

# **Protecting "Made in Switzerland" Designations and the Swiss Cross**

## **Report of the Federal Council**

(Unofficial translation without appendices)

**From 15 November 2006 in response to the Hutter postulate 06.3056  
("Protecting the Swiss Trademark") and the Fetz postulate 06.3174  
("Strengthening the Made-in-Switzerland Trademark")**

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## Summary

A. In response to the issues raised by the postulates\* Hutter 06.3056 and Fetz 06.3174 for stronger protection for the "Swiss trademark," the Federal Council examined the current protection for 'made in Switzerland' designations and the Swiss cross. The analysis resulted primarily in three conclusions: Firstly, the current regulation for using the Swiss cross is not satisfactory. Affixing our national symbol of sovereignty to products is basically illegal while its use for services is legal. This unequal treatment is neither adhered to in practice nor is it justifiable. Secondly, the current legislation contains only very generally formulated conditions which must be met for using a 'made in Switzerland' designation. With the exception of watches, no concrete criteria exist regarding when and by whom a 'made in Switzerland' designation can be affixed to a product and when it cannot. Appropriate criteria have only been developed by individual cantonal courts up until now. Thirdly, illegal uses of 'made in Switzerland' designations or the Swiss cross are not pursued with determination in Switzerland or abroad.

B. In view of these three points, the Federal Council recommends four measures:

1. Affixation of the Swiss cross on products manufactured in Switzerland should be permitted in the future; however, the misleading use of our national symbol of sovereignty (affixing the Swiss cross on products manufactured abroad) should continue to be illegal and pursued in Switzerland based on the Federal Law on the Protection of Trademarks and Indications of Source and the Federal Law on the Protection of Emblems and the Name of the Red Cross.

To realize this, the Federal Council will draft a bill to amend the Federal Law on the Protection of Coats of Arms and Other Public Insignia. At the same time it will examine the option of repealing this federal law. Furthermore, the Federal Council will draft a bill to amend the Federal Law on the Protection of Trademarks and Indications of Source as well as the Federal Law on the Protection of Emblems and the Name of the Red Cross.

2. The Federal Council is signaling to trade associations its readiness to enact one or more ordinances regulating the use of 'made in Switzerland' designations in one or more specific economic sectors, given appropriate interest. It is up to the associations to initiate discussion and reach a consensus regarding common criteria, or to at least find a clear common denominator.

3. The protection of 'made in Switzerland' designations/the Swiss cross should be strengthened in Switzerland. New is that the Federal Institute of Intellectual Property (the Institute), when it determines an instance of illegal use, should notify the business importing the products which do not meet the legal criteria for using a 'made in Switzerland' designation/the Swiss cross and set a deadline for responding. If it is a case of illegal use of the Swiss cross/a 'made in Switzerland' designation and the notified business continues using it, the Institute can file criminal charges with the responsible cantonal authorities.

4. Protection of 'made in Switzerland' designations and the Swiss cross abroad must be strengthened in as far as it is possible and useful. If a business uses the Swiss cross/a 'made in Switzerland' designation on a product manufactured abroad, the Institute can intervene single-handedly, or with the support of the involved trade association and, when necessary and opportune – with the help of the responsible Swiss diplomatic mission and in cooperation with the Federal Department of Foreign Affairs (DFA) and the State Secretariat for Economic Affairs (DEA).

Beyond the legislative framework, it is important that the character of 'made in Switzerland' designations/the Swiss cross and the respective communication of them both domestically and abroad is preserved and further developed.

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\* A type of parliamentary intervention in Switzerland.

## I. Background and Aim of the Report

### 1. Background

The public perceives the Swiss cross as well as designations such as 'Swiss,' 'Swiss quality,' 'made in Switzerland,' and other graphic images indicating Switzerland such as the Matterhorn or William Tell as 'made in Switzerland' designations. Relevant here is the geographical origin coupled with the quintessential qualities associated with being Swiss. This includes ideas of quality, expectations of exclusive use, and/or emotional content associated with Switzerland as the country of origin.

A distinction must be made here with a trademark in the legal sense which indicates the business source and, with that, the character of a product or service of a particular business. Key questions are, who, besides the Confederation, should be authorized to use a) the Swiss symbol of sovereignty or, b) a verbal or pictorial designation for 'Switzerland,' and c) who should enforce legal protection.

In addition to these legal questions, there is also the question of responsibility for the content of 'made in Switzerland' designations/the Swiss cross, for their character, for Switzerland's 'image,' and finally for how to conduct this idea of being "Swiss" in the broadest sense. This last topic is not considered in the current report.<sup>1</sup> However, it should be mentioned here that all efforts to optimally employ 'made in Switzerland' designations/the Swiss cross and to defend them can be profitable only to the extent to which the message transmitted by the designation/cross – in other words, the reputation of Swiss products and services – can positively influence consumer decision-making in the prevailing market. In so far as the Confederation plays a role in the preservation, development, and transmission of this 'image,' it should counteract existing fragmentation, now as before, and focus on concentrating energy. Based on these considerations, the Federal Council intends to take action<sup>2</sup> to reorganize promotion of the country. The collaborative synergy and efficiency of all those involved in this issue<sup>3</sup> must improve. After analyzing the debates in the National Council and Council of States, the Federal Council drafted a preliminary amendment bill which took the concerns and viewpoints expressed by the parliament into consideration.<sup>4</sup>

The currently existing restrictions on the legal use of 'made in Switzerland' designations/the Swiss cross are based on an obligation for truthfulness, respectively a ban on fraud. For the Swiss coat of arms there is additionally the reason of respect (the Swiss cross is not just any meaningless sign; it is the Swiss national symbol of sovereignty) and, in particular, the possibility of confusing the Swiss cross with the Red Cross.

