in terms of colour, form or size.

## INCREASED REQUIREMENTS

The declared goal of the new “Swissness” legislation is to better protect the Swiss indication of origin. The sparse legislation and case law as up to date was deemed insufficient for combating the increased cases of misuse. New detailed provisions are set in the Trade Mark Protection Act regarding calculation and assessment as to whether the stated geographical origins of goods and services are accurate. With regard to goods, a distinction is made between “natural products”, “foodstuffs” and “industrial products”. Furthermore, as of 1 January 2017, the revised ordinance regarding the use of the Swiss name for watches, containing refined and additional criteria, as well as a new ordinance specifically with respect to cosmetic products (including qualified requirements as to the component “Switzerland” with regard to the costs for Research and Development) are due to enter into force.

An inaccurate indication of origin and an inadmissible use of signs, respectively, can trigger civil or criminal charges on the basis of the Trade Mark Protection Act, the Foodstuffs Act, the Coat of Arms Protection Act as well as the Unfair Competition Act.

Should you have any further questions, the legal team of Wild Schnyder AG will be pleased to assist you.

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## EFFECTIVENESS AND IMPACT

New “Swissness” laws are assessed controversially: Producers are arguably free to use an accurate indication of origin since there is no actual approval procedure (Although the FIIP will continue to demand a limitation to the list of goods and services when registering a trademark). This free use policy does not, however, relieve producers of conducting time-consuming and complex calculations on a regular basis, in order to prove admissible use if a conflict arises (please refer to supplementary sheet). Also, it is questioned to what extent misuses of the “Swiss brand” – which primarily occur abroad – fall within the scope of them new legislation.

Companies with the aspiration to label their products with a “Swiss” indication of origin under the prospective legislation are well advised to take a detailed look at the new stipulations in a timely manner. Foodstuffs and industrial products which were produced before the new rules come into effect, and which fulfil the criteria stipulated by the law to date, must be put into circulation no later than the end of 2018.

## SUPPLEMENTARY SHEET A THORNY BOUQUET OF LEGAL RE- QUIREMENTS ...

Detailed provisions are set in the revised Trade Mark Protection Act (revTmPA) with respect to appropriate indications of origin for goods and services:

**Natural products** (Art. 48a) originate directly from nature and are not processed to be put into circulation (Art. 52b lit. b revMschV). Depending on the type of product, different criteria are being set to determine their origin (for example: the place of extraction or harvesting for mineral-based and plant products, the place in which animals spent the majority of their life, or the place of breeding with regard to meat and other animal-related products).

For **foodstuffs** (Art. 48b) the indication of origin must, on the one hand, correspond with the location of processing, which gave the foodstuffs their significant characteristics. On the other hand, at least 80% of the weight of raw materials from which the foodstuffs were created, must originate from this location; in the case of milk and dairy products even 100% of the weight of milk - as the raw material - is required. Natural products which, due to natural environmental circumstances cannot be produced at the place of origin or which are temporarily unavailable in sufficient quantity, must not be included in the calculation. Further exceptions include raw materials for which the "Swiss level of self-sufficiency" is less than 20%, respectively 20 to 49.9%: In the former, the raw materials can be excluded from the calculation; in the latter they are to be considered with a 50% reduction; a "level of self-sufficiency" of at least 50% requires, however, their full addition. The Federal Office of Agriculture will be issuing a decree on this matter. Further specifications with regard to the calculation can be found in the decree on the use of the Swiss indications of origin for foodstuff (due to come into effect on 1 January 2017).

For **industrial products** (Art. 48c) the indication of origin must, on the one hand, correspond to the location at which the activity giving the significant characteristics to the product was undertaken. On the other hand, at least 60% of the manufacturing costs must be incurred at the place of origin. This includes the costs of manufacturing and assembly, the costs for Research and Development as well as

the costs for statutorily prescribed or standardised, industry-wide regulations governing quality assurance and certification; not be included are costs for natural products which, due to natural environmental circumstances, cannot be produced at the place of origin, as well as for raw materials which, for objective reasons, are unavailable in sufficient quantity at the place of origin as well as packaging, transport and distribution costs.

The indication of origin of a **service** (Art. 49) it is accurate, if, on the one hand, it corresponds with the place of business of the person who is responsible for providing the service and, on the other hand, the place actual administration of be said person is located in the same country. Special regulations apply to corporations: The parent company must have its headquarters in Switzerland, the parent company or a subsidiary located in Switzerland must have a place of actual administration in Switzerland, and the foreign-based subsidiary or branch must provide similar services.

### ... AND THE CHALLENGING PROOF OF THEIR FULFILMENT

Namely with respect to industrial products, the share of manufacturing costs incurred at the place of origin becomes consequential. The classification or proportional allocation of common costs and the costs of Research and Development (R&D) as well as the assessment of material and process cost components of semi-finished goods are challenging. A documentation of the product-related planning calculations, which contains the estimated duration of the product development and utilization phases, should become inevitable. As a means of a hardship condition, the average annual R&D costs may be accounted for an indefinite period, with the effect that a product does not lose its "Swissness" status after their full depreciation. There will be certain scopes of valuation which, however, should be used defensibly.

The Swiss Federal Institute of Intellectual Property (FIIP) has recently provided a "Swissness" calculator in the form of an Excel file, with which the percentile share of manufacturing costs incurred in Switzerland can be calculated. According to the FIIP, this calculation tool is due to be published on their website before the end of 2016.