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Prospects for the EU-Ukraine Free Trade Agreement

Scoping Study

May 2008

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PREFACE

The main objective of this study is to bring together the issues and findings of all available reports, studies and negotiation documents relating to the EU-Ukraine free trade negotiations and outline the key issues of potential concern to Ukrainian stakeholders. Therefore, it is presented in a concise, clear and direct format and assumes no prior knowledge of trade policy terminology.

This report comprises a number of stand-alone briefing notes based on the main thematic areas to be covered in the negotiations, as defined in exploratory talks between the EU and Ukraine on a future Free Trade Agreement (FTA) held in November 2007. This allows for very specific distribution to interested parties so that stakeholders can directly access the basic information on specific areas of the negotiations that are most relevant to them. As a result, it is intended to introduce the free trade agreement issues to as wide a range of stakeholders as possible as a prelude to encouraging them to engage meaningfully in dialogue with the government to agree a common national position based on facts, understanding and analysis.

By bringing all parties together in this way, the team will facilitate a process of dialogue, which will lead to a quick conclusion of FTA negotiations to the national benefit of Ukraine. The Trade Sustainability Impact Assessment undertaken for the European Commission by ECORYS (2007), recognises the importance of such a dialogue process:

“While negotiating [...] the FTA [...] both the EU and Ukraine need to be aware of the political pressure and geographical distribution effects the FTA [...] has on the socio-cultural environment in which [it is] being implemented.”

“[...] it is imperative that the EU take into account the views of different stakeholder groups in Ukraine, both during the negotiations and during the implementation of the FTA and its flanking measures.”;

“Support for the FTA throughout Ukrainian society and its regions is crucial for its success. Without broad support, the FTA will not yield significant (sustainable) impacts. Therefore, the EU and Ukraine need to take care to involve, listen to and react to concerns in society and regions and create ownership among Ukrainians to achieve sustainable development.”

The findings and opinions expressed in this report remain those of the authors and do not necessarily reflect those of the Government of Ukraine, British Government or Ministry of Economy

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The Dialogue Process

The intention of these briefing notes is to introduce key issues of the EU-Ukraine Free Trade Agreement (FTA) to a wide audience of stakeholders in Ukraine, summarise the findings of various reports that have been previously undertaken on the likely impact of an EU-Ukraine FTA on Ukraine and to highlight the specific issues which may concern stakeholders.

The next stage of this process will be to distribute these briefing notes and discuss their content with stakeholder groups in order to prioritise issues and identify likely areas of stakeholder interest in the negotiations.

To ensure effective dialogue between the stakeholders and Ukrainian negotiators, the project will facilitate and manage a number of stakeholder dialogue meetings which will help to articulate the positions of various groups. Through discussion and debate amongst themselves, stakeholders and Government Negotiators will be able to develop a common position on each priority issue. Specifically, the project will:

- Prepare issue papers for each priority area to act as a stimulus to informed debate and discussion in Ukraine on the EU-Ukraine FTA;*
- Identify potential participants and encourage active participation in the relevant interest group, supporting the analysis of their concerns to ensure their commitment and understanding of the process;*
- Organise and manage a meeting programme and timetable for each priority issue;*
- Present, as necessary, papers (as a stimulus) in discussion groups over time e.g. working groups private and public, by issue;*
- Encourage open debate and participant contribution and research;*
- Facilitate the preparation of position papers articulating interests and developing national consensus.*

By ensuring national stakeholders are well informed of the issues and are actively contributing to the negotiating process, the Government of Ukraine will be able to engage effectively and more quickly with the EU to agree a mutually beneficial FTA between them and the early conclusion of the EU-Ukraine FTA.

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 1

Trade in Goods

The most fundamental component of any free trade agreement (FTA) is the liberalisation of “substantially all” tariffs and duties of equivalent effect between the two parties. This is defined within World Trade Organization (WTO) rules under article XXIV of the General Agreement on Tariffs and Trade (GATT94). However, there is a degree of flexibility in both the coverage of trade (the actual percentage of trade which is covered by each party) and the sequencing/timing of liberalisation.

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CURRENT SITUATION FOR UKRAINE

National

Ukraine currently applies its normal MFN tariff rates on imports from the EU. Tariffs range from 0 to 24 per cent for non-agricultural imports¹ with an average applied rate of 6.8 per cent² across all sectors. Removal of these tariffs, under a free trade agreement, will result in a fall in government revenue (from duties collected on EU imports) and increased competition for Ukrainian producers from lower priced imports (as a result of the removal of the tariff) from the EU. On the other hand, other producers will benefit from lower priced imports to their production making them more competitive in Ukraine and foreign markets, and consumers will also benefit from lower priced consumer goods and food from these producers as well as EU suppliers.

EU-Ukraine Agreements

The EU applies its General System of Preferences (GSP) to exports from Ukraine. This system provides some of Ukraine's exports with lower tariffs on exports to the EU market and of these, some tariffs are eliminated. As a result of a free trade agreement, EU duties (either full MFN or reduced GSP levels) on those exports from Ukraine will be eliminated and there will be a rise in exports from Ukraine to the EU of both existing and new exports. According to Eurostat data³, less than 5 per cent of 2006 exports from Ukraine were entitled to enter the EU duty free, although under the GSP scheme, the EU allowed a further 40 per cent duty free. The remaining 55 per cent of 2006 exports paid a duty of just over 12 per cent at the full MFN rate and of 42 per cent at a reduced (non-zero) rate.

WTO Commitments

Following Accession to the WTO (May 2008), Ukraine's tariffs will be bound at rates up to 50 per cent, involving reductions from current rates to the bound rates over the next five years (up to 2013). The highest rates and the phase-in period are for sugar (50 per cent), sunflower seed oil (30 per cent) and radio-broadcast receivers, catgut, and certain conveyor/transmission belts (25 per cent). Over the phase in period, tariffs will be eliminated on a range of products including civil aircraft, construction equipment, distilled spirits, certain types of fish, pharmaceuticals, certain chemicals and petroleum oils, medical equipment, wood, pulp & paper, certain yarn and fabric, certain base metals, steel, information technology products, furniture, and toys.

Ukraine has also committed to introduce a tariff quota on raw cane sugar within 3 years of accession.

Other Agreements

Ukraine has concluded free trade agreements covering 100 per cent of imports/exports with the Commonwealth of Independent States (CIS): Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russian Federation, Tajikistan, Turkmenistan, the Republic of Uzbekistan and; with Macedonia.

¹ Based on WTO Tariff Profile of Ukraine (2006): Agricultural MFN applied tariffs exceed range from 0 to over 100%; but less than 20% of imports have applied tariffs of over 24% and less than 4% over 100%.

² Based on WTO Tariff Profile of Ukraine (2006): average MFN applied rate of 4.4% for non-agricultural imports to Ukraine and 22.3% from agricultural imports.

³ Calculated from Eurostat External Trade Database (2008)

ECONOMIC IMPACT (COST-BENEFIT)

Broadly, the economic impact of a free trade agreement from the elimination of tariffs between the EU and Ukraine will be:

- a fall in government revenue;
- an increase in Ukrainian imports from the EU as a result of elimination of Ukrainian duties on EU imports (this will result in some products in Ukraine facing greater competition and result in falls in production, employment etc);
- a rise in Ukrainian exports to EU as a result of the elimination of EU duties on Ukrainian imports (this would result in some Ukrainian products raising production).

The extent of the gains and falls in production will vary by sector according to the coverage and timing of the FTA.

In recent years, a number of studies have attempted to estimate the costs and benefits of the EU-Ukraine FTA using various assumptions on the scope and coverage of a future agreement.

In terms of government revenue loss, a study by ICPS⁴ (2007) estimated that the impact of eliminating 100 per cent of import duties on EU imports would result in a loss of US\$600 million in government revenue in Ukraine.

None of the studies have identified specific products which would see a rise or fall in export. They have modelled the impact at a sector level which has shown that across every sector there would be a rise in Ukrainian imports from the EU and a rise in exports from Ukraine to the EU (with some products gaining and some losing in each sector).

