Swissness – The new legislation on the protection of the brand Switzerland

Corina Peiry-Willhauck, Attorney-at-law, Legal Services, corina.peiry@ch.ey.com

1. The background and aim of the new Swissness legislation

Countless Swiss goods and services enjoy an excellent reputation both nationally and abroad. The Swiss origin of goods and services is closely associated with values such as exclusivity, tradition, innovation and quality. Thanks to this high regard, goods and services that are associated with Switzerland can be positioned within a higher price segment. The resulting economic added value is clearly recognised today by enterprises in an increasingly globalised and networked world. Enterprises are thus increasingly inclined to use indications such as "Switzerland", "Made in Switzerland" and also the Swiss cross for their goods or services or for related marketing purposes. With the increasing success of the "brand Switzerland", abuses have also increased in recent years, both nationally and abroad. This type of abuse damages the good reputation of the "brand Switzerland" in that it fails to meet with the justified expectations of consumers ("If it says Switzerland, it means that it comes from Switzerland") by misleading them regarding the origin of a product or service. This fact inevitably leads to reputational damage and jeopardises the values referred to above for which Switzerland as a production location stands. The Swissness legislation, which came into force on 1 January 2017 intends to maintain over the longterm the value of the "brand Switzerland", to secure it and to provide better protection against abuse.

2. The most important changes

2.1 Appellations of origin

The Trademarks Act (TmA) regulates the principles governing the usage of appellations of origin. For instance, it is stipulated that it is not permitted to use an inaccurate appellation of origin. This provision covers the application of an appellation of origin to the product or its packaging or in relation to a service, along with any usage of the appellation of origin within the course of business, which also includes usage in advertising for goods and services.

Different rules on the determination of origin apply to services, industrial products and natural products and foodstuffs. For services, the enterprise must have a place of business in Switzerland and must actually be managed from Switzerland. Natural products are Swiss if they have a link to the territory of Switzerland. For mineral products, this means the location of their extraction, whilst for crops it is the place where they were harvested. The origin of a foodstuff is the place from which at least 80% of the raw material by weight originates. An industrial product will be of Swiss origin if at least 60% of the production costs for the product are incurred in Switzerland. In addition, the activity by which the essential characteristics of the product are determined along with at least one important stage in the manufacturing process must take place in Switzerland. Finally,
the law lays down special rules concerning the calculation of the Swiss element for particular categories of goods. For instance, under certain circumstances raw materials for industrial products that cannot be extracted (sufficiently) in Switzerland may be disregarded from the calculation of manufacturing costs.

2.2 Swiss cross and Swiss coat of arms

The new law provides that the Swiss cross may be used not, as previously, solely for Swiss services, but now also for Swiss goods. The Swiss cross may not under any circumstances be used in a manner that is inaccurate or misleading. In addition, it may in future be registered as a constituent element of a trade mark, provided that it is combined with at least one other word or figurative element eligible for protection. In contrast to the Swiss cross, in future, the Swiss coat of arms (Swiss cross in a heraldic-style shield) may only be used by public authorities, although continued usage will be permitted as a special exception.

2.3 Sectoral ordinances

Trade ordinances may be adopted to set out in greater detail the statutory provisions governing the usage of the appellation of origin "Switzerland" for particular goods or services, where there is a need for this in a specific sector of the economy. For example, a sectoral ordinance for industrial products may stipulate that certain raw materials that are not (sufficiently) available in Switzerland and must be obtained elsewhere may be disregarded from the calculation of production costs for the purpose of fulfilling Swiss criteria of origin. This means that the special circumstances of a particular sector may be specifically accounted for.

2.4 Combating abuse

Any person who intentionally and unlawfully misuses public symbols (Swiss cross or coat of arms) or abuses the appellation of origin Switzerland will be punished by a custodial sentence of up to one year or by a fine. The Swiss Federal Institute of Intellectual Property (IPI) may file criminal complaints on behalf of the Federation. In addition, anyone who considers that his/her/its rights have been infringed is also entitled to do so. Alongside criminal law protection, it is also possible to take civil action in relation to abuses (e.g. damages claims, actions seeking the cessation of an infringement). The IPI, any competitor, any consumer or any sectoral or consumer protection association has standing to file a civil action.

2.5 Register of geographical indications for non-agricultural products, geographical marks

Under the Swissness legislation, a national Register of geographical indications for non-agricultural products has been created, which is managed by the IPI and is intended to guarantee official protection for product appellations of origin. Previously, such a register had only existed for geographical indications and appellations of origin for agricultural products (e.g. "Gruyère" for cheese, "Epesses" for wine). In addition, it is now possible for appellations of origin and geographical indications included in this register to be registered as trade marks.

For geographical marks, such registration will constitute official recognition of protection. The availability of the two additional official possibilities for recognition means that it will be significantly easier to secure and enforce protection nationally and abroad, as the holder of the right will now be clearly identifiable.

2.6 Deletion procedure

Whilst the deletion of a trade mark that is no longer used in the course of business previously had to be sought through court action, it may now be requested from the IPI according to a simplified procedure. A prerequisite is that the trade mark must not have been used for the goods or services for which it is registered for an uninterrupted period of five years.

3. Conclusion

Alongside more stringent requirements, the Swissness legislation has also established clearer criteria for determining origin and thus increased legal certainty. In addition, the tools for combating abuses have been strengthened. An interesting question, which remains to be resolved, is how closely and consistently the new legislation will be interpreted and enforced. At any rate, it is recommended that affected enterprises acquaint themselves with the new legislation and take any necessary action in good time. Ernst & Young Ltd is able to offer clients valuable advice and support in relation to the implementation of the new legislation.