The newly discovered concept of 'Swissness' as a marketing vehicle inspires more and more businesses to use the Swiss coat of arms and designations such as 'Swiss' on their products, for their services, and in advertising both here and abroad. In the process, the number of uses perceived as illegal mounts leading to complaints from businesses and increased sensitivity among the population and the press regarding 'made in Switzerland' designations/the Swiss cross.

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<sup>1</sup> 'Presence Switzerland' was commissioned to create a "Swiss Story" as a basis for presenting Switzerland abroad for the various organizations active in promoting the country. "Swiss Story" is expected to remain available online under 'www.presence.ch' until November 2006.

<sup>2</sup> It particularly indicated this in the 9 December 2005 report on the coordination of the promotion of the country (<<http://www.seco.admin.ch/publikationen/00527>>).

<sup>3</sup> For instance, Presence Switzerland, LOCATION Switzerland, Swiss Tourism, etc.

<sup>4</sup> The Federal Council began the consultation process for drafting a federal law regarding the promotion of Switzerland as a country on 18 October, 2006. It proposes bundling the federal institutions active in federal communication mandates abroad into a single and unified organization (<[http://www.admin.ch/br/aktuell/00091/index.html?lang=de&msg-id=7740&print\\_style=yes](http://www.admin.ch/br/aktuell/00091/index.html?lang=de&msg-id=7740&print_style=yes)>).

The complaint filed with the Swiss Commission for Fairness<sup>5</sup> by Trybol AG against the firm Juvena (International) AG can be used to illustrate. The main reason for it was that Juvena affixes the designation "of Switzerland" (see Appendix 1) on its cosmetic products even though they are produced in Germany. After the Commission for Fairness dismissed Tybol AG's action, the head of the company published various advertisements with the title *Urgent need to act for better protection of the Swiss trademark* in the press (see Appendix 2).

The case which certainly received the most attention among the public and in the press, was the one dealing with the SIGG pans sold as part of a Coop sale (see Appendix 1). Both the pans themselves and their packaging had the designation 'Switzerland' and the Swiss cross even though they had been manufactured in China.

## **2. Mandate**

The postulate 06.3056 Hutter ("Protecting the Swiss Trademark") of 16 March 2006 (see Appendix 3) mandates the Federal Council to present the parliament with options for better protecting the 'Swiss Trademark' and, in particular, to evaluate the extent to which legislative amendments (acts and ordinances) are needed. The postulate 06.3174 Fetz ("Strengthening the 'Made in Switzerland' Trademark") of 24 March 2006 (see Appendix 4) mandates the Federal Council to examine legislative and other measures for strengthening protection for Swiss indications of source and to make a report.

The Federal Council accepted the two postulates on 17 May 2006. The Council of States approved the Fetz postulate on 9 June 2006 and the National Council approved the Hutter postulate on 23 June 2006.

## **3. Response to the Two Postulates**

The present report answers the two postulates. The Federal Council thus requests that the two parliamentary actions be signed off because the goal has been achieved and the actions themselves are included in the business report.

# **II. Situation Today**

## **1. The concept of being 'Swiss'**

The concept of being 'Swiss' indicates to Swiss as well as foreign consumers primarily, in a general sense, a connection to a safe, well-ordered, and efficient world. The quality of being 'Swiss,' however, also includes ideas such as precision, exactness, dependability, and thoroughness. Consumers who associate numerous qualities with Swiss products and services also associate 'Swiss' with 'top quality' and, in this sense, as a synonym for innovation, exclusive products, and superior services. Finally, 'Swiss' stands for a culturally multi-faceted, cosmopolitan, and global country.<sup>6</sup>

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<sup>5</sup> Commission for Fairness, as an organ of self-monitoring for the commercial communications sector, is not a federal authority but rather an organized association under private law. Thus, it has no competence to execute its decisions. Its task is to determine, upon request by a complainant, at no charge, unfair content in the area of commercial communications and to demand that it be stopped, if necessary with the help of the media (for example, publication of the case in newspapers). Thus, it is possible to present a case to a cantonal court for judgment which has already been examined by the Swiss Commission for Fairness.

<sup>6</sup> See potential for positioning Swiss quality: A study by the htp St. Gallen Management Consultants and the Competence Center Brand Management of the Institute for Marketing and Trade at the University of St. Gallen, expert report on marketing 2006/1, p.9.

The economic value of Swiss quality is clearly recognized today: Half of all businesses trading in Swiss products affix a 'made in Switzerland' designation/the Swiss cross besides their own trademark (co-branding), and over 40% of businesses admit to wanting to use this designation consistently in the future.<sup>7</sup> However, the use of 'made in Switzerland' designations/the Swiss cross is neither standardized nor coordinated since it is based on the strategy of each individual business. Furthermore, the trade associations have developed numerous labels themselves which consumers see as opposing or contrasting.

## 2. *Legislative Framework*

### a) International law

The international framework consists of, specifically, the Paris Convention,<sup>8</sup> the TRIPS Agreement,<sup>9</sup> and the Geneva Convention.<sup>10</sup>

The Paris Convention prohibits the use of misleading indications of source<sup>11</sup> and coats of arms.<sup>12</sup> The registration of national coats of arms and heraldic copies of them as trademarks is illegal, as the responsible authority has not granted authorization for use.<sup>13</sup>

The TRIPS Agreement<sup>14</sup> prohibits the use of deceptive or false indications of source. Furthermore, the minimum level of protection which must be maintained is that which was guaranteed for geographical indications at the time the agreement came into force (for Switzerland, July 1995).<sup>15</sup>

The Geneva Convention prohibits the use of the Swiss cross for goods if there is risk of confusion with the Red Cross.<sup>16</sup>

### b) National law

#### i) *Use of the Swiss cross*

The description of the Swiss cross is set in the federal decree concerning the coat of arms of the Confederation.<sup>17</sup> Therein, the size of the white cross on the red background is defined,<sup>18</sup>

<sup>7</sup> According to a quick survey titled 'Co-branding with 'Made in Switzerland' Designations' carried out by the Branding Institute in May 2005 among the members of the Swiss brand name association, PROMARCA ([www.branding-institute.ch/frameset.html](http://www.branding-institute.ch/frameset.html)).