SUMMARY OF SHORT-TERM IMPACT ON UKRAINE

	ECORYS Study ⁵		CEPS Study	
	Trade Balance With EU (X-M)	Ukrainian Production	Trade Balance With EU (X-M)	Ukrainian Production
Agriculture:				
- Agriculture, fisheries, forestry	-43.0%	+1.1%		
- Cereals/oil seeds	-6.0%	+1.1%		
- Meat	-8.0%	+2.2%	+20.4%	-2.34%
- Sugar/sugar confectionary	-259%	-4.7%		
- Animal/Vegetable Fats	-58%	+5.5%		
- Fruits and nuts	-12%	+3.8%		
Minerals	-	-	-27.2%	-2.17%
Food Processing				
- Beverages and vinegar	-3%	-0.2%	+13.07%	+24.6%
Light Manufacturing	-	-	+2.7%	+6.23%

⁴ CEPS, IFW & ICPS (2006): The Prospects of deep free trade between the European Union and Ukraine

⁵ ECORYS (2008): Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

	ECORYS Study ⁵		CEPS Study	
	Trade Balance With EU (X-M)	Ukrainian Production	Trade Balance With EU (X-M)	Ukrainian Production
Heavy Manufacturing				
- Machinery and Electronics	+30%	+7.4%	+5.9%	+2.58%
- Motor vehicles/parts	-9.0%	+4.7%		
- Transport equipment	-2.0%	+3.3%		
Metal				
- Ferrous Metals	+8.0%	+2.6%	+3.6%	+6.81%
- Metal Products	+14%	+5.8%		

Note: ECORYS Study assumes 100 per cent coverage of non-agricultural products and 95 per cent coverage of agricultural products
 CEPS study assumes 100 per cent coverage of both agricultural and non-agricultural products

EU APPROACH IN OTHER AGREEMENTS

A comparison of the approach of the EU in other agreements is not relevant in terms of coverage as it is understood that Ukraine and the European Commission are aiming to eliminate 95 per cent of all tariffs and duties on both non-agriculture and agricultural products. However, as far as the asymmetric phasing is concerned, it would be useful to compare the level and timing of the elimination of tariffs in other agreements.

EU FTA AGREEMENTS: ANALYSIS OF COVERAGE AND PHASING BY TARIFF LINES

Agreement	Total Coverage	% Trade Eliminated Immediately	Group 1	Group 2	Group 3	Group 4
EU-Mexico FTA (2000)						
Agriculture	75%	n/a				
Non-Agriculture	100%	46%	+11% by Year 5	+43% by Year 7		
EU-Chile FTA (2003)						
Agriculture	93%	82%	+5% by Year 5	+6% by Year 10	2% Subject to Tariff Quotas	
Non-Agriculture	100%	94%	+3% by Year 5	+3% by Year 7		

ISSUES FOR UKRAINE

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

Implications: Assuming that 95 per cent of tariffs on actual trade should be eliminated under the EU-Ukraine FTA., this means that 5 per cent of current imports to Ukraine from the EU can continue to enjoy tariff protection:

- Which products (specific tariffs lines) should negotiators propose?
- What criteria should be set for selection? Protection of local industries or protecting tariff revenues?
- How to assess a product's need for protection on a permanent basis, to be included in the negative list?

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the content of the negative list:

- Representatives of sectors who believe their products should be permanently protected should articulate their position to Ukrainian negotiators, providing fully justified positions based on facts and figures;
- Ukrainian negotiators should determine the criteria for selection of "sensitive" sectors, for example based on job security, strategic industries, food security or others;
- A provisional negative list (by tariff line) should be prepared based upon submissions by stakeholders and Ukrainian negotiators. This then has to be analysed to determine whether or not this exceeds the allowable 5 per cent of EU imports (average over 3 years) and 5 per cent of tariff lines.

Implications: Phasing in of tariff liberalisation is expected and it is likely that this will be front-loaded. Under the EU-Chile FTA⁶, only 6 per cent of non-agricultural, and 11 per cent of agricultural products were liberalised gradually over 7 and 10 years respectively. The EU has indicated it expects a more ambitious approach in Ukraine so less products will be likely to be phased-in, although phasing of up to 10 years could be foreseen:

- Which products (specific tariffs lines) should negotiators propose for phasing?
- What periods of phasing are required?

⁶ The most recent and purportedly most liberal of the EU FTAs to date (excluding the interim SAA and EPAs which are only interim agreements).

Next Steps: In order to have these products phased in, concrete justification of the need will be required by Ukrainian negotiators. Stakeholders will need to engage with government negotiators in a positive way to agree which products need phasing in and the required periods:

- Representatives of producers who believe their products' tariffs should be phased in should articulate their position to Ukrainian negotiators, providing fully justified positions based on facts and figures;*
- Ukrainian negotiators should determine the criteria for selection of phased products and determine a maximum coverage for these groups;*
- A list of products and phasing periods needs to be prepared as an opening negotiating position – however, clear and transparent reasons, based on evidence needs to be presented.*

Implications: It is likely that limited use of tariff quotas will be allowed. Chile included tariff quotas on 2 per cent of its agricultural products (including fisheries under HS Chapter 3):

- Which products (specific tariffs lines) should negotiators propose for tariff quotas (if any)?*
- What levels of quota would be appropriate?*

Next Steps: If Ukrainian negotiators are to propose any tariff quotas, they will need to be fully justified in their aims, objectives and need. Stakeholders will need to engage with government negotiators in a positive way to agree the which products should be covered and to what extent:

- Representatives of producers who believe their products' should benefit from tariff quotas should articulate their position to Ukrainian negotiators, providing fully justified positions based on facts and figures;*
- Ukrainian negotiators should determine whether or not to propose tariff quotas (given their administrative cost) and if so set clear objectives and purpose for such measures;*
- If it is agreed that tariff quotas should be proposed during the negotiations, a list of products and quota levels (and formula for increasing the quota) should be presented, fully justified.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 2

Rules of Origin

"Rules of origin" are the criteria, laws, regulations and administrative procedures used to define where a product was made. Only those products that fully comply with the rules of origin defined in the free trade agreement (FTA) will qualify for duty free access. Bilateral cumulation allows for each party to the FTA to use originating products from each other. Diagonal cumulation operates between more than two countries provided they have FTAs containing identical origin rules and provision for cumulation between them. Diagonal cumulation operates between the European Community and the countries of the so-called "Pan-Euro-Mediterranean cumulation zone" allowing the manufacture of a product to have the origin of the country where the last working or processing operation took place, provided that it was more than a minimal operation.

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Ukraine's non-preferential rules of origin are governed by Section XII of the 2002 Customs Code, Articles 276 to 285. The Code establishes the main criteria for determining the country of origin for goods, while Resolution of the Cabinet of Ministers No. 1864 "On Approval of the Order of determination of Country of Origin of a Good, Crossing the Customs Border of Ukraine" of 12 December 2002 lays down detailed rules.

Other relevant legislative acts include Resolution of the Cabinet of Ministers No. 1861 of 12 December 2002, which approves the Procedure for the Verification of Certificates of the Ukrainian Origin of Goods, and Resolution of the Cabinet of Ministers No. 2030 of 27 December 2002, which approves the Schedule of Production and Technological Processes for Determining the Criterion of Sufficient Processing of Goods, and the Procedure for the Establishment and Application of the Criterion in Determining the Country of Origin of Goods¹.

Ukraine generally applies the concept of change in tariff heading at a 4-digit level to confer origin. The exception to this rule is a list of products for which sufficient processing criterion are determined by specific production and technological operations, including products in Chapters 25 and 27 of the Harmonised System (HS) of product classification and HS Headings 2818, 3301, 3403, 4001, 4017, 7103, 7111 and 8702-8704.

EU-Ukraine Agreements

The EU currently applies its General System of Preferences (GSP) to exports from Ukraine. Ukrainian products that meet the specific rules of origin detailed under the GSP can enter the EU at reduced rates of duty. While products wholly obtained in Ukraine are considered as originating there, products manufactured with inputs from other countries are considered so only if they have undergone sufficient working or processing. The requirements, which vary between products of different chapters of the HS tariff schedule and sometimes also between different headings within those chapters, refer to technical criteria, the added value or other economic criteria, or a change of tariff heading. The rules of origin also foresee that products have to be accompanied by a certificate of origin "Form A" or an invoice declaration, and that they have to be shipped directly to the EU.

The rules of origin applying to imports under the GSP allow, under certain conditions, for cumulation of origin. Where those conditions are met, inputs from other countries are considered as originating in the exporting country.

In order to foster economic co-operation between the EU and beneficiary countries, the rules of origin provide that all imports under the GSP are entitled to bilateral cumulation of origin (i.e. with the EU, which is also known as "donor country content").

A significant proportion of Ukrainian goods entering the EU market currently benefit from the GSP. GSP effective imports from Ukraine have increased significantly from 2000 and the GSP utilisation rate reached 72.5 per cent of the eligible products in 2006. With €1.73 billion of GSP preferential imports to the EU, Ukraine is ranking among the top twelve effective users of the

¹ WTO, WT/ACC/UKR/152

system. Preferential imports are diversified and include *inter alia* the following sectors: chemicals, plant oils, minerals, base metals, machinery and mechanical appliances².

WTO Commitments

The Rules of Origin Agreement requires WTO members to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not).

As from the date of accession to the WTO, all Ukraine's preferential and non-preferential rules of origin comply with the WTO Agreement on Rules of Origin.

Other Agreements

International treaties and agreements concluded by Ukraine include preferential rules of origin for the CIS countries, adopted by the Council of Governments of the Commonwealth of Independent States (CIS) on 30th November 2000, and the rules of origin of the Free Trade Agreement between Ukraine and FYROM. The rules of origin of CIS countries are based on the wholly-obtained or minimal processing criterion as well as, for processed goods, the substantial transformation criterion involving change of tariff heading (at the four-digit HS level) and/or ad valorem percentage requirements. Imports from a CIS country covered by the wholly-obtained criterion include mineral resources, products of plant origin, animals and animal products, fish and fish products, products extracted from the sea bed, waste and scrap, high technology products made in open space or on board spaceships owned or rented from the CIS country; or products manufactured exclusively from the materials indicated above. Simple assembly operations; the preparation of goods for sale or transportation; preservation during storage or transport; mixing operations which do not result in an essentially different product; and the slaughter of cattle do not constitute sufficient transformation or processing. Imports from a CIS country are deemed to have undergone substantial transformation if the value added proportion exceeds 50 per cent³.

