



Fédération de l'industrie horlogère suisse FH  
Verband der Schweizerischen Uhrenindustrie FH  
Federation of the Swiss Watch Industry FH

# Guide to the use of the designation “Swiss” for watches

*Based on the "Swissness" proposal and on the revision of the Ordinance governing the use of the designation "Swiss" for watches*

**Version 5 - 13.09.2018**



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## 1. Introduction

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The purpose of this document, in its 5<sup>th</sup> version adopted in September 2018, is to provide information for Swiss watch enterprises on the new conditions under which the designation “Swiss” may be used for watches. It likewise clarifies the extent to which the “Swissness” proposal and the revision of the Ordinance governing the use of the designation “Swiss” for watches (referred to below as SMO [Swiss Made Ordinance]) introduced changes to the legislation which was in force until 31.12.2016.

This guide reflects the interpretation placed by the Federation of the Swiss Watch Industry FH (referred to below as FH) on the various legal texts of the “Swissness” project, in particular the revised SMO. However, regulations, case law and administrative practice are liable to evolve and undergo changes. The authors of this guide shall therefore not assume any liability with regard to its content. Similarly, as not all the specific cases can be taken into account, this guide will not limit the possibilities for interpretation of the legal texts by watch industry companies, especially when Swiss law gives the manufacturers a margin for manoeuvre. The purpose of this guide is therefore to assist watch industry companies by providing them with an interpretation of the legislation, taking due account of the interests of the branch and the spirit of the law, without setting out potential further requirements not stipulated in the texts<sup>1</sup>.

The services of the FH will be happy to provide any further information to the enterprises concerned.

This document relates solely to the use of the Swiss geographical indications and does not deal with the rules of origin which fall within the scope of the customs administration. Those rules, in particular the ones concerning preferential origin set out in the free trade agreements between Switzerland and other countries, apply in the external trade context for the purpose of calculating customs duties and therefore differ from the criteria relating to geographical designations. The basis of calculation is different and the fact that a certificate of Swiss origin has been obtained from a Chamber of Commerce does not necessarily confer any entitlement to use the Swiss geographical designation on a watch industry product, and vice versa.

### Example 1

According to customs law, a sea water fish caught by a boat flying the Swiss flag is deemed to have been “made entirely in Switzerland.” If the criteria determining the “Swiss” geographical designation were to be aligned with the rules of origin for customs purposes, a fish taken in the Indian Ocean by a Panamanian trawler flying the Swiss flag could therefore sport the Swiss cross and be sold under the designation “Swiss”<sup>2, 3</sup>.

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<sup>1</sup> In case of dispute, only the French version shall be valid.

<sup>2</sup> Example taken from the explanatory report to the Trade Marks Protection Ordinance (TmPO), p. 10.

<sup>3</sup> For further information on the rules of origin: <http://www.ezv.admin.ch/themen/04095/index.html?lang=fr>



### Example 2

Under the terms of the free trade agreements signed by Switzerland or EFTA, the rules of preferential origin shall apply. According to these rules, products which have been entirely obtained or sufficiently worked or processed in Switzerland are regarded as products originating in Switzerland. The rules applicable to watch industry products (Chapter 91 of the Harmonized System) stipulate, in general terms, that the value of all of the foreign materials which are used must not exceed 40% of the ex-works price. The term “ex-works price” means the price paid to the manufacturer in whose enterprise the last working or processing, including the value of all the materials used, was performed. Unlike the term “manufacturing costs” which is used in the SMO context, this notion therefore includes the manufacturer’s profit.

Take the example of a watch produced in Switzerland with a cost price of CHF 500 and let us suppose that the Swiss share of this product represents 50%, i.e. CHF 250. The watch is then sold by the manufacturer at a price of CHF 1,000 including his margin. In that case the watch clearly does not comply with the criterion of 60% of the manufacturing costs which must be obtained in Switzerland, as stipulated in the Federal Act on the Protection of Trade Marks and Indications of Source (Trade Mark Protection Act, TmPA) and the SMO. It cannot therefore legally use Swiss geographical indications. On the other hand, when the ex-works price of this same product is taken into consideration (CHF 1,000), the foreign value then represents no more than 25%, well below the 40% threshold tolerated by the free trade agreements signed by Switzerland. In this particular case, the watch may, under the terms of the customs provisions at least and subject to compliance with a few other conditions (such as rules of tolerance, the rule of direct transport, bilateral or multilateral cumulation...) lay claim to Swiss origin; that fact may then be stated on a certificate of origin or on an invoice. In some situations, the selfsame watch may therefore not be permitted to bear Swiss geographical indications such as “Swiss” or “Swiss Made” on the dial or case, while still being treated for customs purposes as a product originating in Switzerland. The opposite situation is equally possible. A watch that is perfectly Swiss within the meaning of the Swiss Made stipulations and criteria may very well not be regarded as originating in Switzerland within the meaning of certain Free Trade Agreements, if for example the rule of direct transport is stipulated and has not been respected.



## 2. Legal provisions governing “Swissness” for watches

The use of the “Swiss” designation for watches is governed at present by the Ordinance of the Federal Council regulating the use of the designation “Swiss” for watches dated 23 December 1971. The legal basis for this Ordinance is provided at present by Article 50 of the Federal Act on the Protection of Trade Marks and Indications of Source dated 28 August 1992 (TmPA).

On 21 June 2013, the Swiss Federal Chambers took a final vote adopting the draft revision of the law on “Swissness”. This draft seeks to achieve better protection of the designation “Swiss” and of the Swiss cross in order to safeguard on a sustainable basis the excellent reputation which is enjoyed by Swiss products. Following the formal adoption of this draft text, the provisions of the TmPA have been the subject of amendments which likewise apply to industrial products, including watches and their component parts (Art. 48c TmPA):

### **Art. 48c Other products, in particular industrial products**

- <sup>1</sup> *The origin of other products, in particular industrial, corresponds to the place where at least 60% of the manufacturing costs are incurred.*
- <sup>2</sup> *For the calculation under paragraph 1, the following shall be taken into account:*
  - a. *production and assembly costs;*
  - b. *research and development costs;*  
*costs for quality assurance and certification which are prescribed by law or standardised in an economic sector.*
- <sup>3</sup> *Excluded from the calculation under paragraph 1 are:*
  - a. *costs for natural products which, due to natural conditions, cannot be produced at the place of origin;*
  - b. *costs for raw materials which, in accordance with an ordinance under Article 50 paragraph 2, are not available in sufficient quantities at the place of origin for objective reasons;*
  - c. *packaging costs;*
  - d. *transport costs;*
  - e. *the costs for distribution of the goods, as well as costs for marketing and customer service.*
- <sup>4</sup> *In addition, the indication of source must correspond to the place where the activity, which gave the product its essential characteristics, took place. In all cases, an essential manufacturing step must have been carried out at this place.*

In 2014, the Federal Council opened the consultation procedure on the “Swissness” implementing ordinances. When it comes to the use of the designation “Swiss” on watch industry products, the revision of the Ordinance on the Protection of Trade Marks (referred to below as TmPO) is of particular interest. It lays out the general criteria defined in Art. 48c TmPA concerning the method of calculation of manufacturing costs and will therefore supplement the revised SMO.

In order to ensure compliance with the Swissness proposal, the FH has prepared the draft of a revised text of the SMO (PrSMO5). The latter has been taken over and amended slightly by the Federal authorities (revised SMO). After a consultation procedure, the final text of the SMO was adopted by the Federal Council on 17 June 2016. The provisions of the SMO will be explained and analysed in detail below.



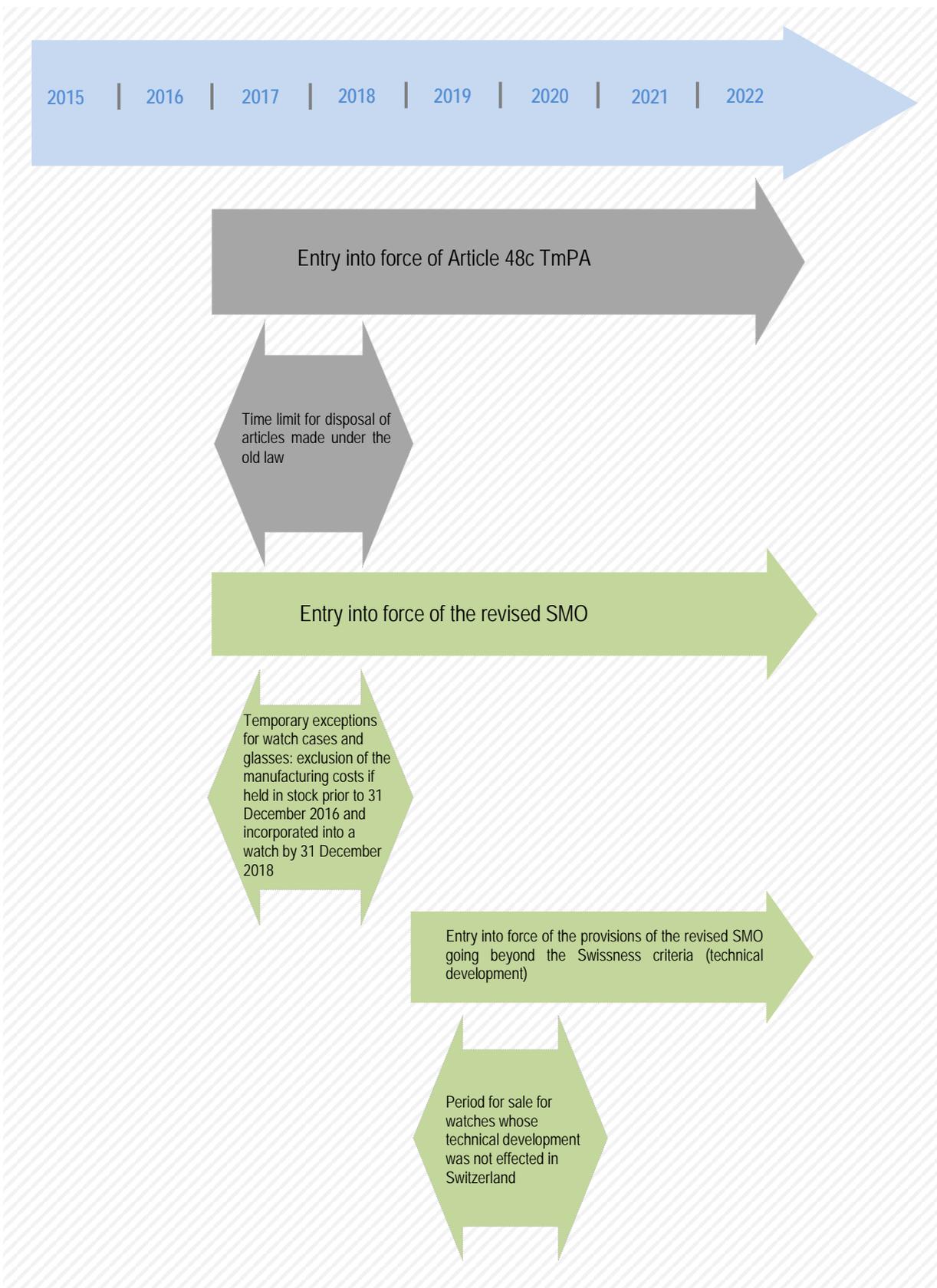
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### **3. Entry into force of the Swissness proposal and of the SMO**