<sup>8</sup> Paris Convention for the Protection of Industrial Property of 20 March 1883 (PC, **SR 0.232.04**).

<sup>9</sup> GATT/WTO Agreement of 19 September 1994, Appendix II.1C: Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS, **SR 0.632.20**).

<sup>10</sup> First Geneva Convention of 12 August 1949 on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (**SR 0.518.12**).

<sup>11</sup> In particular, Article 10, PC.

<sup>12</sup> Article 6<sup>ter</sup>, PC.

<sup>13</sup> Art. 6<sup>ter</sup>, PC

<sup>14</sup> Article 22-24, TRIPS.

<sup>15</sup> Article 24, para. 3, TRIPS.

<sup>16</sup> Article 53, para 2. The Geneva Convention only prohibits the use 'for a purpose contrary to commercial truthfulness or under conditions which could damage Swiss feelings of patriotism.' An inter-governmental survey at the DFA, DDPS and the Federal Office of Justice by the Federal Institute of Intellectual Property in spring of 2006 showed that the use of the Swiss coat of arms can only be prohibited internationally when there is a possibility of confusion with the Red Cross occurs simultaneously. Main illustration: Advertising with the Swiss cross for medicinal activities or those associated with medicine.

<sup>17</sup> Federal decree of 12 December 1889 concerning the coat of arms of the Confederation (**SR 111**).

<sup>18</sup> Article 1: The coat of arms of the confederation is a perpendicular, free-standing, white cross, each arm of which is one-sixth longer than it is wide, on a red background.

however, the relative size of the cross within the coat of arms is not defined nor is and the hue of the ‘red’ color.<sup>19</sup>

The use of the Swiss cross is regulated in the Federal Law on the Protection of Coats of Arms and Other Public Insignia (Coats-of-Arms Law)<sup>20</sup> from 1931. According to this law, the Swiss coat of arms may not be registered as a trademark for goods and may not be affixed *to goods* for commercial purposes. A commercial purpose is when the Swiss cross is affixed to goods in order to indicate their origin (Switzerland). Thusly, affixing the Swiss cross to a yogurt container in order to indicate to consumers that the product comes from Switzerland is illegal. Non-commercial and decorative uses on products are legal. For example, affixing a Swiss cross to souvenir articles (for instance, a large Swiss cross on a tee shirt or baseball cap) is allowed. In such a case, the Swiss cross is being used for purely decorative purposes and the consumers do not expect that the tee shirt or cap have been manufactured in Switzerland. In addition, a very stylized image of the Swiss cross may also be affixed to products under the condition that any risk of confusion with the national symbol of sovereignty can be excluded.

In contrast, the Swiss cross may be used for *service* trademarks as well as in advertising and on prospectuses in so far as it is not misleading regarding the origin of the services. For example, the Swiss Life company (see Appendix 1), headquartered in Switzerland, may use the Swiss cross in its logo.<sup>21</sup>

The federal law concerning the Red Cross<sup>22</sup> also has an influence on the use of the Swiss cross. It states that neither the Red Cross nor any signs which could be confused with it may be registered or used as a trademark. Based on this, the use of the Swiss cross – which can be confused with the sign of the Red Cross<sup>23</sup> – can be outlawed in certain cases.

#### ii) *The use of ‘Swiss’*

The predication should be made that, because it is not possible to monopolize ‘made in Switzerland’ designations, no ‘Swiss’ trademark exists in the legal sense and thus there is actually no one who is legitimately authorized to decide about the use and enforcement of ‘made in Switzerland’ designations/the Swiss cross.

The conditions for using ‘Switzerland’ or ‘Swiss’ for *products* are defined very generally in the Trademark Law as follows:<sup>24</sup> The origin of goods shall be determined by the place of manufacture or by the origin of the basic materials and components used.<sup>25</sup> The Federal Council can specify such conditions if it is justified by general economic interests or by the interests of individual sectors.<sup>26</sup> Up until today, this has only been done – after a protracted debate concerning the highly controversial interests in the watch sector – with the “*Swiss-made*” ordinance for watches (the Watch Ordinance) of 23 December 1971.<sup>27</sup> (For example, the definition of a ‘Swiss watch’ is a watch with a Swiss movement which is cased up in Switzerland and the final control of which is done by the manufacturer in Switzerland.) Besides this regulation, only a sparse judicature on the topic can be referred to; in particular, the decision of the commercial court of St. Gallen according to which the value of the Swiss portion of the

<sup>19</sup> This can be defined by using a color system (such as Pantone or RAL).

<sup>20</sup> Federal Law on the Protection of Coats of Arms and Other Public Insignia of 5 June 1931 (WSchG; **SR 232.21**).

<sup>21</sup> See following point ii) the use of ‘Swiss’ as a criteria for determining the origin of services.

<sup>22</sup> Federal Law on the Protection of Emblems and the Name of the Red Cross of 25 March 1954 (**SR 232.22**).

<sup>23</sup> For example, advertising with the Swiss cross for medicinal activities or those associated with medicine.

<sup>24</sup> Federal Law on the Protection of Trademarks and Indications of Source from 28 August 1992 (MSchG; **SR 232.11**).

<sup>25</sup> Article 48, para. 1 Trademark Law.

<sup>26</sup> Art. 50 Trademark Law.