ECONOMIC IMPACT (COST-BENEFIT)

The ability to source inputs to production at the cheapest rates can be influenced by both rules of origin and the level of cumulation applied. More liberal rules of origin will allow for greater economic efficiency and hence lead to a greater opportunity to export.

A number of recent studies have looked at the impact of a potential EU-Ukraine FTA, however, none of these have analysed the role of rules of origin in detail.

A study by CEPS⁴ (2006) remarks that "Formally, Ukraine benefits from the EU Generalised System of Preferences (GSP). Most agricultural and food industry products are in the 'sensitive' goods category, however, where the

² European Commission, Delegation to Ukraine

³ WTO, WT/ACC/UKR/152

⁴ CEPS, IFW & ICPS (2006): The Prospects of deep free trade between the European Union and Ukraine

margin of preference is small and procedures are complicated (particularly by rules of origin). Also, information about GSP advantages has not been efficiently delivered to Ukrainian producers and exporters; hence the level of GSP usage by Ukraine remains low”.

A study by ICPS⁵ states “Practice has shown that the rules of origin attached to a Free Trade Agreement by the European Union are not open to negotiation. Moreover, the kinds of rules proposed by the EU are generally developed using a somewhat untransparent mechanism to protect certain markets and not to facilitate trade: the greater protection certain sector needs, the stricter the rules of origin for the related goods are. As a rule, no analysis is performed to justify the expediency of including specific rules of origin of goods in a new free trade agreement”

EU APPROACH IN OTHER AGREEMENTS

Most of the EU’s free trade agreements follow a similar approach to the GSP concerning the methods used to calculate rules of origin, detailing specific lists by HS chapter and 4 digit heading of working or processing operations conferring or non-conferring originating status to manufactured products when they are carried out on non-originating materials.

Bilateral cumulation operates between the EU and a partner country where a free trade agreement or autonomous arrangement contains a provision allowing them to cumulate origin. This is the basic type of cumulation and is common to all origin arrangements. Only originating products or materials can benefit from it.

Diagonal cumulation operates between more than two countries provided they have free trade agreements containing identical origin rules and provision for cumulation between them. As with bilateral cumulation, only originating products or materials can benefit from diagonal cumulation. Although more than two countries can be involved in the manufacture of a product it will have the origin of the country where the last working or processing operation took place, provided that it was more than a minimal operation. Diagonal cumulation operates between the EU and the countries of the so-called “Pan-Euro-Mediterranean cumulation zone”.

Pan-Euro-Mediterranean cumulation is currently used by:

The Member States of the EU, the Faeroe Islands, Iceland, Liechtenstein, Norway, Switzerland, Turkey, Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Palestinian Authority of the West Bank and Gaza Strip).

The EU has customs unions with Turkey, the Principality of Andorra and the Republic of San Marino. Products covered by the customs unions with Andorra and San Marino are treated in accordance with the provisions of the Origin Protocols to those agreements. All the relevant agreements contain Joint Declarations stating that products of HS Chapters 25 to 97 originating in Andorra and all products originating in the Republic of San Marino are to be considered as originating in the EU by the partner countries.

The EU operates cumulation with those countries with which a free trade agreement providing for such cumulation and containing Pan-Euro-Med origin rules is in place.

Under the Pan-Euro-Med rules, cumulation can be only applied if the countries of final manufacture and of final destination have concluded free trade agreements, containing identical rules of origin, with all the countries

⁵ ICPS (2007): Free Trade between Ukraine and the EU: An impact assessment

participating in the acquisition of originating status, i.e. with all the countries from which all the materials used originate. Materials originating in a country which has not concluded an agreement with the countries of final manufacture and of final destination shall be treated as non-originating⁶.

ISSUES FOR UKRAINE

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

Implications: It would appear likely that a decision will be taken to adopt the Pan-Euro-Med protocol of origin:

- *By adopting Pan-Euro-Med rules of origin will certain industries and products face a relative advantage in comparison to existing GSP access to the EU market?*
- *By adopting Pan-Euro-Med rules of origin will certain industries and products face a relative disadvantage in comparison to existing GSP access to the EU market?*
- *What action does Ukraine need to take to ensure full benefit from "diagonal cumulation"?*

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree possible changes in rules for specific products:

- *Representatives of producers who believe that their access to EU markets will be negatively affected by the introduction of the Pan-Euro-Med system should articulate their position to Ukrainian negotiators, providing fully justified positions based on facts and figures;*
- *Ukrainian negotiators should determine the likely benefits of diagonal cumulation as opposed to purely bilateral cumulation.*

Implications: To take advantage of diagonal cumulation with other members of the Pan-Euro-Med system in addition to the EU, Ukraine will need to enter into free trade agreements with them containing identical rules of origin:

- *Would any industries benefit from access to cheaper raw materials by sourcing inputs from other members of the Pan-Euro-Med system rather than traditional suppliers?*

Next Steps: Stakeholders should analyse the potential benefit of diagonal cumulation, and present a justified and prioritised list of countries to negotiators:

⁶ European Commission, A User's Handbook to the Rules of Preferential Origin used in trade between the European Community, other European countries and the countries participating to the Euro-Mediterranean Partnership

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- *Representatives of producers who believe that the introduction of the Pan-Euro-Med system would benefit their sector should articulate their position to Ukrainian negotiators, providing fully justified positions based on facts and figures;*
- *Ukrainian negotiators should plan to negotiate FTAs with identical rules of origin with prioritised countries as soon as is feasible.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 3

Trade Facilitation

Trade facilitation refers to measures which ease the passage of goods through the border including simplification of procedures and documentation, transparency of processes, quick clearance times, coordination amongst inspection authorities, adequate appeals procedures and legal redress, efficient customs systems and transit facilities. Free trade agreement (FTA) negotiations are likely to examine ways of simplifying procedures and improving efficiency at the border through harmonisation of customs legislation and procedures as well as agreeing targets for efficiency.

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During the World Trade Organization (WTO) accession process, Ukraine enacted legislation that fully complied with WTO customs rules and related procedures. In addition, Ukraine adopted a Customs Code and amended the Law "On the Unified Fee Charged at the Entry Points through the State Border of Ukraine" to simplify customs procedures and optimise the customs clearance process.

The right of appeal to the Ukrainian customs authorities, or to any State Authority, is guaranteed in accordance with the legislative provisions.

EU-Ukraine Agreements

The EU-Ukraine Action Plan sets out a comprehensive set of priorities in trade facilitation, specifically the "gradual removal of restrictions and non-tariff barriers that impede bilateral trade and implementation of the necessary regulatory reforms."

Specific agreement has been made on:

- aligning customs legislation and implementation with EU standards implementing the principle of risk based customs control and establishing the necessary organisational framework;
- improving the functioning of the customs service;
- simplifying and modernising customs procedures at borders and inland;
- harmonising remaining import licensing and registration requirements with those of the EU.

WTO Commitments

As part of the WTO Doha Development Agenda, WTO members agreed on 31st July 2004 to launch negotiations on trade facilitation. Any agreement at the WTO will have to be adopted and implemented by Ukraine as part of the single undertaking. The aim of these negotiations is to clarify and improve the existing WTO provisions especially relating to increasing the transparency of trade regulations (GATT Article X); simplifying, standardising and modernising import, export and customs procedures (GATT Article VIII) and; improving the conditions for transit (GATT Article V).

Although there is no agreed text for a new agreement, there is broad consensus on the coverage of the agreement:

- publication of all trade regulations, possibly using national websites to increase access and availability globally;
- dedicated trade facilitation enquiry point;
- strengthening the need to notify new and changes in trade measures prior to enactment to allow for consultation;
- publishing advance rulings notifying how a country intends to treat a new import product such as classification, valuation criteria, duty drawback and application of quotas;

- publication of fees and charges and reviews of these fees to ensure that they do not exceed the costs for the services provided (abolition of ad-valorem charges);
- simplification of formalities and documentation and setting limits on requirements for supporting documentation, especially when using electronic documentation systems – some suggest a single document approach;
- establishment of single window administration of import/export transactions;
- pre-arrival processing of documentation to allow immediate clearance upon arrival and use of private authorised agents to assess and clear goods. This would still customs authority for usual inspection based on the use of risk management techniques and not discrimination;
- publication of average release times and requirements for authorities to provide traders with reasons for significant delays on individual consignments;
- national treatment for goods in transit.

Other Agreements

Ukraine has no bi-lateral agreements relating to trade facilitation but is a member of the World Customs Organisation and an active member of United Nations Economic Commission for Europe's (UNECE) committees on trade facilitation.

ECONOMIC IMPACT (COST-BENEFIT)

The main economic benefit of trade facilitation measures is the reduction in transaction costs of both exports and imports.