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The TmPO stipulates that the new provisions of the TmPA (rate of 60% for industrial products) shall enter into force on 1 January 2017, with a time limit of a further two years (expiring on 1 January 2019) for bringing into circulation industrial products which complied with the conditions of origin applicable under the old legislation and which were manufactured prior to 1 January 2017. Article 60a TmPO stipulates that the date of first bringing into circulation shall be the determining factor; this means that watches produced in compliance with the old law and brought into circulation until 31 December 2018 may subsequently be sold with no time limit. The term “bringing into circulation” means placing on the market for the first time or making a new product available in Switzerland or abroad for distribution or final use. The method or mode of distribution chosen is not the determining factor.

The revised SMO entered into force simultaneously with the Swissness proposal, in other words on 1 January 2017. For the criteria which go further than the Swissness criteria (in particular the requirement of technical development in Switzerland), the revised SMO makes provision for entry into force on 1 January 2019 accompanied by a transitional period of two years for the first placing on the market of watches and movements bearing an indication of origin compliant with the revised SMO. The costs of the watch cases and watch glasses may also be excluded from the calculation of the manufacturing costs for the watch if a manufacturer held them in stock prior to 31 December 2016 and they are incorporated into a watch by 31 December 2018.





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## 4. Provisions of the revised SMO

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### 4.1. Definition of the watch

#### Art. 1 Definition of the watch

<sup>1</sup> The term “watch” means the following:

- a. time measuring devices destined to be worn on the wrist;
- b. devices whose main function is to measure time and:
  1. whose movement does not have a width, length or diameter of more than 60 mm, or
  2. whose thickness, measured with the bottom plate and bridges, does not exceed 14 mm.

<sup>2</sup> In respect of the width, length, diameter and thickness, only those dimensions which are technically necessary are taken into consideration.

<sup>3</sup> The component enabling the watch to be worn is not included in the definition of the watch set out in para. 1.

#### Paragraph 1

The definition is couched in sufficiently broad terms to cover connected products to the extent that they are treated as watches both in practice and according to case law. So as not to include other connected devices such as smartphones or mp3 players which also show the time, the definition is confined to products that are designed to be worn on the wrist.

Letter b is intended to cover time measuring devices fitted with a movement which may or may not be designed to be worn on the wrist (small alarm clocks, miniature clocks, pocket watches, clips etc.), while excluding other products which may also indicate the time (pens, knives etc.). The limitation against other products is based on the dimensions of the movement and the stipulation that time measurement must be the main function.

The movement dimensions have also been changed from those indicated in the existing SMO so as to adapt them to the real situation of the market.

In other words, when a product which has a time measuring function is fitted with a movement that exceeds one of these dimensions it will not be regarded as a watch and the articles of the TmPA (Art. 48c et seq) will then apply instead of those included in the revised SMO.

#### Para. 2

The term “technically necessary” enables all the components which merely serve to increase the size of the movement without any technical necessity to be excluded from the measurement of the movement.

#### Para. 3

This provision reflects a constant practice in the industry.

As a general rule, the bracelet of a watch is a separate item from the watch itself. Normally, this is a movable component which is not necessarily fixed to the watch when the latter is manufactured. The bracelet may also be changed on several occasions during the life cycle of a watch, especially in the case of leather straps.



For these reasons, the device which enables the watch to be worn, i.e. the wristlet (and its clasp mechanism), the chain of a pocket watch or the system to fix clip watches, does not fall within the scope of application of the definition of a watch within the meaning of the SMO<sup>4</sup>.

In view of the fact that the bracelet is excluded from the calculation of the 60% according to Art. 1a, letter d SMO, the T3 value (fitting the bar; attaching the bracelet) can in all logic no longer be included in the cost price either.

Detachable bracelet: based on the above remarks, the bracelet may therefore only bear the indication "Swiss Made" if it satisfies the criteria stipulated in Art. 48c TmPA for industrial products. The Swiss Federal authorities classify leather as an industrial product because it is a natural, non-nutritive and processed product<sup>5</sup>. Consequently, 60% of the manufacturing costs of the bracelet must be generated by manufacturing processes performed in Switzerland and the activity which conferred its essential characteristics on the product must have taken place in Switzerland.

A Swiss bracelet placed on a Swiss watch may bear the indication "Swiss Made". On the other hand, a foreign bracelet fitted on a Swiss watch cannot bear this designation. If a Swiss bracelet is fitted on a foreign watch it may only bear a reference to the word Swiss (for instance "Swiss bracelet") if the manufacturer of the watch has taken every precaution to make clear the fact that this designation applies solely to the bracelet and that the watch itself is not Swiss. The permitted marking would for example be "Swiss bracelet" on the back of the bracelet accompanied by the clearly legible indication "Made in China" on the watch itself.

Non-detachable bracelet: an exception from the above principles is possible only if the foreign bracelet is destined to be fixed definitively onto a Swiss watch by soldering or riveting and therefore becomes an integral part of the watch itself. In that case, the rules concerning the marking of the cases (Art. 4 revised SMO) may be assumed to apply by analogy and the indication "Swiss Made" may therefore be used on the bracelet since it refers to the watch as a finished product. Note: even if the bracelet is non-detachable, its manufacturing costs are still excluded from calculation of the Swissness of the watch head.

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<sup>4</sup> Explanatory report SMO, page 7.

<sup>5</sup> Explanatory report p-TmPO, page 13.



## 4.2. Definition of the Swiss watch

### Art. 1a Definition of the Swiss watch

*A watch is to be regarded as a Swiss watch if:*

- a. its technical development has taken place in Switzerland;*
  - 1. in the case of exclusively mechanical watches, at least the mechanical construction and prototyping of the watch as a whole,*
  - 2. in the case of watches that are not exclusively mechanical, at least the mechanical construction and prototyping of the watch as a whole, together with the conception of the printed circuit or circuits, the display and the software;*
- a<sup>bis</sup> its movement is Swiss;*
- b. its movement has been cased up in Switzerland;*
- c. final inspection by the manufacturer took place in Switzerland and*
- d. at least 60% of the manufacturing costs is generated in Switzerland*

### 4.2.1. Existing criteria

Letters abis, b and c are an identical repetition of the criteria in force since 1995 to define a Swiss watch, namely the use of a Swiss movement, assembly and final inspection of the product in Switzerland.

### 4.2.2. Technical development (letter a)

Letter a sets out the definition of technical development. Together with assembly and final inspection, this is an important operation in relation to the conception and manufacture of the watch and must therefore also be performed entirely in Switzerland. Only the technical stages are concerned; the purely “aesthetic stages” (idea, design etc.) may be performed abroad. The development of a technical design in the context of prototyping itself cannot be regarded as purely aesthetic; in other words, this specific process must take place in Switzerland.

Definition of technical development: in general terms, technical development is the action which consists in progressing from the specification to the description of a product that can be manufactured and complies with such specification. Technical development comprises the development of the constituent parts, in other words the technical drawings (with the material(s), dimensions, tolerances and possible further processing) of the individual parts and of the assembled components, so permitting their manufacture and their assembly. It also includes work on the layout of parts, materials, processes, components or computer codes in order to obtain the functions of the product and make the product prototypes.

Definition of mechanical construction: mechanical construction consists in defining the shapes, materials and layout of the mechanical parts. It enables technical drawings (shapes, materials, tolerances, further processing) of the parts and assemblies to be made; this will facilitate their manufacture and assembly.

Definition of prototyping: prototyping means the physical production of one or more prototypes of components or of the watch itself. This is an activity which consists in making the first specimens of a product in order to characterize its working and validate the previous phases of technical development. The outcomes of the prototyping phase often result in improvements to the product.



The prototype is used to perform a physical test of the result of the technical development. All the watches and complete movements made and bearing the label “Swiss” or other designations containing the word Swiss must be the outcome of Swiss prototyping and technical development. Since the revised SMO authorises no exceptions in respect of the operations to be performed in Switzerland, prototyping may not be effected abroad on the pretext that the process is not mastered in Switzerland. However, this does not mean that only Swiss materials may be used to make the prototype, especially when a particular material is not available in Switzerland. The same rules may be applied to the prototypes as to Swiss watches that have been placed on the market, in particular the rule of 60% of the manufacturing costs.