<sup>27</sup> **SR 232.119**.

manufacturing costs<sup>28</sup> of a good must be at least 50% and the essential manufacturing process must have taken place in Switzerland<sup>29</sup> (see Appendix 5). Exactly how “essential manufacturing process” should be understood is illustrated by the following two examples: For a woven scarf to be considered a product of Swiss origin because of a particular coating it has received in Switzerland which stiffened the fabric (although this clearly is an important characteristic of the quality) is insufficient. In the eyes of the customer, the quality of the woven fabric is such an important characteristic of the product that fabric can only be indicated as being of Swiss origin if it was actually woven in Switzerland (see Appendix 6).

In fountain pens, the nib is an important element. But the quality of the fountain pen also primarily depends on the quality of the other parts. According to experience, more repairs are made on the holder than on the nibs for the fountain pens in use. For this reason, consumers pay attention not only to the quality of the nib but also to the quality of the holder (the feed system, the ink regulating system). That is why these parts of a fountain pen are not considered subsidiary parts. Thus, a fountain pen may not be marked as a Swiss product if only the nib has been manufactured in Switzerland (see Appendix 5).

The origin of services, according to the Trademark Law,<sup>30</sup> is determined either by the headquarters of the person providing the service or by the citizenship or the domicile of the persons actually controlling the policies and management of the business. A corporation domiciled in Switzerland can accordingly use the name “Swiss Consulting” for services. A corporation with headquarters in Rumania can also legally use this name for its services under the condition that the person who actually controls it (for example, the director) has Swiss citizenship or is domiciled in Switzerland.

To protect indications of source, finally, the Unfair Competition Act<sup>31</sup> and the moral rights to the protection of a name (which also exists for communal entities) can also be applied.<sup>32</sup>

### 3. Actual Situation

#### a) Usage

The use of the *Swiss cross* on goods is widespread despite being illegal.

For example, the Swiss cross is used on milk products, ice cream, etc. by Emmi AG (see Appendix 1) and for mineral water by Valser (see Appendix 1). The latitude for distinguishing between legal, decorative use (for example, a Swiss cross on a tee shirt or cap) and illegal commercial purposes, or between legal, stylized and illegal, confusing reproduction of the cross is difficult to apply and is clearly exploited. The Victorinox firm (see Appendix 1), which affixes an only slightly stylized form of the Swiss cross, can serve as an illustration. Famous Swiss companies also use the term ‘Swiss’ (for example, Juvena, Mövenpick, Raichle) (see Appendix 1) even though their manufacturing has for the most part been moved abroad.

#### b) Domestic enforcement

Although the – constantly more frequent – violations against the *Coats-of-Arms Law* could be persecuted or pursued *ex officio* by the cantons as a public offence and anyone can file criminal charges, such offences are hardly pursued in reality.

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<sup>28</sup> Including raw materials, sub-assemblies, accessory parts, salaries, and general manufacturing costs excluding operating expenses.

<sup>29</sup> In ambiguous cases, the origin of the intellectual property embodied by the object and the particulars of the trade sector are to be duly considered.

<sup>30</sup> Art. 49, para.1, Trademark Law.

<sup>31</sup> Federal Act on Unfair Competition of 19 December 1986 (UWG; **SR 241**); Article 2 and 3 Bst.b.

<sup>32</sup> Article 29, para. 2, Swiss Civil Code (ZGB; **SR 210**).



For 'made in Switzerland' designations, those involved (typically Swiss producers) as well as the industry sectors and consumer organizations have the option of civil or criminal charges, while commercial misuse must be pursued *ex officio* by the cantons. However, here as well, hardly any law suits or criminal proceedings are followed through. Because of the minimal judicature (which concerns exclusively 'traditional' products such as fountain pens and scarves), it is unclear whether and how far, for example, the costs for research or for quality control can also be counted as part of the production costs and thus be included for consideration in determining Swiss origin.

c) Enforcement abroad

Foreign law often is dramatically different from Swiss law (level of protection, legitimacy, costs, etc.). In addition, the interpretation and judicature of the relevant international treaties are often vague, which makes the outcome for prosecution not only expensive but uncertain. Enforcement through a foreign court is therefore rarely attempted, not least because no 'made in Switzerland' designation exists in the legal sense and it is not clear who actually has the right to enforce a 'made in Switzerland' designation/the Swiss cross.

d) Federal action to inform

In instances of illegal use, the Federal Institute of Intellectual Property, as the responsible federal agency for matters concerning indications of source, informs the trade organization involved. The Institute has regular contact with the Swiss embassies abroad and initiates first measures through the embassies when time is of essence. Today, if a company uses the Swiss cross/a 'made in Switzerland' designation on products which, for example, were manufactured and sold in the USA, the Institute notifies the company – through the embassy – of its illegal action and informs the trade associations involved. When the company does not refrain from illegally using the Swiss cross/a 'made in Switzerland' designation, the Institute must nevertheless forgo litigation because there is no clearly legitimate plaintiff for a 'made in Switzerland' designation/the Swiss cross and thus no clear legitimacy for the Confederation, respectively the Institute, to file action; the prospects for such a trial are too small and the potential costs associated with one too high.

Domestically, the central customs authority informs the Institute based on random samples. The Institute writes to the incriminating company and issues a warning. The Confederation, however, has neither the express authority nor the means to litigate against such infringements.

e) (In)ability of the cantonal criminal authorities

In spite of the clear, legislative situation which urges cantonal authorities to prosecute *ex officio* illegal uses, in fact they seldom take advantage of their legal authority and rarely initiate proceedings.

f) Random searches by the customs authorities

The central customs authority discovers illegal uses during random searches at customs based on the customs forms and informs the Institute. Concretely, this means that the central customs authority informs the Institute when, for example, it makes a random search and discovers that a 'Swiss made' label or the Swiss cross has been affixed to foreign products. The Institute writes to the incriminating company and issues a warning.

g) Self-help with private labels

Given the generalness of the definition of a 'made in Switzerland' designation/the Swiss cross, private collective or guarantee marks often impose their own criteria, which are often more strict than the official ones. A trade association controls whether they are met and the associated

characteristics are guaranteed to the consumer. An example of this is the sign of the crossbow which is registered by Swiss Label (Society for the promotion of Swiss Products and Services) in numerous countries as a trademark (see Appendix 1) or also the registered guarantee mark from *Swisscos* (Union for the protection of cosmetic products of Swiss origin) (see Appendix 1).

