

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 8

Intellectual Property

Intellectual property rights (IPR) negotiations involve ensuring that the “intellectual property” of companies in each country are adequately protected so as to increase confidence and therefore increase willingness to trade and invest in each others markets (as companies have recourse to the law if any infringement occurs). These rights include patents, copyright, trademarks, industrial design, circuit layouts and geographical indications (GIs).

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CURRENT SITUATION FOR UKRAINE

National

Ukraine's IPR legislation has evolved recently based on the obligations of the World Trade Organization (WTO) and particularly, the Trade Related Intellectual Property Rights (TRIPS) Agreement. There are currently 10 specific laws and more than 100 by-laws and regulations regulating intellectual property rights, and Ukraine is party to 18 related multilateral treaties.

The State Department for Intellectual Property is responsible for the formulation and implementation of Ukraine's intellectual property policy. A subdivision of the Department, composed of State inspectors, combats the manufacturing and distribution of counterfeit goods, in particular discs for laser-readable systems.

Ukraine has a Patents Court and special boards of justice within the Supreme Commercial Court of Ukraine, the commercial courts of Kyiv and Sevastopol, the oblasts, and the Republic of Crimea, and within commercial courts of appeal to deal specifically with intellectual property cases.

EU-Ukraine Agreements

Both the EU-Ukraine Partnership and Cooperation Agreement (PCA) with the EU and EU Ukraine Action Plan commit Ukraine to establishing IPR rules "similar" to those of the EU within 5 years of the PCA Agreement (5 years from 2004). The EU Ukraine Action Plan elaborates specifically that Ukraine would:

- Ensure implementation and effective enforcement of TRIPS compliant legislation upon Ukraine's accession to the WTO;
- Enforce legislation on trademarks and geographical indications;
- Continue harmonisation of legislation to EU legislation in the sphere of intellectual and industrial property rights protection;
- Ensure effective implementation of sanctions of infringements of intellectual and industrial property rights;
- Encourage the establishment and the effective functioning of the necessary associations of rights holders and establish a dialogue with them and the users of intellectual property.
- Strengthen enforcement authorities (administrative and judicial) and ensure proper access to judicial review.
- Improve administrative co-operation between relevant Ukrainian national authorities and with third country authorities.
- Take effective measures against counterfeit/pirated goods in specifically targeted sectors.

WTO Commitments

Ukraine fulfilled its WTO obligations prior to accession through the introduction and amendments to its laws and establishment of judicial and enforcement institutions.

The WTO Doha Ministerial Agreement has two TRIPS elements: access to medicines (which has already been agreed by General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health) and geographical indications notifications. Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Ministerial Declaration mandate WTO membership to agree and establish a system of notification and registration of geographical indications for wines and spirits. However, to date, nothing concrete has been agreed. However, if and when the Doha Round is completed, Ukraine and the EU will have to implement this notifications system.

Other Agreements

Ukraine is a member of 18 multi-lateral treaties relating to international property rights, which broadly correspond to the WTO obligations. It does not have any other bi-lateral agreements outside of this framework.

ECONOMIC IMPACT (COST-BENEFIT)

The economic impact of more effective IPR protection enforcement will be the increase in investment in Ukraine as EU companies become more confident that their intellectual property will be protected by law. Moreover, EU companies are also likely to use innovative technologies and practises where without IPR security, they would not be willing to risk its loss. In terms of the impact of this increased investment and better technologies available in the Ukrainian economy, the net effect will be to reduce costs of production. Only one study has estimated the impact of effective enforcement and adoption of the EU *acquis* on Ukraine. It is estimated that production costs in Ukraine would fall by 20 per cent¹ across the economy.

EU APPROACH IN OTHER AGREEMENTS

Most EU FTA agreements (including those with the Mediterranean) contain commitments to² "ensure adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards, including effective means of enforcing such rights." The Chile-EU FTA is more vague simply agreeing to "cooperate" in IPR and detailing technical assistance and advice to be given by the EU.

The Stabilisation and Association Agreements with Croatia and Albania go further than other agreements in committing these countries to guaranteeing within 3 and 4 years respectively "a level of protection of intellectual, industrial and commercial property rights similar to that existing in the EU, including effective means of enforcing such rights." Furthermore, if IPR problems arise, these will be reviewed by the Stabilisation and Association Council and a mutually satisfactory solution will be agreed.

ISSUES FOR UKRAINE

What does this mean for stakeholders and negotiators in Ukraine:–

¹ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

² EU-Jordan FTA

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Implications: It appears likely that the EU and Ukraine will agree an approach which will go further than the Croatian/Albanian FTAs in that they will not only agree a timetable for implementing and enforcing protection to a level "similar" to the EU but will agree a timetable for approximation with EU legislation and enforcement (including IPR customs control). Therefore the outstanding issues on IPR approximation will be:

- What timeframe should be allowed for Ukraine to bring its legislation and enforcement into line with that of the EU?

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe for aligning Ukrainian legislation and enforcement with that of the EU:

- Representatives of industries affected by stricter enforcement of IPR in Ukraine should justify any transitional period required to comply with international IPR enforcement;
- Ukrainian IPR enforcement agencies should determine the capacity constraints and costs of alignment and justify a suitable timeframe accordingly;
- Stakeholders can then prepare a joint position with the government on the timeframe for aligning IPR protection levels with the EU.

Implications: Ukraine and the EU are likely to agree to include provisions in the FTA which ensure the protection of EU GIs in Ukraine. This relates to product descriptions used in Ukraine for wines and spirits such as Champagne, Cognac, Port and Sherry (which have been used for many years):

- *What would be the effect on domestic and third country markets of the cessation of use of these terms?*
- *Do any enterprises have grandfather rights in the use of these terms under TRIPS and are these legitimate under the EU acquis?*

Next Steps: Stakeholders will need to engage with government negotiators to agree how to assure effective compliance with GI rules without adverse impact on the Ukrainian wine and spirits industry:

- *Representatives of producers who believe they are using these terms legitimately or can justify a substantial adverse impact of the loss of these terms should present their case, backed by evidence and analysis;*
- *Ukrainian negotiators should investigate any claims of legitimacy in the use of these terms (e.g. reported grandfather rights) and if so, consider the implications to Ukraine of voluntarily foregoing these claims;*
- *Stakeholders should prepare a position paper detailing the impact of eliminating the use of these terms in Ukraine and third countries, given the international reputation some of the brands have developed under these terms (for both legitimate and illegitimate use). Negotiators and stakeholders should also specify the needs and resources in order to comply (whereby support from EU could be sought for quicker opening).*