In the case of watches which had already been fully developed before the date of entry into force, these steps do not have to be repeated in Switzerland (unlike the situation for watch movements, see section 4.3.2). In the case of smart watches, the module which performs time measurement as such must be developed in Switzerland. However, the connection between the smart watch and smart phone can be established via a foreign operating system as it does not perform any time measuring function<sup>6</sup>.

The technical development requirement relates to the watch as a whole and – with the exception of the watch movement (see Art.2 para 1, letter a) – not to individual components of the watch. Their technical development may take place abroad, provided that this does not involve component parts which are explicitly named in Art. 1 letter a, section 2. According to that provision, in the case of watches that are not purely mechanical, the printed circuits, display and software must also be developed in Switzerland<sup>7</sup>. If therefore the Swiss manufacturer uses a watch case purchased abroad for his watch, the technical development of that specific component can also take place abroad. This reflects the reality of the market.

The costs of technical development performed in Switzerland may be included in the manufacturing costs of the watch within the meaning of Art. 1a, letter d, SMO.

#### 4.2.3. FAQ technical development (mechanical design and prototyping)

**Is it compulsory to make prototypes in Switzerland if the mechanical constructions already exist and habitual manufacturing standards have been followed? If variations to the collection are introduced (change of colour, addition of a transfer print, re-stamping, movement change), can the prototyping be performed outside Switzerland?**

No, according to Art. 1a, letter a SMO, technical development, i.e. mechanical construction and prototyping of the watch, must be performed in Switzerland when the watch lays claim to Swiss origin. No exemption is allowed. This does not mean that a prototype must be developed artificially if there is no technical need to do so or if the prototype for a similar model already exists.

**Is it compulsory to make a prototype for each reference placed on the market even if there is no technical reason for doing so and the aesthetic validation has been confirmed by CAD and on wax?**

No. On the other hand, the CAD and wax phases must be performed in Switzerland because they are part of the prototyping.

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<sup>6</sup> Explanatory report SMO, page 8

<sup>7</sup> Explanatory report SMO, page 8/9



#### **Must the prototype be functional? Can a wax model be regarded as a prototype?**

The prototype may have a functional or aesthetic character. A wax model can therefore be regarded as a prototype. Wax is a material that is widely used for rapid prototyping. A prototype of that kind can therefore be treated in the same way as a conventional metal prototype.

#### **What must be done to be able to provide evidence of prototyping in Switzerland on the occasion of an inspection?**

It must be possible to prove that prototyping was performed in Switzerland by producing documents such as drawings, invoices or accounts.

#### **What is the situation if a manufacturer uses a foreign licence to make his movement or his watch?**

In such a case the conclusion might be reached that technical development did not take place in Switzerland. However, it is hardly possible to lay down a general rule and each particular case must be judged on its merits.

#### **4.2.4. Calculation of 60% of the manufacturing costs for the watch (letter d)**

Before looking in more detail at the calculation of the manufacturing costs for the watch head, we need first to define the criteria that a component must respect to be treated as a “Swiss component” for the purpose of calculating the Swissness of the watch.

##### *4.2.4.1. Swiss component*

In general, in the absence of special provisions, a component must comply with the criteria set out in Art. 48c TmPA and those contained in Art. 52a to 52o TmPO to be treated as coming from Switzerland. This will be the case in particular for external watch parts.

The main criteria are set out again below.

- **At least 60% of the manufacturing costs must be generated in Switzerland:**
  - o Account is taken in particular of the production and assembly costs, material costs, research and development costs, costs of quality assurance and certification stipulated by law or uniformly regulated at the level of a branch (see table for calculation of the manufacturing costs below § 4.2.4.3.).
  - o The following in particular are not included: costs of the natural products which cannot be obtained in Switzerland because of the prevailing natural conditions, costs of raw materials which, for objective reasons, are not available in sufficient quantity in Switzerland as shown in the branch list, packaging costs, transport costs after production, costs of commercial sale such as promotional costs and after-sales service costs.
  
- **The activity which conferred its essential characteristics on the product must have taken place in Switzerland.** If this activity is R&D, in every case at least one significant phase of production of the product must have been performed on our territory



Note: although a component may not be regarded as “Swiss” (no essential activity in Switzerland and/or percentage of the Swiss share less than 60%), the precise manufacturing costs generated in Switzerland during development or production could nevertheless be included by the manufacturer who makes subsequent use of that component. More detailed information will be given below about the different methods of calculating the manufacturing costs (see § 4.2.4.7 *Calculation of costs with rounded and non-rounded percentages*).

**Important:** according to Art. 48 para. 2 and 3 TmPA any further requirements such as the observation of manufacturing or processing principles or usual quality criteria or those prescribed at the place of origin must also be satisfied and all these requirements must be defined on a case by case basis depending on the way in which they are understood by the circles concerned and, when this is relevant, their influence on the reputation of the products concerned. That is the case in particular for watchcases for which the special criteria to be satisfied are specifically set out in Art. 4 SMO (see § 4.9).

Concerning watch dials, some specific production stages must also take place in Switzerland for them to acquire their essential characteristics in that country. As a possible interpretation accepted in the branch and proposed by the FH, a dial which has in particular undergone at least one of the following operations in Switzerland may be regarded as a Swiss dial:

- rough plate: i.e. manufacture of the base with or without feet (stamping or rough plate with apertures, centre holes and blanked counters)
- the plate: i.e. finishing the base (polishing, coating treatments, machining, addition of a colour)
- finishing: i.e. production of the attached elements (hour circle, flanges, rings, aperture or counter surrounds)

In addition, according to this same possible interpretation within the branch proposed by the FH, decal transfer, assembly and final inspection must also be performed in Switzerland and at least 60% of the manufacturing costs must be generated in Switzerland.

Nevertheless, a dial made abroad is authorized to bear the indication “Swiss Made” on its front surface if it is subsequently to be fitted into “Swiss Made” watches compliant with the regulations in force in Switzerland.

#### *4.2.4.2. Description of the watch head*

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Two variants are possible to define the elements which form the complete watch head and the way in which they are to be included in the calculation of the percentage. Variant 1 which takes each element separately and Variant 2 which permits the creation of a family or sub-families for the components that make up the case.

The two variants are plausible and defensible from a legal angle. The components listed in this section refer to the calculation of the manufacturing costs so that the case elements can be separated into distinct components or on the contrary viewed together as a function of their procurement and of a choice of manufacturer. However, the choice between one or other of the two variants and the way in which the method is applied must not be arbitrary, just as the choice of components forming a family or sub-family cannot be arbitrary but must reflect an industrial logic.



### **Variant case 1 / calculation of separate components**

The following individual elements make up the complete watch head and are therefore included separately in the percentage calculation:

- movement;
- middle part of the case;
- case back
- bezel;
- glass;
- crown;
- push-pieces;
- dial;
- hands.

To enable this variant to be used, the source and cost or purchase price of each component must be known to the watch manufacturer.

It has the advantage of providing great transparency as to the source and prices, of assuring total sourcing flexibility and of being easy to implement. Moreover, the elements do not have to comply with the definition of the case figuring in Art. 4 of the revised SMO which describes the criteria that a complete case must satisfy in order to be treated as a “Swiss case”.

On the other hand, this variant will mean that the case-maker cannot sell his cases under the “Swiss Made” designation even if the aggregate Swiss value of the individual case components exceeds the 60% threshold (the stages stipulated in Art. 4 of the revised SMO are missing, see below § 4.9). Similarly, the watch manufacturer who uses them cannot declare to his clients that his cases are “Swiss” nor can he benefit from calculation of the rounded percentages pursuant to Art. 52i para. 1 letter b TmPO (60% → 100%) for the complete case.

Nevertheless, this Variant 1 does enable one or other of the calculation methods referred to in Art. 52i TmPO to be used, authorizing either imputation to the manufacturing costs of a precise percentage corresponding to the share of the cost of the materials in question generated in Switzerland or else rounded percentages, i.e. to 0% or 100% Swiss (see below § 4.2.4.7.).

### **Variant case 2 / calculation of the component family (or sub-family)**

Depending on the different channels for supply of the components, this variant allows a family of components to be formed for the case. The choice of components forming a family (or a sub-family) must not, however, be arbitrary as already indicated above.

The following components therefore form the complete watch head:

- movement;
- case;
- dial;
- hands.

The case family may in particular comprise the following elements:

- middle part of the case;
- case back;
- glass;
- crown;
- push-pieces and bezel, if any



This Variant 2 implies, with a component family formed for the case, that the manufacturing costs calculation is made using the method of rounded percentages (Art. 52i, para. 1 letter b TmPO) and that Art. 4 SMO is respected by the whole assembly (see § 4.9 below). In other words, the watch manufacturer may count the price paid for the case as 100% Swiss. Similarly, a case-maker who applies this Variant 2 may, if the component family respects Art. 4 SMO, indicate that he is selling “Swiss Made” cases and the watch manufacturers who buy them may indicate that they are using “Swiss cases” for their products.

In some cases, the two variants may produce different results. That happens when the manufacturer rounds off the material costs on the basis of Art. 52i TmPO. Let us assume that the manufacturer uses a middle part of the case (with the back) at CHF 50 for which the manufacturing costs are 55% Swiss. At the same time the glass and the crown with manufacturing costs of CHF 15 and CHF 10 respectively are 100% Swiss. If Variant 1 is applied, the middle part of the case does not satisfy the 60% criteria and will therefore fall back to 0% Swiss value within the meaning of Art. 52i TmPO, i.e. the CHF 50 will have to be recorded as foreign. Only the two other components would then be included as 100% Swiss in the calculation, i.e. CHF 25. Applying Variant 2, we arrive at a family of components and add together the costs of the middle part of the case (including the back), the glass and the crown (= CHF 75). Of these CHF 75, only CHF 22.50 are foreign (45% of the middle part and back = 30% of the total); this in turn means that the entire sum of CHF 75 can be counted as Swiss (provided that an operation conferring its essential characteristics on the product has taken place in Switzerland and that the case has been assembled in Switzerland, see below § 4.9).