Current estimates of border costs as a share in the value of exports is estimated at between 4¹ and 6² per cent. It is estimated³ that these costs could be reduced by 50 per cent as a result of adopting EU customs procedures. In addition, a recent survey⁴ in the EU revealed that the two most important factors in developing intra EU trade have been the elimination of customs documentation (48 per cent of respondents said that had a positive effect on their business) and the abolition of border controls (42 per cent). This suggests that Ukrainian business will benefit from improved efficiency at the border.

A number of studies also document indications of the inefficiency in the Ukraine Customs Service:

- around 15⁵ per cent of customs valuations in 2005 had to be subsequently corrected;
- in 2004, the average time⁶ to clear a single consignment was 3.2 days and cost US \$156.60—not counting customs duties or export taxes;

¹ ICPS (2007): Free Trade between Ukraine and the EU: An impact assessment

² ECORYS (2008): Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

³ Ibid.

⁴ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

⁵ Ibid.

⁶ World Bank (2004) Ukraine Trade Policy Study

- a survey of Ukrainian business cited the following issues as restricting trade: the frequent need for “unofficial payments,” arbitrary interpretations of rules by officials, frequent changes in requirements, contradictory and vaguely formulated customs rules, overly long bureaucratic decision-making and the high cost of meeting regulatory requirements.

EU APPROACH IN OTHER AGREEMENTS

The Euro-Mediterranean Association agreements (including those with Tunisia, Israel, Morocco, Jordan, Algeria and Lebanon) provide general agreement based on broad aims including:

- simplifying the procedure for customs clearance of goods (computerisation of customs procedures is called for, in the case of Israel);
- instituting a single administrative document similar to that of the EU (except in the cases of Israel and Lebanon);
- providing the possibility of connections between the transit systems of the EU and partner countries (except for Israel);
- exchanging information among experts, organising field workshops and seminars, and providing technical assistance, if necessary.

The EU free trade agreements with Chile and Mexico are more detailed, with the Chile Agreement being the most comprehensive:

- simplifying requirements and formalities related to customs clearance of goods and improving the transparency and efficiency of customs operations;
- developing procedures that would make it possible to collect export and import data in a single body—reducing, simplifying and standardising information that needs to be included in customs documents and ensuring the use of a single incoming and outgoing document according to international standards;
- ensuring coordination of customs and other oversight bodies to make it possible for this data-collecting body to exercise official control over exports and imports;
- computerisation of customs procedures and possible institution of common standards;
- the application of modern customs technologies, including risk management, simplified procedures for importing and selling goods, after-sale oversight, and ways of auditing companies;
- the institution of a common position in international organizations that examine customs issues—the WTO and the World Customs Organization (WCO).

The EU’s Stabilisation and Association agreements, such as the EU-Croatia Agreement go further towards fuller harmonisation with “the approximation of the customs system of Croatia to that of the EU” and cooperation in the area of customs including:

- the possibility of interconnection between the transit systems of the EU and Croatia, as well as the use of the Single Administrative Document (SAD);
- the improvement and simplification of inspections and formalities in respect of the carriage of goods;
- the development of cross-border infrastructure between the Parties;
- the development of customs cooperation support for introduction of modern customs information systems;
- the exchange of information including on the methods of investigation;
- the adoption by Croatia of the Combined Nomenclature;
- training of customs officers;
- mutual assistance between administrative authorities in customs matters of the Parties shall take place.

ISSUES FOR UKRAINE

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

Implications: Should Ukraine will adopt EU customs laws and procedures that will benefit all traders:

- *What timeframe will be required to adapt current customs laws and practises to those of the EU?*
- *How much will this cost?*

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the timeframe for adopting EU customs procedures:

- *Representatives of producers who believe that the current trade facilitation/customs regime adversely affects their competitiveness and trade should articulate in detail the implications for their business (additional costs) and advocate speedy adoption of EU procedures;*
- *Ukrainian authorities at the borders need to assess the costs and timing implications of adopting EU procedures and prepare a justified position on their adoption;*
- *All stakeholders need to agree with the negotiators the timeframe for adoption and implementation of the EU acquis in the best interests of the nation as a whole.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 4

Technical Regulations

Technical regulations and standards are applied to a range of products to ensure human health, for the protection of the environment or to meet other consumer interests. Technical regulations and standards define specific product characteristics, such as size, shape, design, functions, performance, labelling or packaging, as well as related process and production standards. Under World Trade Organization (WTO) rules, governments have a right to apply technical regulations and standards so long as the regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade. However, although all countries generally apply these measures in accordance with WTO rules, the resulting product standards and requirements differ, meaning that exporters must comply not only with their own national standards and procedures, but also with those of its export market(s). A free trade agreement (FTA) can be used to align the legislation, standards and measurement procedures of both parties in order to facilitate and ease exports.

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CURRENT SITUATION FOR UKRAINE

National

As part of its WTO accession process, Ukraine had to comply with the Technical Barriers to Trade (TBT) Agreement to ensure standards, technical regulations, certification and conformity assessment procedures were not used as a barrier to trade in Ukraine. In order to comply, Ukraine enacted a number of laws to develop a WTO compatible legal framework including:

- Standards, Technical Regulations and Conformity Assessment Procedures;
- Standardisation;
- Conformity Assessment;
- Accreditation of Conformity Assessment Bodies;
- Metrology and Metrology Activity;
- Protection of Consumer Rights;
- State Regulation of Imports of Agricultural Products;
- Labour Protection;
- Quality and Safety of Foodstuffs and Raw Food.

In 2006, more than 11,000¹ standards were applied in Ukraine, of which, more than 3,100 were identical to or based largely on international standards.

The State Committee of Ukraine for Technical Regulation and Consumer Policy (Derzhspozhyvstandart) is responsible for policy, standardisation, technical regulations, and conformity assessment.

EU-Ukraine Agreements

The Partnership and Cooperation Agreement (PCA) between the EU and Ukraine agrees to “the approximation of laws [...] in particular: [...] technical rules and standards” and; “to promote the use of EU technical regulations and the application of European standards.”

The EU-Ukraine Action Plan specifies precisely the actions to be undertaken in Ukraine to “Continue the alignment of Ukraine with the EU and international regulatory and administrative practices and prepare for Ukraine’s participation in the EU internal market in selected priority industrial sectors:

- Jointly identify priority sectors for alignment with EU and international regulatory practices [...];
- harmonise the necessary framework and sectoral legislation with the EU technical regulations in the priority sectors;
- continue the revision of existing Ukrainian standards, providing for harmonisation with international and European standards and for voluntary application;
- reinforce institutional capacity on standardisation, accreditation, conformity assessment, metrology and market surveillance,

¹ WTO (2008) Ukraine Working Party Report

integrating the Ukrainian institutions, to the extent possible, into the European and international structures;

- approximate legislation on liability for defective products and general product safety;
- gradually simplify procedures of conformity assessment of industrial products, in accordance with the requirements of the Technical Regulations (EU Directives), and with the objectives of avoiding compulsory certification of non-risk products and multiple testing of products;
- consolidate and develop the market surveillance capacities of the Ukrainian institutions based on best practice of EU Member States”.

WTO Commitments

All of Ukraine's existing legislation relating to technical regulations, standards and conformity assessment comply with the Technical Barriers Agreement. All national and regional standards are voluntary, except those referred to in technical regulations intended to protect national security interests, prevent deceptive practices, protect the life and health of people, animals or plants, as well as protect the environment.

Ukraine also committed to:

- gradually basing all its technical regulations on the international standards by 30th December 2011;
- bringing Ukraine’s technical regulation on shelf-life for fish into conformity with the CODEX Alimentarius guidelines;
- reducing the number of products subject to mandatory third party certification (Ukraine will notify the revised list to the WTO by 31st January 2012).

Other Agreements

Ukraine has concluded 40 bilateral agreements² on co-operation and mutual recognition of conformity assessment with 28 countries. In addition, Ukraine is a member of the following international bodies which set standards:

- International Organization for Standardization (ISO);
- International Electrotechnical Commission (IEC);
- System for recognition of testing results of electrotechnical equipment for conformity with electric safety standard (IECEE-CB scheme).
- International Organization of Legal Metrology (OIML);
- Organization of the state metrological institutions of the Central and Eastern countries (COOMET);
- International Collaboration in Measurement Standards (EUROMET);
- Conférence Générale des Poids et Mesures (GCPM).

ECONOMIC IMPACT (COST-BENEFIT)

² Derzhspozhivstandart (2005)

The adoption of different technical regulations and standards, together with changes in conformity assessment procedures, will have a number of economic effects in Ukraine:

- Approximation of technical regulations and introduction of European standards will enable Ukrainian exports in those sectors to enter the EU more easily. If this is combined with mutual recognition of conformity assessment, Ukrainian bodies will be able to provide certification of regulations to ease exports and reduce costs leading to increased exports. Equally EU producers will find it easier to export to Ukraine;
- For those sectors which approximate with EU technical regulations and standards, there will be a cost to all companies in that sector (not just those exporting) in terms of upgrading/changing production to comply with new standards;
- Increased investment to comply with new regulations and standards may lead to increased costs in Ukraine.