#### 4. **Conflicting interests**

The opposing interests surrounding the 'made in Switzerland' designations/the Swiss cross are large. The question is: Strict criteria to protect against dilution and preserve national sentiments, or broad usage for commercial purposes?

Political pressure comes from smaller Swiss companies producing for the most part, or even entirely, domestically. An example in case is the company Trybol AG which manufactures primarily cosmetic products in Switzerland. These companies would prefer restrictive use conditions. The SWISS LABEL ('Crossbow') association is most offended that others use the Swiss cross illegally while it correctly refrains from doing so. The parliamentary actions are demanding effective protection for 'made in Switzerland' designations/the Swiss cross from exploitation of their reputation. The media goes in the same direction and additionally criticizes the discrepancy between the law and reality. Among the public there is the expectation that the government should be come to the defense of 'its' <sup>33</sup>designation/cross.

Opposing pressure comes particularly from larger Swiss companies and from holding societies with outsourced production which lay claim to access to the Swiss indication of source based on their domestically-based development, research, and marketing activities or quality control: For example, the case of the company Juvena (International) AG, whose research, development, and marketing activities take place in Switzerland while the cosmetic products are manufactured in Germany. This is also true for Mövenpick of Switzerland which produces its products in numerous countries outside Switzerland. These companies receive back-up from the Commission for Fairness, which has construed and intends to expand its own principles accordingly. In addition, companies, such as Victorinox, which use an only slightly stylized form of the Swiss cross for its products (see Appendix 1) and have built their palette of products primarily on the quality of being *Swiss*, do not want to refrain from their (legally problematical) use of the Swiss cross as a marketing instrument.

In the evaluation of the interests involved, it should be considered that for the small and medium-sized *businesses* it is more difficult to create an own trademark and protect it in order to promote product sales. A *business* which has access to a large portion of the market can more easily develop its own trademark to refer to concepts such as reliability and exclusivity in the eyes of consumers, even if its center of production is abroad. This comparison would rather speak for strict criteria for acceptable use of 'made in Switzerland' designations/the Swiss cross.

### III. Target Situation/Requirements

#### 1. **Target Situation**

The Federal Council's main goal covers the following two elements: On the one hand, defining 'made in Switzerland' designations/the Swiss cross should lead to more clarity, transparency, and legal certainty. On the other hand, appropriate enforcement of protection, both in Switzerland and abroad, is needed. The content of 'made in Switzerland' designations/the

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<sup>33</sup> The question arises here, naturally, to whom exactly 'made in Switzerland' designations/the Swiss cross belong to. An indication of source is rather an atypical right because it is not based on an individual's right. In other words, it is not an individual right but rather a collective right. The collective then created the value needing protection, and the protection is available to anyone belonging to the collective. The entity 'Allmend' \*(from old German law) is a similar example: Everyone belonging to it may use it under the condition that he or she upholds certain rules.

Swiss cross – in other words, their essential nature and key message – must be backed up by the Swiss *businesses* wanting to benefit from it, either within the existing legislative framework or an amended one.

## **2. Requirements**

Achieving this goal should take the following requirements into account:

Firstly, the issues raised by the Fetz and Hutter postulates must be addressed: 'Made in Switzerland' designations/the Swiss cross must be protected such that foreign *businesses* cannot take advantage of their good reputation in an unauthorized way.

Secondly, the interests of those, on the one hand, aiming for broad usage of 'made in Switzerland' designations/the Swiss cross because they represent a marketing advantage, and, on the other, those interests fearing 'dilution' because usage is too broad must be equally considered.

Thirdly, the current distinction between commercial and decorative use of the Swiss cross leads to ambiguity. This distinguishing criterion should thus be abolished for products manufactured in Switzerland. Equally unjustifiable is treating products and services differently. According to the current law, the use of the Swiss cross for services is legal (in so far as the use is not deceptive in terms of the origin of the services), while affixing the Swiss cross on goods for commercial purposes is illegal. This historically-based distinction was retained by legislators for political reasons during the last trademark law revision at the beginning of the 1990's. However, this 'privilege' granted to services is no longer justifiable and the unequal treatment should be abolished.

Fourthly, the currently legal use of the Swiss cross should not be restricted. Concretely, this means that companies such as Swiss Life should be allowed to continue using the Swiss cross for their services as till now.

Fifthly, the distribution of authority (Federal Institute of Intellectual Property, central customs authority, cantonal court authorities) must be more clearly regulated and the enforceability of protection for 'made in Switzerland' designations/the Swiss cross (in particular, through litigation) must be improved.

Sixthly, the measures to be enacted must be in accordance with Switzerland's international obligations (above all, the Geneva Convention and the TRIPS Agreement).

Finally, measures which do not additionally burden the federal budget should be in the foreground if possible.

## **IV. Concrete Measures**

Numerous options were examined in the context of drafting this report. Based on an extended analysis, the Federal Council recommends that four measures be introduced<sup>34</sup> which, together, would make a coherent package for better protection for 'made in Switzerland' designations and the Swiss cross.

### **1. Provision of Information**

Prior to drafting these measures, the FDJP (and within this, the Federal Institute of Intellectual Property) should carry out comprehensive studies which allow determining who may use a

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<sup>34</sup> See items 3-6, below.

'made in Switzerland' designation and under which conditions, and how protection of this designation can be guaranteed.