It is the responsibility of the case-maker and watch manufacturer to choose one of the two methods explained above for which theoretical calculated examples are given in Annex 1 at the end of this document.

#### *4.2.4.3. Definition of the “manufacturing costs”*

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In addition to the costs set out in Art. 48c LmPO, the following costs incurred at the place of origin are relevant:

- **research and development costs;**
- **material costs;**
- **production costs, including the costs of quality assurance and certification prescribed by law or regulated uniformly at the level of an industry.**



The following table, taken from the explanatory report for the TmPO, gives a clear definition of the term “manufacturing costs”<sup>8</sup>:

Manufacturing costs calculation	
	Research costs
	Development costs
<b>1</b>	Total research and development costs (R&D costs)
	Costs of raw materials
	Costs of auxiliary materials
	Costs of semi-finished products – share of material costs
	Costs of semi-finished products – share of the process costs
<b>2</b>	Total direct material costs
	Costs of packaging and transport of the products during production
	Costs of storage of the products during production
	Other process costs
<b>3</b>	Total indirect material costs
<b>2+3</b>	Total material costs
	Wages and manufacturing costs associated with wages
	Manufacturing costs associated with machines
	Other manufacturing costs
	Costs of quality assurance and certification prescribed by law or uniformly regulated at the level of an industry
	Cost of third party services and licences relating to a product
<b>4</b>	Total production costs
<b>1+2+3+4</b>	<b>Total manufacturing costs (including R&amp;D costs)</b>

**Advice:** To prevent the Swiss share of the manufacturing costs of a product from falling below the 60% mark simply because of a declining exchange rate, we will prefer to base the calculation for imported materials on an average exchange rate applied by the enterprise in its routine business (Art. 52n, letter b, TmPO). However, when making the calculation, enterprises must remain free to use the exchange rate which is effectively applied (letter a).

<sup>8</sup> Explanatory report TmPO, page 16.



#### 4.2.4.4. R&D costs

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Art. 52f TmPO stipulates that research costs include the costs generated both by non-product-focussed research and by research which is focused on products. The term development costs therefore means costs incurred from the time when the idea of the product first emerges until the product is ready to be placed on the market.

Costs generated by product-focussed research, together with development costs, are imputed directly to the manufacturing costs of the product. Costs generated by research which is not focused on the products on the other hand are apportioned between the manufacturing costs of each product<sup>9</sup>. For example, these costs may be apportioned by using one of the following distribution scales<sup>10</sup>:

- **scale habitually applied by the enterprise;**
- **hypotheses formulated in the operating plan;**
- **customary practice in the industry which can be manifestly verified.**

The manufacturer may not know in advance how many products will leave the production line in the end. In that case a detailed apportionment of the R&D costs may be hard to make. It is therefore advisable to refer to the planning done by the enterprise, for example in its business plan.

Sometimes a product no longer reaches the minimum rate of 60% of the manufacturing costs necessary to claim Swiss origin once the initial R&D costs have been fully written down. It would be an anomaly for a product to lose its status as a “Swiss” product for that reason. To avoid such situations, account can continue to be taken of the average annual depreciation costs<sup>11</sup>. In the event of any abuse, for example excessively fast write down to be able to benefit from this permanent application of the depreciation costs, Art. 52d TmPO is applicable (prohibition of abusive use of the margin of manoeuvre).

#### 4.2.4.5. FAQ R&D

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**Must a distinction be made between Swiss and non-Swiss services or consultancy (determined on the basis of the place at which the administrative headquarters of the enterprise is located)?**

Yes, these costs may be included in the calculation of the 60% when they are generated in Switzerland and vice versa.

**Do preparatory technical drawings form part of the technical development when they are made in Switzerland?**

Yes, these drawings are part of the R&D (mechanical construction and prototyping) which must be performed in Switzerland. The relevant costs can therefore be included in the calculation of the 60%.

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<sup>9</sup> Art. 52g TmPO.

<sup>10</sup> Explanatory report TmPO, page 17.

<sup>11</sup> Explanatory Report TmPO, page 18.



#### **Are the designer's royalties treated as R&D costs?**

These costs represent the remuneration of the designer and are included in the R&D costs pursuant to Art. 48c, para. 2, letter b TmPA. They may be stated in the calculation if the work is done in Switzerland. On the other hand, foreign royalties are not included in the Swiss value and must therefore be stated as foreign costs.

#### **Can royalties be included in the indirect expenses associated with the manufacturing costs?**

According to information provided by the Federal Institute of Intellectual Property, royalties paid by the Swiss enterprise are part of the production costs and must therefore be stated as foreign costs when a foreign licence is involved. The same applies to a foreign IT licence.

#### **By analogy with the provision applicable to raw materials, might it be possible to envisage the exclusion from the calculation of the costs associated with non-Swiss services or consultancy when the necessary skills do not exist in Switzerland?**

TmPA or TmPO make no provision for any such exception. This possibility of exclusion refers to the material only and not to services.

#### *4.2.4.6. Material costs*

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Material costs are divided into direct and indirect costs. Direct costs of materials are made up of the costs of raw materials, auxiliary materials, semi-finished products and incorporated components. They are directly imputable to the products. Indirect material costs include, for instance, costs of temporary storage of the products, their packaging and transport required during the manufacturing process. These indirect costs are then taken into account in the calculation, depending on the place at which they were performed.

#### *4.2.4.7. Statement of material costs*

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Art. 52i TmPO permits two calculation variants:

- **Direct material costs are imputed to the (Swiss) manufacturing costs in a percentage corresponding to the share of the material costs in question which are generated in Switzerland.**
- **Direct material costs are imputed to the (Swiss) manufacturing costs at the following rates:**
  1. **100% for materials which satisfy the requirements of Art. 48 to 48c TmPA (60% or more);**
  2. **0% for materials which do not satisfy the requirements of Art. 48 to 48c TmPA (less than 60%).**

The enterprise is not allowed to mix the two methods of calculation for an identical product line; it must respect a unified calculation method for products in the same series manufactured at the same period.



The following two examples show the application of the variants described above:

*Example Variant 1 – Calculation of costs according to non-rounded percentages*

Components	Costs (CHF)	Swiss share of manufacturing costs	Swiss value (CHF)
<b>Movement</b>	150	70%	105
<b>Complete case</b>	100	80%	80
<b>Dial</b>	50	100%	50
<b>Hands</b>	20	0%	0
<b>Glass</b>	20	0%	0
<b>Crown</b>	15	50%	7.50
<b>Pushpieces</b>	20	100%	20
<b>Total</b>	<b>375</b>	<b>70%</b>	<b>262.50</b>
<b>Casing-up in Switzerland (wages and machine-related manufacturing costs)</b>	70	100%	70
<b>R&amp;D in Switzerland</b>	5	100%	5
<b>Storage during production</b>	1	100%	1
<b>Total manufacturing costs</b>	<b>451</b>	<b>75%</b>	<b>338.50</b>

*Example Variant 2 – Cost calculation based on rounded percentages*

Components	Costs (CHF)	Swiss share of manufacturing costs	Swiss value rounded up (CHF)
<b>Movement</b>	150	70% → 100%	150
<b>Complete case</b>	100	80% → 100%	100
<b>Dial</b>	50	100%	50
<b>Hands</b>	20	0%	0
<b>Glass</b>	20	0%	0
<b>Crown</b>	15	50% → 0%	0
<b>Pushpieces</b>	20	100%	20
<b>Total</b>	<b>375</b>	<b>85%</b>	<b>320</b>
<b>Casing-up in Switzerland (wages and machine-related manufacturing costs)</b>	70	100%	70
<b>R&amp;D in Switzerland</b>	5	100%	5
<b>Storage during production</b>	1	100%	1
<b>Total manufacturing costs</b>	<b>451</b>	<b>87%</b>	<b>396</b>

If the watch manufacturer purchases components from sub-contractors, information about the manufacturing costs of the component may prove hard, or even impossible, to obtain. This information is normally confidential because it would enable the supplier's profit to be calculated. In that situation, the manufacturer may work on the basis of the purchase price of the component. It is sufficient for the supplier to let him know whether the component is Swiss (according to Variant 2) or the precisely calculated "Swiss" percentage of the purchase price (according to Variant 1).



When the watch manufacturer works with sub-contractors, his means of verification to ascertain whether the information provided by them is truthful are inevitably limited. It is therefore advisable to ask them to provide a written attestation confirming the Swiss source or the precise percentage of Swiss value relating to the components which have been ordered. In the absence of any serious doubt as to the accuracy of the information supplied, a written attestation would a priori therefore be sufficient to enable an assurance to be given that the figures used in calculating the percentage of the Swiss manufacturing costs are correct<sup>12</sup>. If such information later proves to be either inaccurate or wrong, the manufacturer may, on the basis of such an attestation, bring a civil lawsuit or file an action under criminal law against the sub-contractor who is at fault.

#### 4.2.4.8. FAQ materials

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##### **Can upstream transport of components originating from the suppliers be included in the calculation of the 60%?**

The cost generated by potential transport during the manufacturing process can be included in the Swiss part to the extent that it takes place in Switzerland and is necessary for production. The cost of transport downstream of production on the other hand cannot be included in the calculation (Art. 2c, letter d SMO).