The extent of these effects will depend on the sub-sector involved and how close current standards are to EU norms.

A number of recent studies on the EU-Ukraine FTA have examined some of the likely impacts, but most simply discuss the theoretical impact of harmonising technical regulation, standards and conformity assessment. However, a few more specific impacts are presented:

- the short run costs³ of passing legislation, implementing and monitoring the harmonised standards are very high and should not be underestimated. However, these one-time short run costs are easily outweighed by the significantly strong and positive long run effects of harmonisation of norms;
- increases in competition and reduction of companies' costs related to passing conformity assessment procedures⁴ would most strongly apply to the aviation industry (production of aircraft) and the machinery and electronics sector;
- Approximation of norms⁵ will lead to reduction in the current costs of compliance with the EU norms, which is estimated to be 13.9 per cent of total production costs in Ukraine. The sectors which will benefit most from this reduction are those where compliance costs are high and where prospects for export are highest especially agriculture (where costs are estimated to fall by 7 per cent as a result of harmonisation), manufacturing of textiles and wearing apparel (22 per cent cost reduction), motor vehicles (8 per cent cost reduction), machinery and electronics (7 per cent cost reduction) and food production (5 per cent of costs);
- [for the energy sector alone] the cost of developing⁶ a single state standard from scratch averages UAH 40,000, while harmonizing to a single international standard is only UAH 10,000. The expense of developing the 50 highest-priority standards will be about UAH 2

³ ECORYS (2008): Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁴ Ibid.

⁵ Ibid.

⁶ ICPS (2007): Free Trade between Ukraine and the EU: An impact assessment

million, while instituting all the international standards required by the EU will be UAH 7 million.

EU APPROACH IN OTHER AGREEMENTS

Provisions relating to standards, technical regulations and conformity assessment procedures in EU free trade agreements (FTAs) with other countries have become progressively more precise (also this may reflect geographical proximity to the EU). The EU FTA with Chile⁷ simply agrees to “encourage” measures:

- bridging the gaps in conformity assessment and standardisation;
- improving convergence and compatibility between the respective systems and;
- planning and implementation of projects.

Many Euro-Med Association Agreements⁸ move away from just encouraging actions to:

- “upgrading the level of Egyptian conformity assessment bodies, with a view to the establishment, in due time, of mutual recognition agreements in the area of conformity assessment.”

The Stabilisation and Association Agreements in the Western Balkans⁹ go further still in concrete actions to adopt EU norms and systems:

- take the necessary measures in order to gradually achieve conformity with EU technical regulations and European standardisation, metrology, accreditation and conformity assessment procedures;
- promote the use of EU technical regulations and European standards, tests and conformity assessment procedures;
- conclude, where appropriate, European Conformity Assessment Protocols.

ISSUES FOR UKRAINE

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

Implications: The EU-Ukraine Action Plan is very specific in terms of harmonisation with the EU of legislation, standards and procedures for conformity for priority sectors:

- *What level of harmonisation (equivalence, mutual recognition or full integration of systems)?*
- *What product/sector coverage should be included?*
- *What timeframes for harmonisation?*

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the level, coverage and timeframe for harmonisation of technical regulations, standards and conformity assessment:

⁷ Article 18, EU-Chile Free Trade Agreement (2003)

⁸ Article 47, EU-Egypt Association Agreement (2004)

⁹ Article 73, EU-Croatia Stabilisation and Association Agreement (2004)

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- *Representatives of producers should assess the potential for exporting to the EU, the cost of compliance with EU norms and the ability of the entire sector to comply. Based on this some firms will be in favour of deep harmonisation and others opposed. Others will agree with harmonisation but with reservations by sector and timing. Each group should articulate their positions based on data, facts and figures and present this to Ukrainian negotiators;*
- *Government agencies responsible for introducing technical standards and standards and conformity assessment procedures should make an assessment on the practicality and costs of harmonisation (including equivalence, mutual recognition or full integration) and determine the extent and timing for harmonisation. The relative positions should be articulated to Ukrainian negotiators with facts and costings;*
- *Ukrainian negotiators should then discuss with stakeholders the scope and coverage of technical regulations, standards and conformity assessment harmonisation over time with the aim of agreeing a common position for the negotiations.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 5

Sanitary & Phytosanitary Measures

Sanitary and Phytosanitary (SPS) measures or standards are applied to agricultural and food products to protect human, animal and plant life and health, and to help ensure that food is safe for consumption. Under World Trade Organization (WTO) rules governments must apply these measures, based on risk assessment processes so that they cannot be used as a barrier to trade (that is, there must be a valid reason to apply the SPS rules based on scientific evidence). However, although all countries generally apply these measures in accordance with WTO rules, the resulting product standards and requirements differ meaning that exporters must comply not only with their own national standards, but also with those of its export market(s). A free trade agreement (FTA) can be used to align the legislation and standards of both parties in order to facilitate and ease exports.

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CURRENT SITUATION FOR UKRAINE

National

During the WTO accession programme, Ukraine implemented a comprehensive SPS reform programme that consolidated its legislation proscribing when and how SPS measures can be applied in three WTO compatible laws. These laws: a Law on Veterinary Medicine; a Law on Safety and Quality of Food Products and; a Law on Plant Quarantine, provide the legal framework for the development, application and enforcement of SPS measures and standards, including procedural and transparency aspects. Based on the WTO SPS Agreement, the main provisions are related to terminology; harmonization; equivalence in measures; risk assessment and appropriate level of protection; adaptation to regional conditions; transparency (enquiry and notification points); and inspection, control and approval procedures.

By 2005, Ukraine had introduced over 800¹ WTO compatible SPS norms to replace its existing standards; of these, 340 were approximated with those of the EU. In 2006, Ukraine planned to develop over 1000 more standards for agricultural and food products covering: margarine, butter, mayonnaise, sugar, beer, soft drinks, confectionary, alcohol beverages, spirits, animal feed and mixed fodder supplements and breeding systems for livestock.

A number of government agencies share responsibility for the introduction and enforcement of SPS measure for food safety, plant and animal health. These include, the Ministry of Agriculture (the State Service of Veterinary Medicine of Ukraine and the State Service of Plant Quarantine of Ukraine) and the Ministry of Health (i.e. the State Sanitary-Epidemiological Service of Ukraine).

EU-Ukraine Agreements

The Partnership and Cooperation Agreement (PCA) between the EU and Ukraine agrees to "the gradual approximation of Ukrainian standards to EU technical regulations concerning [...] agricultural food products including sanitary and phytosanitary standards."

The EU-Ukraine Action Plan reaffirms this commitment to increase food safety for consumers in Ukraine and facilitate trade through the harmonisation of legislation, norms and standards to those of the EU, and in the area of food safety to gradually converge towards the EU regulatory framework for food safety measures and institutional arrangements for food safety control.

Specifically, the Action Plan agrees the following:

- Review a list of measures to be taken for gradual convergence towards the principles of the EU sanitary and phytosanitary control legislation and institutions, accompanied by timetables and a financing plan. Advance effective reform in this area (e.g. clear division of competences of institutions, principles of Directives 96/22/EC on prohibition of substances and 96/23/EC on monitoring the residues of substances);
- Conduct comparative assessment of EU and Ukrainian legislation in the sphere of food hygiene, including food processing. If necessary

¹ Food and Agricultural Organisation of the United Nations (FAO) "The Challenge of Conforming to Sanitary and Phytosanitary Measures for WTO Accession and EU Exports: The Case of Ukraine" 2006

draw up measures for legislative approximation in this area, accompanied by a financing plan;

- Progress in convergence with EU food traceability legislation; general food safety principles and requirements (Regulation (EC) No 178/2002); effectively implement the Hazard Analysis Critical Control Point system at enterprises and controlling bodies, including the fish industry.

WTO Commitments

All of Ukraine's existing sanitary and phytosanitary measures, including regulations, orders, decrees and other measures that directly or indirectly affect international trade in agricultural products have already been brought into conformity with the provisions of the WTO SPS Agreement. No transitional periods for compliance were applied.

Other Agreements

Ukraine is a member of the Codex Alimentarius, the Office of International Epizootics (OIE) and the International Plant Protection Convention (IPPC). These bodies primarily set international standards which can be used to guide and develop national standards.

ECONOMIC IMPACT (COST-BENEFIT)

The adoption of new and more stringent SPS standards will have a number of economic effects in Ukraine:

- improved food safety systems will better the health of Ukrainian citizens;
- approximation of standards will increase the ease of exports from Ukraine to the EU of those sectors which are harmonised as produces will not have to comply with different standards than those applied in Ukraine. Equally EU producers will find it easier to export to Ukraine;
- for those sectors which approximate with EU standards, there will be a cost to all companies (not just those exporting) in terms of upgrading/changing production to comply with new standards;
- increased investment to comply with new legislation may lead to increased costs (and failing enterprises who cannot comply) in the short run but longer term, is likely to increase efficiency and lower prices.

The extent of these effects will depend on the sub-sector involved and how close they are to EU standards already.