If it proves to be useful, the FDJP (the Institute) will also conduct demographic surveys, for example, on consumer expectations regarding the use of 'made in Switzerland' designations and the Swiss cross on products.

The FDJP (the Institute) will also conduct a comparative legal study to show how other countries regulate the use and enforcement of their name, under which conditions private persons may use this name, and how protection is realized.

Finally, the FDJP (Institute) will determine any potential legal impact which could arise from the measures recommended for protecting 'made in Switzerland' designations and the Swiss cross.

The concrete legislative amendments and recommendations for future measures to strengthen protection for 'made in Switzerland' designations and the Swiss cross should be conformed to the conclusions reached by these analyses.

## **2. Financial Impacts**

Any financial and personnel impacts arising from these analyses and the measures recommended in this report<sup>35</sup> should be completely absorbed by the Institute, which is financially independent. In this way, there will be no additional financial or personnel impact for the Confederation due to the measures recommended in this report. Whatever additional future measures for strengthening protection for 'made in Switzerland' designations/the Swiss cross not mentioned in this report, the Federal Council will determine the financial and personnel effects for the Confederation at the time it deems such recommendations appropriate.

## **3. Drafting a Legislative Amendment Bill**

### **a) Summary**

Today's situation<sup>36</sup> and the current legislative regulation<sup>37</sup> of protection for coats of arms<sup>37</sup> diverge greatly. The question is whether the legal provisions should be conformed to the actual situation, and, if so, how the conformation should be effectuated. To answer this question, the Federal Council will draft a bill to amend the Federal Law on the Protection of Coats of Arms and Other Public Insignia. It plans to put it through the consultation process in the second half of 2007. The revision aims to assure that the Swiss cross may be used not only for services but also for products in so far as that use is neither deceptive nor inappropriate. Affixing the Swiss cross to a product is legal when the product has been manufactured in Switzerland (neither deceptive nor inappropriate). The legal use of our national symbol of sovereignty, however, depends on how one defines a 'Swiss product.' The conditions for using a 'made in Switzerland' designation are currently regulated only very generally in the Trademark Law. Except for watches,<sup>38</sup> there are no concrete legal provisions which exactly define when a 'made in Switzerland' designation may be affixed to a product. Judicature on the matter is also sparse.<sup>39</sup> The Federal Council's amendment bill, which should also include changes in the Trademark Law, will thus also have to deal with a possible inclusion of criteria regulating 'made in

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<sup>35</sup> Items 3 - 6.

<sup>36</sup> See section II.3, above: Actual Situation.

<sup>37</sup> See section II.2, above: Legislative Framework

<sup>38</sup> However, the legal conformity of the 'Swiss-made' ordinance for watches is controversial today. See section IV.4.c), below.

<sup>39</sup> See section II.2.b.ii, above: The Use of 'Swiss'

Switzerland' designations (for instance, the two criteria established by the commercial court of St. Gallen in its 24 April 1968 decision<sup>40</sup>) at the legislative level.

Within the framework of this legislative revision, the Federal Council will also have to examine to what extent the other provisions in the Coats-of-Arms Law are justifiable, or whether this law cannot be repealed. In doing so, sufficient protection, particularly for public designations, the cantonal coats of arms, and foreign coats of arms, and the Red Cross should continue to be guaranteed.

#### b) Advantages

The recommended measures would make it possible to update, respectively repeal, an old law which is no longer consistently applied. Through this, clarity and transparency would be increased: The use of public coats of arms is principally unrestricted, as long as it is appropriate and does not lead to deception, and as such is subject to the same regulation as indications of source. Thus, it would be possible to affix the Swiss cross on a product manufactured in Switzerland (for example: Emmi). However, affixing the national symbol of sovereignty to products which are manufactured abroad would continue to be illegal. In this way, the existing uneven treatment of the use of the Swiss cross on products (the use is illegal, even when the product is manufactured in Switzerland) and services (the use is currently legal if the *business* has its headquarters in Switzerland) would be eliminated. The current difficulties in distinguishing between commercial and decorative uses for products manufactured in Switzerland would also be resolved.<sup>41</sup> The recommended measures take economic interests into account as well, since they do not impact any existing entitlements. Companies such as Swiss Life can continue to use the Swiss cross for their services as they have until now. Finally, this measure is also compatible with the Geneva Convention and the TRIPS Agreement.

#### c) Disadvantages

The protection currently provided for foreign coats of arms in the Coats-of-Arms Law<sup>42</sup> (protection against risk of confusion between the emblem being used and a foreign coat of arms<sup>43</sup>) goes further than the minimal protection provided under the Paris Convention for the Protection of Industrial Property (this protection covers only imitations of foreign coats of arms in the heraldic sense<sup>44</sup>). The part of the Trademark Law on geographical indications of source must therefore be supplemented in case the Coats-of-Arms Law is repealed in order to maintain the currently existing level of protection for foreign coats of arms.

In regards to the risk of confusion for the Red Cross, a new differentiation problem would be created.<sup>45</sup> Whether the Red Cross law needs to be supplemented with a corresponding provision in order to eliminate this problem and guarantee a certain legal certainty needs to be evaluated.

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<sup>40</sup> See section II.2.b.ii above for the criteria on using 'Swiss'; the criteria applied were confirmed by the same court in its decision on 6 November 1992 and from the Cantonal Court of St. Gallen in its decision on 13 January 2003 (unpublished).

<sup>41</sup> However, for products manufactured abroad, this distinguishing criteria would continue to be necessary. It would need to be evaluated whether consumers perceive the Swiss cross as an indication of source (in this case, affixing the Swiss cross is illegal) or as purely decorative (for example: the Swiss cross on a t-shirt; in such a case, affixing is legal).

<sup>42</sup> Article 10, Coats-of-Arms Law (WSchG)

<sup>43</sup> Risk of confusion continues to exist also under the assumption that the foreign coat of arms is loosely rendered.