##### **If upstream transport is not included, must the customs duty costs on imported products which are therefore paid to a Swiss institution likewise be excluded?**

In the view of the Federal Institute of Intellectual Property, even if customs costs are paid to a Swiss institution they cannot form part of the Swiss manufacturing costs. These costs follow the origin of the imported component.

##### **Must the costs of packaging for storage of the products be excluded?**

Costs of temporary storage of articles during production can be taken into account, together with the packaging costs of these products for that period.

##### **Is the watch manufacturer's margin included in the calculation?**

No, the watch manufacturer's own margin is not part of the product manufacturing costs. On the other hand, the margin of a component supplier may be included in the calculation because the watch manufacturer cannot have access to full details of his sub-contractors' costs.

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<sup>12</sup> Day/Ludvigsen, sic! 6/2010, 482.



#### 4.2.4.9. Production costs

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Production costs include the direct and indirect costs of production (Art. 52I TmPO). In particular, production costs include wages and production costs linked to wages, production costs linked to machines and the costs associated with quality assurance and certification prescribed by law or regulated uniformly at the level of an industry. A distinction must be made between costs incurred in Switzerland and those incurred abroad. Depending on whether they are fixed or variable, production costs are attributable to the product either directly or on the basis of a scale.

Wages and production costs linked to wages include, for example, all the costs of the persons directly involved in the production of the product. Wages of HR personnel, those of the IT Department, the Legal Department or overheads cannot normally be counted because the link with manufacture of the product concerned is not sufficiently direct for them to be included in the calculation of the unit production cost. These wages or salaries are not part of the production process but concern instead the management of the production process (for example human resources recruit the workforce which is itself responsible for production).



### 4.3. Definition of the Swiss movement

#### Art. 2 Definition of the Swiss movement

<sup>1</sup> To be regarded as a Swiss movement, the movement must:

- a. have undergone technical development in Switzerland:
  - 1. for exclusively mechanical movements, at least mechanical construction and prototyping of the movement as a whole,
  - 2. for movements that are not exclusively mechanical, at least mechanical construction and prototyping of the movement as a whole, together with the conception of the printed circuit or circuits, conception of the display and conception of the software;
- a<sup>bis</sup> have been assembled in Switzerland;
- b have been inspected by the manufacturer in Switzerland and
- b<sup>bis</sup> at least 60% of the manufacturing costs must be generated in Switzerland and
- c at least 50% of the value of all the constituent parts, but excluding the cost of assembly, must be of Swiss manufacture.

<sup>2</sup> For the calculation of the value of the constituent parts of Swiss manufacture according to para. 1, letter. c, the following rules apply:

- a. ....
- a<sup>bis</sup>. the cost of the dial is included:
  - 1. if it performs an electronic function for the watch and
  - 2. if it is intended for fitting to watches with an electro-optical display or with a solar module ;
- b. the cost of assembly may be included when a certification procedure stipulated by an international treaty guarantees that, by reason of close industrial cooperation, quality equivalence exists between the foreign constituent parts and the Swiss constituent parts;
- c. the cost of assembly taken into consideration where this is appropriate cannot exceed the total value of the foreign constituent parts acknowledged to be equivalent which are incorporated into the Swiss movement concerned.

<sup>3</sup> The provisions of the Agreement of 20 July 1972 supplementing the Agreement on horological products between the Swiss Confederation and the European Economic Community and the Member States are reserved.



#### 4.3.1. Existing criteria

Letters abis, b and c reproduce the identical criteria which have been in force since 1972 to define a Swiss movement, namely the fact that it must be assembled in Switzerland, be inspected in Switzerland and be of Swiss manufacture for at least 50% of the value of all the constituent parts, but excluding the cost of assembly.

#### 4.3.2. Further criteria

##### *Para. 1, letter a*

As in the case of the watch, reference is made to development which involves three stages: creation, mechanical manufacture and prototyping. Only the technical stages, including mechanical manufacture and prototyping, must be performed in Switzerland. Among the stages involved in the production of a watch movement, mechanical construction, i.e. the phase of development and construction of the constituent parts generally using a CAD tool, are an integral part of R&D. This stage enables the manufacturer to find and optimize the components (geometries, materials, dimensions, theoretical performance, reliability etc.) which are then tested physically during prototyping which is also part of the R&D process because it enables the mechanical construction to be validated.

Unlike the situation for watches, technical developments effected abroad for movements already developed at the time when the revised SMO entered into force must be repeated in Switzerland. However, a movement which had already been developed in Switzerland before the entry into force of the revised SMO will not require redevelopment<sup>13</sup>.

This different treatment is justified because watch movements have a very long life cycle (20 to 30 years). If, in the case of watch movements with such a long life, technical development did not have to be performed again with effect from 1 January 2019, this criterion would be deprived of its effective substance<sup>14</sup>.

The costs of technical development performed in Switzerland can be included in the Swiss value of the movement manufacturing costs.

##### *Para. 1, letter b<sup>bis</sup>*

For the purpose of calculation of the 60%, R&D costs may be taken into consideration. The principles outlined above for the watch apply.

##### *Para. 1, letter c*

According to the CH-EU horological industry agreement of 1972, a watch whose movement is of Swiss manufacture for at least 50% of the value of all the constituent parts is treated as a Swiss watch. The expression “value of all the constituent parts” has been retained to ensure the use of a term which is formally identical to that used in the 1972 agreement. Contrary to the definition of the manufacturing costs, this notion does not include the R&D costs.

The exception stipulated in Art. 48 c para 3 letter b TmPA (non-imputation of costs of raw materials that are not adequately available in Switzerland) does not apply to the calculation of the 50% value share. This contrasts with the 60% manufacturing cost criterion in Art. 1a, letter d SMO and – to the extent that the watch movement is offered for sale as such – Art. 2 para. 1 letter bbis SMO<sup>15</sup>. The exceptions foreseen in art.

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<sup>13</sup> Explanatory report SMO, page 9

<sup>14</sup> Explanatory report SMO, page 9

<sup>15</sup> Explanatory report SMO, page 9



48c, para 3, letter a TmPA (costs for natural products non available in Switzerland) and art. 52k TmPO (material or component non available in Switzerland and on the sector list) do not apply in this context either.

According to our interpretation therefore, all the watch movement component parts are used to calculate the specific value criterion of 50%, even if they are either not available at all or not available in sufficient quantities in Switzerland. This enables a weakening of the Swiss made concept for watches to be prevented. The exceptions set out in Art. 2c SMO refer to the calculation of the manufacturing costs and not to the value share of the component parts.

#### *Para. 2, letter a<sup>bis</sup>*

In principle, the dial is not included in the calculation of the movement costs. That is self-evident because the dial is not part of the movement.

However, an exception is stipulated for watches with electro-optical display or with a solar module if the dial performs an electronic function (energy accumulation). In that case, the dial cost is also included.

#### *Para. 2, letters b and c*

Inclusion of the assembly cost is intended to favour manufacturers who benefit from the 1972 agreement. This agreement with the European Union is the only one to be taken into consideration for the purposes of this provision.

Under this agreement, a “list of equivalent calibres” is drawn up and regularly updated. It is published in the Swiss Official Gazette of Commerce (SOGC) and in the systematic collection of Federal Law.

When a manufacturer established in Switzerland uses such “calibres” to assemble his movements he may calculate 50% of the Swiss value contained in the movement by including the assembly price; that enables him to make proportionate use of a larger quantity of foreign parts.

The mechanism created by Art. 2 para. 2 letter b presupposes that the costs of assembly can only be taken into account in an amount equivalent to the overall value of the component parts covered by the certification procedure. Inclusion of the costs of assembly in an amount exceeding the value of the components acknowledged as being equivalent with a view to the incorporation of (third party) foreign components (with no such recognition) in a Swiss watch movement would conflict with the purpose of Art. 2 para. 2 letter b and would therefore be unlawful (Art. 2 para. 2 ZGB)<sup>16</sup>.

#### *Para. 3*

The provisions of the supplementary watch convention take precedence over those of the SMO on the principle of superior law.

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<sup>16</sup> Explanatory report SMO, page 10



#### 4.4. Definition of the Swiss constituent part

##### **Art. 2a Definition of the Swiss constituent part**

*The following is treated as a Swiss constituent part:*

- a. *a part which was inspected by the manufacturer in Switzerland and*
- b. *of which at least 60% of the manufacturing costs has been generated in Switzerland.*

To the extent that a stipulation requires certain constituent parts to be of Swiss manufacture, a definition must be given of them. The 60% rate is required for all industrial products by Art. 48c, 1<sup>st</sup> paragraph, TmPA. This is the minimum rate which must be included in the SMO.

According to Art. 48c, para. 4, TmPA, the indication of source must likewise correspond to the place at which the activity which conferred its essential characteristics upon the product took place. In all cases, a significant phase of the manufacture of the product must have been performed there.

The definition given in Art. 2a SMO therefore only concerns in this instance the constituent parts described in Art. 2, para. 1 letter c SMO which defines the Swiss movement.

#### 4.5. Definition of assembly in Switzerland

##### **Art. 2b Definition of assembly in Switzerland**

*A movement is deemed to have been assembled in Switzerland within the meaning of Art. 2, para. 1, letter a<sup>bis</sup> when all the constituent parts are assembled in Switzerland. Only the subassembly of the following constituent parts may be effected abroad:*

- a. *in the case of exclusively mechanical movements: the gear trains*
- b. *in the case of non-exclusively mechanical movements:*
  1. *the electronic modules,*
  2. *the electro-optical display modules,*
  3. *the energy collecting module,*
  4. *the regulating organ,*
  5. *the gear trains,*
  6. *the motor or motors, including the rotors and coils.*

These exceptions correspond to customary practice in the industry and procurement constraints in the field of quartz. The provisions of the existing SMO already implicitly acknowledge the fact that some sub-assembly work may be done abroad. The revised SMO now gives a clear definition of the sub-assembly work which may be performed abroad. The requirement of final assembly in Switzerland is, however, retained because this stage is essential and endows the movement with its appearance and qualities.