A number of recent studies on the EU-Ukraine FTA have examined some of the likely impacts of approximation of Ukraine's SPS norms and laws with those of the EU. Complete harmonisation and mutual recognition is expected to be costly, citing² the experience of Poland and Lithuania, this could be as much as 2-3 per cent of GDP, even though they received €172 and €205 million per annum from the EU respectively for six years.

In terms of specific impact by sub-sector:

² CEPS, IFW & ICPS (2006): The Prospects of deep free trade between the European Union and Ukraine

Cereals³: Ukraine already exports cereals to the EU and this trend is likely to continue since there are few technical requirements in the EU for these products.

Meat and meat products⁴: In the short-run costly investments in productive capacity and upgrading of outdated machinery to comply with EU food safety requirements will be necessary. In the longer run, Ukraine is expected to become a major exporter to the EU of meat, meat products and animal fats.

Fruit⁵: In the short-run, imports of fruit from the EU are likely to adversely affect Ukrainian production as producers struggle to meet EU SPS standards through investments. But as these are met, exports to the EU are expected to grow and result in a trade surplus. This will also support and extend exports of processed fruits to the EU.

EU APPROACH IN OTHER AGREEMENTS

Early EU FTAs such as those with Mexico and Chile concentrated on procedural aspects of SPS providing procedures for either party requesting separate agreements for equivalence of SPS measures and procedures for certification and verification of compliance with each other's SPS measures. These covered live animals, plant and meat products but excluded the following measures: Food additives (all food additives and colours); Processing aids; Flavours; Irradiation (ionisation); Chemicals originating from the migration of substances from packaging materials; Labelling of foodstuffs; Nutritional labelling; Feed additives; Animal feeding stuffs; Medicated feeds and premixes and; Genetically Modified Organisms (GMO's).

In the case of the Euro-Med and Western Balkan association agreements, agreement on SPS standards goes further agreeing to the "gradual harmonisation"⁶ of veterinary and phytosanitary standards.

³ Ibid.

⁴ ECORYS (2008): Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁵ Ibid.

⁶ For example, Article 71 of the EU Jordan Association Agreement and Article 92 of the EU Croatia Stabilisation and Association Agreement

ISSUES FOR UKRAINE

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

Implications: In term of harmonisation of SPS standards with those of the EU, there appears to be greater flexibility in this area in terms of the depth and coverage (sectors) of the provisions. For example, approximation of SPS norms would be less ambitious than mutual recognition whereby not only the standards are equivalent, but that the authorities in Ukraine certifying Ukrainian producers are accredited and approved by EU authorities:

- *What level of harmonisation?*
- *What product/sector coverage should be included?*
- *What timeframes for compliance?*

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the level, coverage and timeframe for harmonisation of SPS norms and procedures:

- *Representatives of producers should assess the potential for exporting to the EU, the cost of compliance with EU norms and the ability of the entire sector to comply. Based on this some firms will be in favour of deep harmonisation and others apposed. Others will agree with harmonisation but with reservations by sector and timing. Each group should articulate their positions based on data, facts and figures and present this to Ukrainian negotiators;*
- *Government agencies responsible for implementing SPS measures should make the assessment on the practicality and costs of harmonisation (including mutual recognition and current testing capabilities of laboratories) and determine the extent and timing for harmonisation. The relative positions should be articulated to Ukrainian negotiators with facts and costings;*
- *Ukrainian negotiators should then discuss with stakeholders the scope and coverage of SPS harmonisation over time with the aim of agreeing a common position for the negotiations.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 6

Trade in Services

Liberalisation of services trade involves amending national legislation to allow foreign participation and/or national treatment of foreigners in the domestic market. Services trade is complex as for each service sub-sector there are a range of modes/methods in which they can be delivered/supplied (mode 1: cross border such as processed data being electronically transmitted; mode 2: consumption abroad such as foreign tourists visiting the country; mode 3: commercial presence such as branch offices of a foreign bank or; mode 4: temporary movement of natural persons such as use of foreign construction workers). However, unlike negotiations for goods, services negotiations usually involve a positive list approach, that is, only those services sector and mode of supply specified on the list are liberalised whereas for goods, all goods are liberalised except those on the list.

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CURRENT SITUATION FOR UKRAINE

National

During its World Trade Organization (WTO) negotiations, Ukraine liberalised its services sector and as a result, has reportedly one of the most liberal and open services trade regimes. For most sectors, Ukraine has no restrictions on market access and national treatment for supply of services in modes 1-3¹. The only restrictions on services trade in Ukraine are summarised below:

Sector or subsector	Modes of supply			
	Cross-border supply	Consumption abroad	Commercial presence	Temporary presence of natural persons
Market access (MA)/national treatment (NT)				
BUSINESS SERVICES				
Legal Services			MA: Only Ukrainian citizens can supply notary services.	MA: Unbound NT: Unbound
Accounting	MA: Official Audit reports must be confirmed by an auditor from Ukraine or a Ukrainian audit firm.			MA: Unbound NT: Unbound
Medical and dental services and; Services provided by Midwives, Nurses, Physiotherapists and Paramedical Personnel			MA: Professional qualification requirements according with Ukrainian legislation. NT: Foreign service suppliers must speak Ukrainian.	MA: Unbound NT: Unbound
COMMUNICATION SERVICES				
Postal and Courier Services (including express delivery services)	MA: Licensing systems may be established for sub-sectors (i) to (iv) (addressed mail; addressed parcels, addressed press items and express delivery), for which a general Universal Service Obligations exists. These licenses may be subject to particular universal service obligations and/or financial contribution to a compensation fund. None for sub-sectors (v) to (viii).			MA: Unbound NT: Unbound
DISTRIBUTION SERVICES				
Wholesale trade services of books, newspapers, magazines (except stationary)			MA: Foreign participation is limited to 30% for five years after the date of accession. Thereafter, none.	MA: Unbound NT: Unbound
EDUCATION				
Primary and; Secondary and; Higher			MA: in line with Ukrainian legislation, only a citizen of Ukraine may be the head of an educational institution, notwithstanding the type of ownership.	MA: Unbound NT: Unbound

¹ For the most part, Ukraine has not made commitments for mode 4.

Sector or subsector	Modes of supply			
	Cross-border supply	Consumption abroad	Commercial presence	Temporary presence of natural persons
	Market access (MA)/national treatment (NT)			
FINANCIAL SERVICES				
Direct Insurance (Life and non-life)	MA: Unbound ²			MA: Unbound NT: Unbound
Insurance intermediation, such as brokerage and agency	MA: Unbound ³ After 5 years from the date of accession: none.			MA: Unbound NT: Unbound
Trading: - derivatives and; - exchange rate and interest rate instruments, including products such as swaps, forward rate agreements	MA: Unbound			MA: Unbound NT: Unbound
Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues			MA: Only legal persons engaged exclusively in issuance of securities, and banks.	MA: Unbound NT: Unbound
HEALTH RELATED AND SOCIAL SERVICES				
Hospital Services and; Other human health services	MA: Unbound NT: Unbound		MA: professional qualification requirements according with Ukrainian legislation.	MA: Unbound NT: Unbound
RECREATIONAL, CULTURAL AND SPORTING SERVICES				
Entertainment services (including theatre, live bands and circus services)	MA: Unbound			MA: Unbound NT: Unbound
Cinema theatre operations	MA: Unbound NT: Unbound	NT: Unbound	None, except for access to subsidies: unbound.	MA: Unbound NT: Unbound
Dance instructor services	MA: Unbound NT: Unbound			MA: Unbound NT: Unbound
News agency services			MA: Foreign investment is limited to 35%.	MA: Unbound NT: Unbound
Libraries, archives, museums and other cultural services	MA: Unbound NT: Unbound	NT: Unbound	NT: Unbound	MA: Unbound NT: Unbound
TRANSPORT SERVICES				

² except none for: - insurance of risks relating to maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising there from.

³ except none for: - insurance of risks relating to maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising there from.

Sector or subsector	Modes of supply			
	Cross-border supply	Consumption abroad	Commercial presence	Temporary presence of natural persons
	Market access (MA)/national treatment (NT)			
Maritime Cargo Handling Services and; Storage and warehousing Services and; Customs Clearance Services for Maritime Transport Services and; Container Station and Depot Services	MA: Unbound NT: Unbound			MA: Unbound NT: Unbound
Internal waterways - Passenger and freight transportation (excluding cabotage)	MA: Unbound NT: Unbound		MA: Unbound	MA: Unbound NT: Unbound
Air Transport Computer Reservation System	MA: Unbound NT: Unbound		MA: Unbound NT: Unbound	MA: Unbound NT: Unbound
Rail Passenger and freight transportation	MA: Unbound		MA: Unbound	MA: Unbound NT: Unbound
Road Passenger and freight transportation	MA: Unbound		None on condition of the registration as a legal entity.	MA: Unbound NT: Unbound
Services auxiliary to all modes of transport except Freight transport agency services	MA: Unbound NT: Unbound			MA: Unbound NT: Unbound
Other Services n.e.s.				
Beauty Services and; Massage Services and; Spa Services and; Hairdressing	MA: Unbound NT: Unbound			MA: Unbound NT: Unbound

In addition, unbound restrictions exist on horizontal issues such as foreign land ownership and; subsidies and state support for foreign service providers.