<sup>44</sup> If foreign coats of arms are imitated in a loosely stylized way, it can no longer be a question of a reproduction in the heraldic sense.

<sup>45</sup> By way of the phrase 'medicinal or goods and services associated therewith' (see footnote 16 and 23).

#### d) The definition of the Swiss cross

The Institute has received various queries from private persons and the press regarding the relative size of the Swiss cross and its 'red' color in past years. The amendment proposed by the Federal Council, which would allow the Swiss coat of arms to be used on products manufactured in Switzerland, will lead to an increase in questions of this sort. Therefore, the revision should also be used an occasion to more precisely define Switzerland's public emblems.

#### e) Proposed schedule for the revision

Under the conditions that the parliament will positively acknowledge this report during the first half of 2007, the further schedule would be as follows:

- Drafting of a bill which would include the above-recommended amendment of the law by the FDJP during the first half of 2007: Revision/repeal of the Coats-of-Arms Law, and amendment of the Trademark Law and the Red Cross Law.
- Federal Council resolution and opening of the consultation process approximately in the second half of 2007.
- If the results of the consultation process indicate that significant differences of opinion exist on essential points: a report on the results of the consultation process and a Federal Council resolution on the continuation approximately during the first half of 2008.
- Otherwise the Federal Council can draft a legislative message regarding the revision/appeal of the Coats-of-Arms Law, amendment of the Trademark Law and the Red Cross Law, and send it to parliament in the second half of 2008.

### 4. *Sector-specific Provisions Regarding 'Made in Switzerland' Designations*

#### a) Summary

The Federal Council signals to the trade associations that it is prepared to enact one or more ordinances for one or more specific industry sectors in order to particularize the general conditions in Article 48 of the Trademark Law and more precisely define the use of 'made in Switzerland' designations (as was done in the 'Swiss made' ordinance for watches<sup>46</sup>). However, it will be up to the interested trade associations to initiate discussion and to agree within the sector on common criteria, or at least a clear direction. Any specifications must be within the scope of the law and be based on the conditions for using 'made in Switzerland' designations; in other words, based on the average Swiss consumer's perception of products and services.

#### b) Advantages

Transparency and legal certainty will be increased for those who need to apply the law and those who must abide by it. The criteria will be tailor-made and close to actual practice since they will be developed in close collaboration with the sectors themselves. The content of 'Swiss made' will be generally strengthened, which takes account of the issue raised by the postulates. When pursuing illegal uses abroad, there will be at least explicit Swiss legislation which can be referred to.

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<sup>46</sup> However, conformity of the 'Swiss-made' ordinance for watches with the law is controversial today. See point c).

### c) Disadvantages

The example of the 'Swiss made' ordinance for watches (and its controversial conformity with the Trademark Law<sup>47</sup>) has shown that, even within a sector, it is difficult to reach agreement. It could result in even less restrictive conditions if the interests of the sector take precedence. Such a result would be criticized by the small businesses producing primarily or even completely in Switzerland.<sup>48</sup>

## 5. Improvement of Domestic Enforcement

### a) Summary

For many years it has been the Federal Institute of Intellectual Property which has taken action as soon as instances of illegal use are identified in Switzerland. In particular, when the central customs authority informs the Institute of products from abroad which have the Swiss cross or a 'made in Switzerland' designation (the latest example: Bicycle saddlebags manufactured in Taiwan marked with the label 'XY Swiss made'). In such cases, the Institute issues a warning to the errant business and notifies it that infringements of the Coats-of-Arms Law and the Trademark Law are criminal offences.<sup>49</sup> Numerous businesses have already removed the illegal labels from their products or packaging as a result of such interventions.

In the future, the Institute should be even more active and consistently inform the errant business of its illegal act. The warning given these businesses would be reinforced by setting the company a deadline for response under threat of legal action. Considering the current inaction of the cantons,<sup>50</sup> in the future when instances of serious illegal use are present, the Institute should file criminal charges with the responsible cantonal authorities. The Institute will immediately proceed against illegal uses which are not affected by the legislative amendments recommended by the Federal Council: It will take action based on the Trademark Law when a product labeled with a Swiss cross is entirely manufactured abroad, however not when the product is entirely manufactured in Switzerland (in so far as the recommendation to repeal the Coats-of-Arms Law permits this type of use in the future). In regards to using 'made in Switzerland' designations, the Institute will give the company which has imported a product<sup>51</sup> not meeting the conditions for 'made in Switzerland' designation/Swiss cross a deadline for response. In instances of serious illegal use, the Institute will file criminal charges with the responsible court. Such a case would be, for example, a product manufactured abroad with no relationship to Switzerland whatsoever (when no manufacturing step, also no development, takes place in Switzerland).

The cantons should be made aware of the scope of their authority (action *ex officio*) with appropriate information.

The Federal Council will evaluate the possibility of explicitly anchoring this responsibility with the Institute in a new legislative provision.

### b) Advantages

Illegal uses will be treated in a transparent and consistent way. In contrast to the current situation, serious instances of illegal use will be more severely punished if necessary, by

<sup>47</sup> Compare the statement in the Federal Supreme Court decision of 22 February 2006 (Tiq of Switzerland/4C.361/2005, Erw.3.6.1).

<sup>48</sup> See section II.4, above.

<sup>49</sup> See also section II.3.d, above: Federal obligation to inform

<sup>50</sup> See section II.3.e, above: (In)action of the cantonal criminal authorities

<sup>51</sup> The Swiss businesses which produce their products in Switzerland and export them abroad are naturally not impacted by this problem. Products which have been manufactured in Switzerland may be labeled with a Swiss cross independently of which country they are sold in.

initiating criminal proceedings. For instance, if the central customs authorities inform the Institute that the electronic device of a Swiss firm, completely manufactured abroad, is labeled with the Swiss cross, the Institute would inform the firm of the regulations and set a deadline for a response. If the firm continues the illegal use of the Swiss cross, the Institute would file criminal charges with the responsible cantonal authorities. By actually imposing legal sanctions, the deterrent effect would be greater.