As several components may be used in watch movements, pre-assembly abroad is permitted not only with reference to the individual component listed under letters a and b, but also for several components of that identical type<sup>17</sup>.

## 4.6. Manufacturing costs

### **Art. 2c Determining manufacturing costs**

*The following are not taken into consideration for the purpose of calculating the manufacturing costs:*

- a. the cost of the natural products which cannot be produced in Switzerland because of the natural conditions;*
- b. the cost of the materials that are not available in sufficient quantity in Switzerland for objective reasons to the extent that they are not available;*
- c. the packaging costs;*
- d. the transport costs;*
- e. the costs of commercialisation, such as promotional costs and after-sales service costs;*
- f. the cost of the battery.*

This provision takes over the criteria of Art. 48c TmPA in order to make the SMO more readily understandable.

Letter f stipulates that the battery is excluded because it is a movable component which does not form part of the movement. The movement is generally sold without the battery and, depending on storage, the battery may be changed before sale. It therefore cannot influence the source of the watch or the source of the movement. In principle, all quartz watches are fitted with removable batteries.

### 4.6.1. Exclusion of natural products and materials from the manufacturing costs

Art. 48c. TmPA, Art. 52k TmpO and Art. 2d SMO enable manufacturers who wish to use the “Swiss” designations to exclude the costs of the natural products that cannot be produced in Switzerland because of natural conditions, together with the costs of the raw materials which, for objective reasons, are not available in sufficient quantities in Switzerland pursuant to an ordinance published in virtue of Art. 50, para. 2 TmPA (Art. 52k TmpO goes on to stipulate that this may be information made public by a branch on the basis of a public list).

The definition of the natural product is not clearly set out in the law, even if it is generally accepted that a product can no longer be termed natural once it has acquired new essential properties.

The exclusion from the manufacturing costs of the natural products which cannot be made in Switzerland because of natural conditions prevailing there relates for instance to raw gold or other precious metals. By definition, knowing that there are no gold mines in Switzerland, the raw material clearly cannot be Swiss. However, when a manufacturer of watches purchases for instance a gold case the processes associated with treatment of the gold in Switzerland, such as refining, can be included in the calculation of the Swiss manufacturing costs percentage. The value of the raw gold itself must, however, be excluded from the

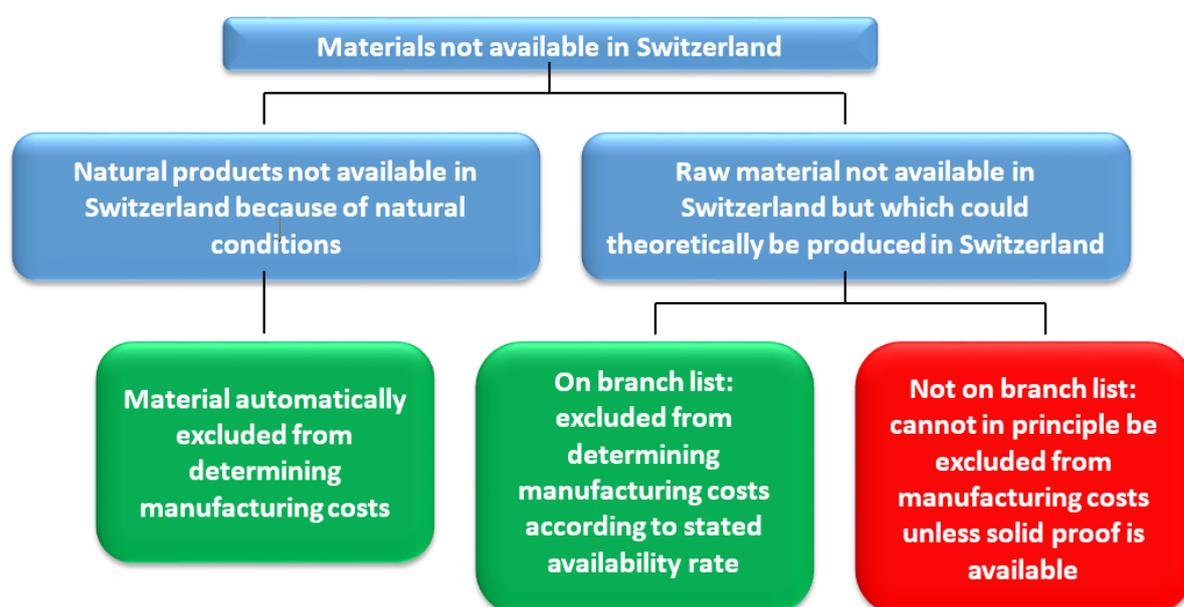
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<sup>17</sup> Explanatory report SMO, page 11



calculation to prevent the calculation of the manufacturing costs from being diluted. This deduction may for instance be made on the basis of the current price of gold or as a function of a scale of prices drawn up by the industry (see COFITER and COFIPAC tables of Apiah – price of the metal fixed on the day on which work on the order for materials begins). Further details will be given below as to the way in which the exclusion of natural products and materials that are not available in Switzerland is to be implemented in the calculation of Swissness.

Unlike letter a, letter b uses the term “cost of materials” which is broader than the notion of natural products and also includes semi-finished products which might not be available in sufficient quantities in Switzerland. The exemption under letter b cannot be claimed if the raw material concerned is available in Switzerland but also abroad on more favourable conditions (for example, lower prices, shorter delivery lead-times). The exception therefore cannot be claimed for purely economic reasons<sup>18</sup>. In addition, the material, the semi-finished product or the component which appears on the branch list or in an ordinance benefits from the presumption of exclusion.



#### 4.6.1.1. Principle of transformation of the material in Switzerland

It would be possible in principle to exclude at all stages of the production process all the materials that are not available in Switzerland or are only available there in insufficient quantity from the 60% calculation according to Art. 48c TmPA. However, if that option is chosen the deduction of materials that are not available in Switzerland or are only available there in insufficient quantity must be made for both foreign and Swiss components; that requires a very detailed knowledge of the cost of the materials used in each component of the watch head.

With a view to simplification, Art. 52i TmPO letter b offers the possibility of rounding off the Swissness calculation at the time of transformation of the material, so enabling a component for which 60% of the manufacturing cost is generated in Switzerland and which has undergone in Switzerland the phase conferring upon it its essential characteristics, to be included fully (100%) in the manufacturer’s calculation of the

<sup>18</sup> Message Swissness proposal, N 7770.



finished product, including all materials. This method of calculation therefore has the effect in a sense of “giving Swiss nationality” (hereinafter called “swissization”) to foreign materials.

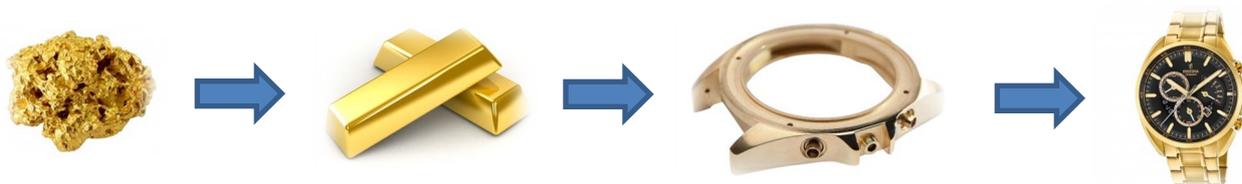
This “swissization” therefore enables the deduction to be made, potentially in cascade, of the cost of materials that are either not available in Switzerland or only available in insufficient quantity from the components incorporated into the watch head, but it is of course possible only if all the criteria for Swissness are respected.

For example, foreign steel used to manufacture a case in Switzerland according to the legal criteria (see below § 4.9) will be “naturalized Swiss” because the price subsequently paid for the case by the watch manufacturer can be taken into account in full as a “Swiss cost”.

This principle of the transformation of the material, which therefore results from a purely accounting effect, may also be called the principle of the “first material transformer”. It is automatically limited to Switzerland, the first phase of transformation of the natural material or incorporation of a semi-finished product into another product often being the essential stage of production and therefore the key point in time to make this deduction of the “material cost”.

However, Art. 52d TmPO outlaws misuse and in particular its letter b prohibits a service provided in Switzerland that is so small as to be evidently out of all proportion to the service provided abroad, in particular when the costs generated in Switzerland are negligible in relation to the cost of the materials that had to be procured abroad because they were available in insufficient quantities in Switzerland.

It can be deduced from this that the principle of the first material transformer in Switzerland does not apply if the natural materials that are not available in Switzerland or the semi-finished products figuring on the branch list are of a precious nature. In that case, the material cost **must be excluded at each phase of the manufacturing process**. A contrary opinion would have manifestly perverse effects, such as the “swissization” of expensive materials, so enabling the Swiss share of the finished product to be artificially increased.



The term precious materials includes in particular those listed in the Federal Act on the Control of Precious Metals (RS 941.31) such as gold, platinum, palladium and silver, together with all materials with a value per kilo corresponding to, or greater than, the price of the least expensive precious metal, i.e. at present silver (CHF/kilo). This definition might therefore also include diamonds, gemstones, mother-of-pearl and other natural and/or semi-finished materials figuring on the branch list.

To ensure that this exception does not add unnecessary complexity to the “Swissness” calculations and does not contradict the pragmatism sought by the legislator, a rule of tolerance is permitted, namely that if the precious metal represents less than 10% of the total manufacturing costs of the component into which it is directly incorporated it may then become Swiss as is the case for non-precious materials.