EU-Ukraine Agreements

Both the PCA and EU Ukraine Action Plan provide for the "Gradual abolition of restrictions to progressively allow the supply of services between the EU and Ukraine in certain sectors." The PCA specifies actions in a range of sectors including maritime transport, post services, education and financial services. In addition the Action Plan specifies legislative work across sectors to:

- ensure co-ordination between all relevant administrative entities in order to facilitate the supply of services and to eliminate barriers to trade in services;
- ensure effective implementation of legislation that sets out basic principles of non-discrimination, introducing more detailed secondary or sector-specific legislation as necessary.

WTO Commitments

Most commitments entered into force at the time of Ukraine's accession to the WTO. However, there are a few commitments which will be phased in, namely:

- Insurance intermediation, such as brokerage and agency: currently market access is unbound but within 5 years of accession, no restrictions/exceptions must be applied.
- Wholesale trade services/distribution of books, newspapers, magazines (except stationary): for five years after the date of accession foreign participation is limited to 30 per cent, thereafter, no restrictions will apply.

As a recent member of WTO whose services commitments are much deeper than the original signatories to the General Agreement on Trade in Services (GATS), Ukraine is unlikely to be required to liberalise further under any WTO Doha negotiations agreement.

Other Agreements

Ukraine has no other bi-lateral agreements relating to access to services markets.

ECONOMIC IMPACT (COST-BENEFIT)

Providing increased market access to foreign participation in services sector in Ukraine and national treatment will increase competition in these sectors which in turn will lead to lower prices, better quality and wider range of services. Approximation to EU legislation would further increase competition from both Ukrainian and EU service providers lowering prices even more.

Allowing the EU greater access to Ukraine will mean in turn that the EU will grant greater access to Ukrainian service providers and therefore, should lead to greater exports of Ukrainian services.

Whilst recent studies on the impact of a EU-Ukraine FTA all address services, they mainly provide an overview of the current situation in Ukraine by sector and sub-sector without detailing the potential benefits of further liberalisation.

However, a few key estimates are provided:

- Based on the experience of the integration of service sectors from central European countries with the EU, Ukraine's GDP could rise by 3-9 per cent⁴ based on full integration of services with that of the EU (liberalisation and approximation of all sectors).
- For distribution services,⁵ higher levels of competition lead to increased productivity but also to bankruptcy of firms after the introduction of the FTA.
- Domestic transport services⁶ providers in Ukraine are expected to experience a fall in output and employment in the short run, but with

⁴ Studies by Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

⁵ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁶ Ibid.

growth in the longer run along with increased market shares for EU transport operators.

- EU market openings might have less positive effects on the EU transport sector⁷ if granted to Ukrainian operators without ensuring they meet EU quality requirements (requirements concerning access to occupation - financial standing, professional competence and good reputation, driver qualifications as well as technical and environmental vehicle standards etc). Such requirements are imposed on EU transport operators and not necessarily applicable to Ukrainian operators entering the EU market. A difference in the level of requirements imposed might give rise to a competitive advantage for Ukrainian operators and result in negative effects in the European transport sector.
- The estimated FTA impact on communication services⁸ are not expected to be large. Economically, competition will increase and prices are expected to drop, which will likely lead to increases in production and employment in the long run.
- Financial services providers in Ukraine are predicted to decline as a result of the FTA. Prices for financial services are expected to drop – which is expected to have a strong positive impact on the rest of the Ukrainian economy.

EU APPROACH IN OTHER AGREEMENTS

The EU's approach to trade in services within the context of FTA negotiations has been to agree a GATS plus agreement whereby sub-sector by sub-sector the degree of liberalisation is agreed and the method of access allowable proscribed in detail. This applies equally to both parties. This is the case for the EU-Chile FTA, as well as many of the Euro-Med agreements. However, the EU Association Agreement with Croatia goes further in specifying approximation of legislation and harmonisation in methods of regulation and control of services sectors with that of the EU. The EU Croatia Association agreement specifies provisions specifically for transportation services and financial services and provides for a transition time of four years.

⁷ Ibid.

⁸ Ibid.

ISSUES FOR UKRAINE

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

Implications: It appears likely that the EU will request that Ukraine makes more commitments than its WTO offer and that the FTA will go beyond the provisions in the Partnership and Cooperation Agreement (PCA) and Ukraine's WTO commitments:

- What further commitments may Ukraine have to make?
- Do any sub-sectors need to be protected still? On what basis?
- What service sectors in the EU would Ukrainian service providers like to liberalise?

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the service sector liberalisation schedule for Ukraine and the EU:

- Representatives of providers who remain protected under the WTO commitments (see WTO GATS Schedule or summary table above) should assess the impact of further liberalisation with the EU. Those who believe these restrictions should remain, should justify their positions based on evidence, data and analysis (defensive interests);
- Representatives of providers who currently face market access or national treatment restrictions in EU markets (including freedom to use Ukrainian workers) should articulate their problems and request Ukrainian negotiators to include further EU liberalisation of those sectors (offensive interests);
- Ukrainian negotiators should match the needs of Ukrainian offensive and defensive interests with the WTO GATS schedules of Ukraine and the EU to derive a list of sectors for mutual liberalisation and access.

Implications: It appears likely that the EU will request that Ukraine further approximates its services legislation with that of the EU:

- What sectors and sub sectors should be included and what sub-sectors need reservations?
- What timeframe should be allowed for Ukraine to approximate?
- What level of capacity development will be required to comply?

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe and scope for adopting EU services legislation and enforcement:

- Representatives of providers who believe rapid introduction of EU legislation and enforcement in their sectors would be beneficial should articulate their case whereas those providers/sectors which feel the status quo should continue (e.g. need for continuing state monopolies, state aid or monopoly restrictions) should also articulate their case for exemption or longer transition;*
- Ukrainian regulators/line Ministries should determine whether or not any sectors should be excluded (if so they need to fully justify) and the capacity requirements and costs to implement EU approximation and enforcement practises;*
- Stakeholders can then prepare a joint position with the government on the timeframe for fully adopting EU services legislation and enforcement in specific sectors/sub-sectors and timeframes for implementation.*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 7

Competition Policy

Negotiations on competition policy involve ensuring fair competition in the markets of both parties including anti trust laws, state aid and state enterprises. Anti trust legislation seeks to ensure that firms do not undertake actions that will distort the market or restrict competition (anti-monopoly, mergers etc). State aid examines whether aid to a segment of business produces unfair market distortions and limits competition. State Enterprises examines whether or not the existence of state owned enterprises restricts competition, including sectors where there is a natural monopoly. In the context of a free trade agreement (FTA), this would be concerned with the impact of any unfair trade practises on import competition but would also affect domestic competition.

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CURRENT SITUATION FOR UKRAINE

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Ukraine has an anti-trust framework based on the 1996 Constitution, as well as in Law No. 2210-III "On the Protection of Economic Competition" of 11 December 2001, and in Law No. 236/96 "On the Protection from Unfair Competition" of 7 June 1996.¹ According to several sources², Ukraine's anti-trust legislation is comprehensively based on the EU anti-trust legislation.

To implement these laws, Ukraine has established a competition authority, the Anti-Monopoly Committee of Ukraine which is mandated to regulate mergers, abuse of dominant position, unfair competition and anticompetitive actions of state authorities (including state aid, government procurement and price controls).

There is no law on state aid.

There is also a law "On Natural Monopolies" which defines, in a Ukrainian context, natural monopoly activities. These monopolies then operate under sector specific laws (e.g. transport, electricity etc) but regulatory bodies have only been established to oversee two of these industries and ensure that there is no abuse of monopoly position.

EU-Ukraine Agreements

Both the EU Ukraine Action Plan and the Partnership and Cooperation Agreement (PCA) contain provisions to ensure there are no "restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the EU and the Ukraine"³ and more specifically "continue progress in the establishment of a fully functioning market economy, including price-formation, control of state aid, and a legal environment that ensures fair competition between economic operators".⁴

¹ WTO Working Party Report

² CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine. 6.3.2 p. 100

³ PCA Article 49 paragraph 1

⁴ EU Ukraine Action Plan Paragraph 16

Provisions of Article 49 of the PCA is given below followed by elaborations in the EU Ukraine Action plan:

Anti-trust	State Aid	Natural Monopolies/State Trading
<p>2.1 [...] have and enforce laws addressing restrictions on competition [...].</p>	<p>2.2 [...] refrain from granting State aids favouring certain undertakings or the production of goods other than primary products [...] or the provision of services, which distort competition insofar as they affect trade between the EU and Ukraine.</p>	<p>2.5 In the case of public undertakings or undertakings to which Member States or the Ukraine grant exclusive rights, [...] from the fourth year from the date of entry into force of this Agreement, to ensure that there is neither enacted nor maintained any measure distorting trade between the EU and the Ukraine to an extent contrary to the</p>
<p>[...] ensure adequacy and compatibility with the EU, of the domestic anti-trust legislation and control regime.</p> <ul style="list-style-type: none"> – Assess adequacy, and compatibility with EU, of current legislative framework, in practice, in particular its respect of the principles of non-discrimination, transparency and procedural fairness; – Continue to reinforce independence of the Anti-monopoly Committee, ensure adequate legal powers and resources; and reinforce staff training. 	<p>[...] and develop legislation and control regime compatible with that of the EU</p> <ul style="list-style-type: none"> – Draft and adopt state aid legislation, including in particular: <ul style="list-style-type: none"> – a definition of state aid compatible with that of the EU; – a principle of prohibition of state aids which distort trade between Ukraine and the EU. 	