### c) Disadvantages

By filing complaints against Swiss businesses using a 'made in Switzerland' designation/the Swiss cross illegally, the Institute and the FDPJ run the risk of becoming the target of negative criticism because they are taking action against companies which – aside from the identified illegal use – contribute to the healthy functioning of the Swiss economy. On the other hand, the Institute and the FDPJ could be accused of passivity if they do not initiate appropriate proceedings (for example, because the Institute was not informed of the importation of products with the Swiss cross or a 'made in Switzerland' designation,<sup>52</sup> or because the infractions were not classed as serious enough).

## 6. Improvement of Enforcement Abroad

### a) Summary

The Institute has also been active abroad for many years. If it is informed of an illegal *use* of the Swiss cross or a 'made in Switzerland' designation, the Institute notifies the errant firm – through the Swiss embassies – of its illegal act and informs the respective trade associations who in turn can decide on what measures to take.<sup>53</sup> In the case of *foreign trademark registrations*, the Institute, respectively the Swiss embassies, monitor the registrations in certain countries. This is, for example, the case in Argentina where the embassy has new trademark registrations monitored by a local agent and then regularly informs the Institute if a problematical trademark is registered. If the trademark contains a 'made in Switzerland' designation/the Swiss cross, the Institute informs the trade associations so that they have the possibility to file opposition against the registration. In urgent instances of serious illegal use, first measures are initiated directly by the Institute.

In the future the Institute should work closely with the DFA (Directorate of Political Affairs, representation abroad) and *seco* to further bolster trademark registration monitoring activity in countries with high levels of illegal usage. In instances of serious illegal use, the Institute would directly, or through the Swiss embassy, write to and warn errant businesses to stop using the 'made in Switzerland' designation/the Swiss cross or registering the questionable trademark. The Institute would intervene in particular in instances of errant foreign businesses on the basis of Article 6<sup>ter</sup> PC<sup>54</sup> to strengthen protection of the Swiss cross.

In terms of the use of the Swiss cross and 'made in Switzerland' designations abroad, monitoring beyond foreign trademark registrations by the Confederation (the Institute) is, in contrast, neither realistic nor appropriate and for that reason not intended. Initiating criminal proceedings by the Confederation abroad would also go too far and therefore is not an appropriate measure: Because of the lack of clear entitlement for 'made in Switzerland' designations/the Swiss cross and, with that, uncertainty about who can legitimately be the plaintiff, the risks involved in litigation and high costs would be much too much.

<sup>52</sup> This would be the case if the central customs authority did not discover the questionable products and the Institute was not informed some other way (notification by a private party, for instance).

<sup>53</sup> See also section II.3.d, above: Federal action to inform

<sup>54</sup> See section II.2.a above: International Law.



The FDPJ (the Institute), however, will investigate the possibility of further measures such as, for example, registering guarantee marks or certification marks in selected countries, or the possibility to further expand protection for 'made in Switzerland' designations through bilateral treaties.

#### b) Advantages

The measure addresses a core issue in the Hutter and Fetz postulates. It presents an obvious supplement to Measure 5 which, used alone, could lead to the justifiable reproach that domestic businesses would be increasingly persecuted while little was being done against illegal uses abroad. In addition, it is exactly abroad where the use of 'made in Switzerland' designations/the Swiss cross is economically significant. In addition, the measure provides an important contribution and generates synergy for the anti-piracy platform created by the Federal Institute of Intellectual Property and the ICC Switzerland, which has proven to be an effective public-private partnership.<sup>55</sup>

#### c) Disadvantages

Too high expectations could be created among the involved industry sectors.

## V. Conclusions of the Federal Council

In order to deal with the problems regarding the use of 'made in Switzerland' designations/the Swiss cross in a coherent fashion, the Federal Council recommends implementing the four measures presented in section IV of this report. Namely:

1. Drafting an amendment bill which includes the amendment or repeal of the Coats-of-Arms Law, and amendment of the Trademark Law and the Red Cross Law;<sup>56</sup>
2. The Federal Council signals to trade associations its readiness to enact one or more ordinances to regulate the use of 'made in Switzerland' designations in one or more specific economic sectors given appropriate interest. However, it is up to the associations to initiate discussion and work out common criteria, or to at least find a clear common denominator;<sup>57</sup>
3. To take measures to strengthen protection for 'made in Switzerland' designations/the Swiss cross in Switzerland;<sup>58</sup>
4. To take measures to strengthen protection for 'made in Switzerland' designations/the Swiss cross abroad;<sup>59</sup>

## Appendices

Appendix 1: Document containing the examples concerning the use of the Swiss cross and 'made in Switzerland' designations cited in this report.

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<sup>55</sup> For further information about this: <<http://www.stop-piracy.ch>>.

<sup>56</sup> Section IV.3.

<sup>57</sup> Section IV.4.

<sup>58</sup> Section IV.5.

<sup>59</sup> Section IV.6.

- Appendix 2: Copy of the Trybol AG advertisement with the title "Dringender Handlungsbedarf für einen besseren Schutz der Marke Schweiz" (*Urgent need to act for better protection of the 'made in Switzerland' trademark*).
- Appendix 3: Hutter postulate 06.3056 of 16 March 2006: Protecting the Swiss Trademark
- Appendix 4: Fetz postulate 06.3174 of 24 March 2006: Strengthening the Made in Switzerland Trademark.
- Appendix 5: Copy of the decision by the St. Gallen Commercial Court of 24 April 1968.
- Appendix 6: Copy of the decision by the St. Gallen Commercial Court of 6 November 1992.