#### Example 1

When a foreign producer of a monocrystalline material (ball) used for the production of sapphire glasses sells this material to a Swiss intermediary who in turn sells it without transformation to a Swiss sapphire glass maker, the latter will be the first material transformer because the material has not been modified by the intermediaries and he can therefore exclude the semi-finished product in an amount corresponding to the percentage of its unavailability as stipulated in the branch list.

#### Example 2

A Swiss dial-maker buys a round piece of mother-of-pearl abroad and excludes it from the Swissness calculation of his dial in an amount of 100% according to the branch list, so obtaining the Swiss Made qualification. However, the watch manufacturer who buys that “Swiss Made” mother-of-pearl dial must nevertheless deduct from the price paid for this component the value of the natural material (mother-of-pearl) if the kilo price of that material is equal to or greater than the spot price of silver unless the value of the mother-of-pearl does not exceed 10% of the dial manufacturing costs (tolerance margin).

### 4.7. Material not available in sufficient quantities in Switzerland – branch list

#### Art. 2d Materials that are not available in sufficient quantities in Switzerland

*If the watch industry publishes information about materials that are not available in sufficient quantities in Switzerland pursuant to Art. 52k of the ordinance of 23 December 1992 on the protection of trade marks, it must make sure that such information has an objective foundation. In the event of failure to agree within the industry, it shall refer the matter to independent third parties.*

When a material is available in Switzerland but not in sufficient quantities, Art. 52k TmPO requires the industry to keep an up-to-date list and to indicate the availability rates. The FH as the umbrella federation of the Swiss Watch Industry considers that it has the necessary authority to keep this list<sup>19</sup>. It will effect this publication after submitting the matter to its official bodies and obtaining a formal decision from the FH Board.

The FH list will create the presumption that a certain material is not available in an adequate quantity (i.e. available only in the quantities indicated by the published rate). A manufacturer may refer to this presumption to justify use of the indication “Swiss”. However, the presumption may be reversed by judicial proceedings<sup>20</sup>.

For the system to be transparent, this information supplied by the FH must be made available to all the stakeholders in the specific sector. This will be on the FH internet site.

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<sup>19</sup> Explanatory report SMO, page 11

<sup>20</sup> TmPO Explanatory report, page 20.



Allowance for a material which is partially unavailable in sufficient quantities in Switzerland will be proportionate to its degree of availability. If the calculation of the costs of a material is made on the basis of the availability rate published by the FH, it must be presumed that the inclusion of the cost of this material in the same proportions is a priori compliant.

This “branch list” is not an integral part of the SMO and is therefore not legally binding<sup>21</sup>.

This presumption does not release the manufacturer from his responsibility for the use of an indication of source. If the information within an industry is manifestly imprecise or contradictory, the presumption may be overturned to the detriment of the manufacturer who has referred to such information.

Three cases are possible in connection with the branch lists<sup>22</sup>:

1. A component part is objectively not available in Switzerland. It is placed on the list and the manufacturers may assume that this component can be excluded from the calculation.
2. A component is objectively available in insufficient quantities. It is placed on the branch list in relation to its availability in Switzerland (e.g. component X - 30 per cent availability in Switzerland). When calculating the necessary minimum share of Swiss origin, it is permissible to take account of this component in an amount of up to only 30 per cent. When calculating the necessary minimum share, i.e. the sum of the manufacturing costs incurred in Switzerland, the manufacturer can take account of all the costs permitted by the regulation. He is not limited by the degree of availability of component X in Switzerland. In other words, if a manufacturer has access to a large quantity of component X of Swiss origin, he may also include it as a Swiss product in an amount of more than 30 per cent.
3. A component is objectively available in Switzerland but for special economic reasons a manufacturer cannot procure this component. In that case, the component in question may not figure on the list because it is objectively available in adequate quantities.

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<sup>21</sup> Explanatory report SMO, page 11

<sup>22</sup> Explanatory report SMO, page 12



## 4.8. Conditions for the use of the Swiss indications

### Art. 3 Conditions for use of the word “Swiss” and the Swiss cross

- <sup>1</sup> *The following may be used only for Swiss watches and Swiss movements:*
- a. *the word “Swiss”;*
  - b. *indications such as “Swiss”, “Swiss product”, “made in Switzerland”, “Swiss quality”, other designations containing the word “Swiss” or indications that are liable to be confused with that word and*
  - c. *the Swiss cross or signs which may be confused with it.*
- <sup>1bis</sup> *Swiss indications of source relating to specific activities within the meaning of Art. 47, para. 3ter, TmPA are permitted only if they are not understood by the interested parties as an indication of source for the product as a whole.*
- <sup>2</sup> *If the watch is not Swiss, the designations figuring in para. 1 may still be placed on Swiss movements, provided that they cannot be seen by the watch purchaser.*
- <sup>3</sup> *The indication “Swiss movement” may be placed on watches which contain a Swiss movement. The word “movement” must be written in full using letters that are identical in type face, size and colour to those used for the designation “Swiss”.*
- <sup>4</sup> *Paras. 1 and 3 apply even when these designations are used in translation (in particular “Swiss”, “Swiss Made”, “Swiss Movement”), either with the indication of the genuine origin of the watch or with the addition of words such as “nature”, “type”, “style” or other combinations of words.*
- <sup>5</sup> *Apart from the placing of these indications on the watches or on their packaging, use comprises:*
- a. *the sale, putting up for sale or bringing into circulation of watches with an indication of this kind;*
  - b. *the placing on signs, advertisements, prospectuses, invoices, letters or commercial papers.*

The indication “mouvement suisse” or “Swiss movement” applies only to watches which use Swiss movements within the meaning of Art. 2 SMO. It goes without saying that watches using movements bearing the words “Swiss Parts” or “Far East Assembly” cannot benefit from this designation.

If the combination of the indication “Switzerland” or “Swiss” and the development of the activity (e.g. design) is perceived overall as an indication of the origin of the goods, the conditions of Art. 48 ff TmPA must be satisfied. Normally, it must be assumed that the key commercial circles understand such indications on wristwatches as an indication of the origin of the goods as a whole<sup>23</sup>. This means that indications such as “Swiss Design” or “Swiss Research” on wristwatches are not compliant under normal circumstances, in particular because of the small size of wristwatches.

The situation concerning the designation “Genève” (Genf, Geneva) is particular. This designation may be governed by Art. 48d, letter b, TmPA, which means that manufacturers may benefit from the exemption from the criteria of Art. 48c TmPA if it is self-evident that the indication of source is being used lawfully as understood by the industry and by consumers. The example of the designation “Genève” for watches is

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<sup>23</sup> Explanatory report SMO, page 13



quoted in the explanatory statement from the Federal Council concerning the Swissness proposal (p. 7772). This indicates that a looser link with the Canton of Geneva will generally suffice, for example when the watch is Swiss within the meaning of the SMO but its production does not take place in the Canton of Geneva. However, the indication "Genève" remains accurate for the circles concerned because the enterprise which makes this watch is entered in the Register of Commerce of Geneva and pursues its commercial activities in that canton.

The revised SMO also introduces the notion of the Swiss cross and better protection of that cross. Watches which display a Swiss cross will therefore have to satisfy the same criteria as those which make verbal references to Switzerland (Swiss, Swiss Made etc.).

## 4.9. Placing the indication of source on the watch cases

### Art. 4 Placing the indication of source

#### a. On the watch cases

<sup>1</sup> A watch case is regarded as Swiss if:

- a. it has undergone at least one essential manufacturing operation in Switzerland (namely stamping, machining or polishing);
- b. it has been assembled in Switzerland;
- c. it has been inspected in Switzerland and
- d. of which at least 60% of the manufacturing costs has been generated in Switzerland.

<sup>2</sup> The designations referred to in Art. 3, paras. 1 and 4, can only be placed on cases which are destined to be fitted to watches that satisfy the criteria set out in Art. 1a.

<sup>3</sup> The indication "boîte suisse", or its translation, may be placed on Swiss cases intended to be fitted to watches which are not Swiss watches within the meaning of Art. 1a. When the indication is placed on the exterior of the case, the indication of source of the watch or of the movement must figure in a visible manner on the watch.

The required percentage rises from 50% to 60% to ensure consistency with the definition of the watch and of the movement.

The term "turning" is replaced by "machining", which reflects the evolution of the industrial processes that has taken place since 1972.

Since no mention is made of the watchcase in Art. 1a (definition of the watch), the Ordinance does not require the use of a Swiss case for a watch to qualify as being "Swiss made". A watch case which does not satisfy the above criteria does of course remain a foreign component.

As described in Section 4.2.4.2. *Description of the watch head*, there are two variants for taking account of the case components, i.e. either individually or as a "family" of sub-elements. When the first variant is chosen, Art. 4 SMO is deemed not to apply because each element is considered individually and not as a whole, a complete case. On the other hand, the second variant providing for the formation of a sub-assembly of components making up the case implies compliance with Art. 4 SMO if the manufacturer who satisfies the criteria set out above wishes to benefit from the method of calculation of the rounded number according to Art. 52i para. 1 letter b TmPO and therefore from the "swissization" mechanism (a case with 60% of its manufacturing costs generated in Switzerland could see its full (100%) value stated as Swiss by the watch manufacturer).



However, the terms used by Art. 4 SMO “A watchcase which has undergone **at least one essential production operation** in Switzerland (i.e. stamping, machining or polishing) is regarded as Swiss” leave a great deal of latitude for interpretation. Nothing indicates the extent to which Art. 4 SMO must be applied because there is no mention of the proportion of stamping, machining or polishing that must be performed in Switzerland nor of the case components concerned by those processes.

According to the branch opinion, when stamping, machining or a similar production process (injection) of the middle section is performed entirely in Switzerland and if that operation confers its essential characteristics on the case (for example by defining its definitive shape), that process would a priori be regarded as sufficient for an “essential manufacturing operation” to have taken place on Swiss territory within the meaning of Art. 4 SMO for the entire case. A case cannot in fact exist unless its middle part has been stamped, machined or injected because that is its central and principal element. However, the possibility cannot be ruled out that future or atypical constructions (such as 3D printing) may justify the definition of another component as being the central and principal component of the case which must undergo “the essential production operation” in Switzerland for the criteria set out in Art. 4 SMO to be satisfied.

#### 4.9.1. FAQ case

**Are we to deduce from the text that all of the essential operations cited must be performed in Switzerland or can a rate of 60% be applied as in the case of the manufacturing costs?**

According to the drafting and the wording of the article, the principle that at least one of the essential operations named here must be performed 100% in Switzerland will apply.

**Traditionally, the cutting of components is done using a punch and a die. This operation may be replaced by high pressure water cutting. Can this technique be used and treated as equivalent to a classical stamping operation, despite the fact that a press is not employed?**

We take the view that this new technique can be regarded as a stamping operation despite the fact that a press is not used.

#### 4.10. Placing on the watch dials

##### **Art. 5b. On the watch dials**

<sup>1</sup> *The designations appearing in Art. 3, paras. 1 and 4, can only be placed on dials which are intended for watches that satisfy the criteria defined in Art. 1a.*

<sup>2</sup> *The words "Swiss dial", or their translation, may be placed on the back of Swiss dials intended to be fitted to watches that are not themselves Swiss watches within the meaning of Art. 1a.*



#### 4.11. Placing on other separate parts of the watch

##### **Art. 6c. On other separate parts of the watch**

- <sup>1</sup> *The designations figuring in Art. 3, paras 1 and 4, can only be placed on separate parts intended for watches that satisfy the criteria defined in Article 1a.*
- <sup>2</sup> *Swiss movement blanks which are exported, together with movements manufactured using such blanks, may bear the indication "Swiss parts".*

The option of placing the words "Swiss parts" on these products does not imply permission to place the indication "Swiss parts" on the dial or on the case (or any other indication containing the word "Swiss"). The indication "Ebauche suisse" or "Swiss ebauche" ("Swiss EB") is not permitted.

#### 4.12. Samples and collections of samples

##### **Art. 7 Samples and collections of samples**

*Notwithstanding Art. 3, para. 2, and Art. 4 to 6, cases, dials, movements and other separate parts may bear Swiss indications of source when:*

- a. they are exported separately in the form of samples or collections of samples;*
- b. they are manufactured in Switzerland and*
- c. they are not intended for sale.*

#### 4.13. Provisions of criminal law

##### **Art. 8 Provisions of criminal law**

*Breaches of the provisions of this ordinance are governed by the stipulations of criminal law set out in TmPA.*

It will also be noted that the Ordinance on Trademark Protection imposes a limit on the margin for manoeuvre that manufacturers are allowed by prohibiting misuse. Art. 52d TmPO in fact stipulates that no inappropriate use shall be made of the margin for manoeuvre allowed by application of the determining criteria to define the source of a product or a service, and in particular prohibits:

- a. the application without objective reason of several methods to calculate the cost of the materials constituting a product to determine their source;*
- b. such a low rate of service provision in Switzerland that it is clearly out of all proportion to the service provided abroad, in particular when the costs generated in Switzerland are negligible compared to the cost of the materials that have had to be procured abroad because they are not available in sufficient quantities in Switzerland.*



## 4.14. Entry into force

### **Art. 9 Entry into force**

*This ordinance enters into force on 1 January 1972.*

*Transitional provision for the amendment of 17 June 2016:*

- <sup>1</sup> *Watches and movements manufactured between 1 January 2017 and 31 December 2018 which do not comply with the conditions set out in Art. 1 a, letter a, and 2, para. 1, letter a may only be placed on the market for the first time until 31 December 2020 with an indication of origin compliant with the law in force at the time of manufacture.*
- <sup>2</sup> *The calculation of the manufacturing costs of a watch may exclude the costs of the cases and glasses:
  - a. which a manufacturer had in stock prior to 31 December 2016 and*
  - b. which are incorporated into a watch until 31 December 2018.**

The meaning and application of the aforementioned transitional measures may give rise to confusion and must therefore be clarified.

The revised SMO stipulates a time limit of two years (until 31 December 2020) to bring on to the market stocks which do not satisfy the criterion of technical development but, depending on the time of development or the product type – watch or movement – the situations may differ.

For instance, movements developed abroad prior to 1 January 2019 (including under the old law) may be brought into circulation for the first time until 31 December 2020 even if they do not satisfy the criterion of technical development, but of course only if they respect all the other legal criteria. Their technical development must then be repeated in Switzerland.

Watches developed abroad between 1 January 2017 and 31 December 2018 may also be brought into circulation for the first time until 31 December 2020, but thereafter they must be redeveloped in Switzerland if they are to continue to bear Swiss indications.

Watches developed abroad under the old law, i.e. prior to 31 December 2016, benefit from an acquired right and do not have to be redeveloped in Switzerland to be able to continue to use the “Swiss Made” designation, but all the other criteria stipulated in the law must also be respected. They may therefore continue to be manufactured and placed on the market with no limit in time.

The SMO further provides a transitional period for watch cases and watch glasses during which these components may be excluded from the manufacturing costs. The term watch cases also includes “watch case parts” while the watch glasses that are excluded include all types of watch glasses such as sapphire crystals and mineral crystals<sup>24</sup>. However, these components must have been held in stock by the manufacturer by 31 December 2016 and must be incorporated into a watch by 31 December 2018.

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<sup>24</sup> Explanatory report SMO, page 14



## 5. Annex 1

In this example, a Swiss case-maker performs certain production operations for the middle part of the case in Switzerland without these phases being essential. He buys/makes his bezels, crowns, case backs and push-pieces in Switzerland. He uses a Chinese glass made from Swiss sapphire material and buys other small supplies abroad. Finally, he assembles these cases in Switzerland and effects the final inspection of the products himself. In the course of production, the case components are procured and stored at an average cost of one franc per piece. He does not offer his cases for sale as “Swiss Made” because they are not “Swiss Made”, even if the value of these cases does reach the 60% threshold. In fact, they do not respect the criteria of Art. 4 SMO (the phase which confers its essential characteristics on the product is missing).

	Swiss costs	Foreign costs	Swiss % rounded	Swiss value % rounded	Foreign value % rounded
<b>Materials</b>					
Middle part	7.00	18.00	0%	0.00	25.00
Bezel	7.50	2.50	100%	10.00	0.00
Case back	5.00	1.50	100%	6.50	0.00
Crown	13.00	0.00	100%	13.00	0.00
Push-pieces	12.00	0.00	100%	12.00	0.00
Glass	3.00	9.00	0%	0.00	12.00
Various (gaskets, screws ...)	0.00	2.00	0%	0.00	2.00
<b>Production</b>					
Case assembly	10.00	0.00	100%	10.00	0.00
Quality control	5.00	0.00	100%	5.00	0.00
<b>Overheads</b>					
Storage	1.00	0.00	100%	1.00	0.00
<b>R&amp;D</b>					
Design	2.50	0.00	100%	2.50	0.00
<b>Total manufacturing costs</b>				<b>60.00 (60.60%)</b>	<b>39.00 (39.40%)</b>

**NB:** The above calculations could also be made for each of the components using the precise value percentages method as a function of their Swiss or foreign origin. In that case, the result would be in the order of 66.66% of Swiss value compared to just 60.60% using the rounded percentages method.



The watch manufacturer who purchases these cases shall therefore under no circumstances state their value (CHF 99.00) as being 100% Swiss in his own calculations because they do not satisfy the criteria of Art. 4 SMO. However, he may incorporate all these elements (components, production and development phases) separately, considered individually depending on their origin and calculated at the invoiced prices (shown in red below, case-maker's 30% margin included and applied to the final cost of the components/operations) in his Swissness calculation tables for the watch head as shown below:

	Swiss costs	Foreign costs	Swiss % rounded	Swiss value % rounded	Foreign value % rounded
<b>Materials</b>					
Middle part	7.00	18.00	0%	0.00	32.50
Bezel	7.50	2.50	100%	13.00	0.00
Case back	5.00	1.50	100%	8.45	0.00
Crown	13.00	0.00	100%	16.90	0.00
Push-pieces	12.00	0.00	100%	15.60	0.00
Glass	3.00	9.00	0%	0.00	15.60
Various (gaskets, screws ...)	0.00	2.00	0%	0.00	2.60
Dial	3.00	10.50	0%	0.00	13.50
Hands	1.00	3.50	0%	0.00	4.50
Movement	19.00	3.00	100%	22.00	0.00
<b>Production</b>					
Case assembly	10.00	0.00	100%	13.00	0.00
Quality control	5.00	0.00	100%	6.50	0.00
Watch assembly + quality control	7.50	0.00	100%	7.50	0.00
<b>Overheads</b>					
Storage	1.00	0.00	100%	1.30	0.00
<b>R&amp;D</b>					
Case design	2.50	0.00	100%	3.25	0.00
Dial-hands design	0.00	1.50	0%	0.00	1.50
<b>Total manufacturing costs</b>				<b>107.50 (60.49%)</b>	<b>70.20 (39.51%)</b>

**NB:** The figures shown in orange above will no doubt not be known to the watch manufacturer because the case-maker does not wish to disclose them as that would reveal his own margin. That is why the prices invoiced by the case-maker for each component/operation may be taken into account. The above calculations could also be made by the precise percentages method; in that case the case-maker's margin will be expressed as a percentage applied to each cost item, regardless of its origin (for example, all Swiss and foreign costs augmented by 30%).