WTO Commitments

As part of its World Trade Organization (WTO) commitments, Ukraine agreed that from the date of accession, Ukraine would eliminate all export and import-substitution subsidies. However this does not cover state aid or regulating state aid to ensure that there are no distortions to competition. Ukraine currently provides state aid to special economic zones and priority territories, technological parks, as well as sector-specific support for fisheries, shipbuilding, the automotive sector, aircraft, construction, the space industry, coal mining, and publishing (of books). No other commitments relating to state aid were made.

The WTO Doha Ministerial Agreement began negotiations on competition policy, which Ukraine would have to adopt. However, the General Council of the WTO adopted the following Decision on 1st August 2004: *"competition policy [...] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round"*.

Other Agreements

Ukraine has no other bi-lateral agreements relating to competition policy.

ECONOMIC IMPACT (COST-BENEFIT)

The main economic impact of greater competition in the Ukrainian market will be to lower costs. Monopolistic and other structural distortions “crowd out” other, more efficient producers and prices are “controlled” at higher rates. In addition, more competition will increase consumer choice as the few dominant companies provide single, often sub-standard varieties. Finally, uncompetitive environments stifle innovation as dominant companies have no incentive or need to develop products or production processes so greater competitive will increase economic efficiency.

As a result of this greater competition and lower costs, Ukraine’s producers will increase their international competitiveness and therefore, Ukraine’s exports will increase.

Whilst recent studies on the impact of a EU-Ukraine FTA all address competition policy, none have been able to quantify the benefit to Ukraine of increased competition. Most studies focus on detailing deficiencies in Ukraine’s current system:

- Although Ukraine has substantive anti-trust legislation, the implementation is very poor and furthermore, the independence of the Anti-monopoly Committee, the main authority responsible for enforcing all competition policy, has seen its independence reduced.⁵
- 31 per cent⁶ of total sales in Ukraine are from sales of monopolistic enterprises and a further 14 per cent from oligopolistic enterprises – this means only 55 per cent of total sales in Ukraine come from competitive markets.
- The most restrictive (non-competitive) markets are transport and telecommunications (only 15 per cent of sales are competitive), energy and coal (23 per cent), machine building (50 per cent) and agriculture/food (53 per cent).⁷
- The main oligopolistic markets⁸ in Ukraine that would also benefit from greater competition are cement, beer, tobacco, mobile telephone markets and petrol.
- Between 2003 and 2004,⁹ the number of cases of abuse of monopoly position increased but the Anti Monopoly Committee has been ineffective as the concentration of monopolistic industry in production increased over the same period. This is attributed to the fact that the Anti-Monopoly Committee reverted to price controls, which actually reduced competition.

⁵ Studies by Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations and; CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine.

⁶ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁷ Ibid.

⁸ Ibid.

⁹ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

EU APPROACH IN OTHER AGREEMENTS

The EU has used a range of approaches for competition policy and state aid in FTA negotiations:

- In agreements such as the EU Chile Association Agreement¹⁰, competition policy provisions are limited to applying “[...] their respective competition laws [...] so as to avoid the benefits of the liberalisation process in goods and services being diminished or cancelled out by anti-competitive business conduct. To this end, the Parties agree to cooperate and coordinate among their competition authorities”; with regards to state monopolies “Nothing [...] prevents [...] maintaining public or private monopolies according to their respective laws” and; state aid is restricted to the provision of “information on state aid on an annual basis, including the overall amount of aid and, if possible, the segregation by sector.”
- Other FTA agreements such as those of Albania (also Croatia and some Mediterranean Countries) go further in outlawing any uncompetitive practises, including state aid “which distorts or threatens to distort competition by favouring certain undertakings or certain products.” The only method for assessing this will be that set out in EU legislation. Moreover, Albania will be required to adopt EU legislation and ensure all state aid, state monopolies and exclusive rights given to entities are compatible with EU competition legislation. Transitional periods of up to 4 years were granted for implementation in respect of these laws and effective enforcement.

ISSUES FOR UKRAINE

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

Implications: It appears likely that the EU will request that Ukraine further approximates its competition legislation with that of the EU, including introduction of laws relating to state aid. It is also likely that the EU will insist on better enforcement along EU standards:

- *What timeframe should be allowed for Ukraine to comply?*
- *Are any sectors to be excluded? On what basis?*
- *What level of capacity development will be required to comply?*

¹⁰ Similar provisions are present in the Mexico FTA

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe and scope for adopting EU competition legislation and enforcement:

- Representatives of producers who believe rapid introduction of competition in their sectors would be beneficial should articulate their case whereas those producers/sectors which feel the status quo should continue (e.g. natural monopolies which are necessary in a Ukrainian context but would not be allowed under EU equivalent legislation) should also articulate their case for exemption or longer transition;*
- Ukrainian competition authorities/line Ministries (if no regulator exists in a sector) should determine whether or not any sectors should be excluded (if so they need to fully justify) and the capacity requirements and costs to implement EU approximation;*
- Stakeholders can then prepare a joint position with the government on the timeframe for fully adopting EU competition legislation and enforcement and any exceptions to be negotiated.*

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

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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).*

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 9

Public Procurement

Government procurement negotiations involve access of each party to government contracts and can include central government, regional government and state owned enterprises. However, the coverage of procurement on a sector-by-sector basis can be negotiated, as can the thresholds where national treatment is applied and type of contract (works, supply and services).

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CURRENT SITUATION FOR UKRAINE

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Ukraine's procurement legislation has evolved recently based on the obligations of the World Trade Organization (WTO). The current Law provides for a single government procurement system and is based on the UNCITRAL model law on government procurement and includes some provisions of the WTO Agreement on Government Procurement (GPA) and European Union Directives.

Foreign participation is allowed in most tenders but Ukrainian's receive a 10 per cent price advantage during the evaluation process.

EU-Ukraine Agreements

The EU does not offer Ukraine compulsory access to any public procurement in its member states and vice versa. Government tenders for a list of central government institutions in the EU must offer competitive tenders to other EU members and GPA members¹ above set thresholds as shown below:

	Works	Supplies	Services
Central Government bodies	€133,000	€137,000	€5,150,000

Ukraine is not currently a signatory to the GPA.

Under the EU-Ukraine Action Plan, Ukraine has committed to further approximation of its procurement law with that of the EU especially with respect to the limited use of exceptions, improved access to independent judicial review, provision of information on procedures, dissemination of information on tenders and co-operation with the EU on the use of e-tendering technologies.

WTO Commitments

Ukraine fulfilled its WTO obligations prior to accession through the various legal amendments to its procurement laws.

The WTO Doha Ministerial Agreement began negotiations on transparency in public procurement, which Ukraine would have to adopt. However, the General Council of the WTO adopted the following Decision on 1st August 2004: *"government procurement [...] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round"*.

Other Agreements

Following accession to the WTO, Ukraine agreed it would start negotiations on accession to the Government Procurement Agreement. This commitment stated that Ukraine would become an observer to the GPA at the time of accession and would start GPA negotiations by requesting membership and tabling an entities offer after one year.

¹ Canada, European Communities, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland and United States

ECONOMIC IMPACT (COST-BENEFIT)

The economic impact of approximation of procurement laws to those of the EU will be to increase efficiency of public investment in Ukraine (lower, more competitive bids) leading to increased government investment (from procurement savings). This would increase GDP. Moreover, fair competition in government procurement in Ukraine would reallocate resources to more efficient companies, particularly SMEs, which would grow and reinvest in the economy, further increasing GDP.

Opening up public tenders in Ukraine to EU participation would also lower costs further and potentially increase the quality of public works, supplies and services. In addition, Ukraine's participation in the EU procurement process would potentially lead to increased trade in goods and services as Ukrainian business win EU public procurement contracts.

Whilst recent studies on the impact of a EU-Ukraine FTA all address public procurement access, none have been able to quantify the benefit in aggregate or by sector. Most studies focus on the potential benefit of increased efficiency (through greater transparency) and point to key statistics which show Ukraine's current system is inefficient and significant in economic terms (so gains in public procurement could have large impacts on the whole economy and GDP):

- Public procurement is estimated to be between 5 and 20 per cent² of GDP;
- The existing level of participation in open tenders is relatively low at present. On average³, only 2.6 firms (2005) submit bids for each open tender in Ukraine. The number of single participant bids represented 15.3 per cent⁴ of total value of procurement.
- 11.4 per cent⁵ of bids by value are requests for price proposals
- 99.8 per cent⁶ of all contracts by value are awarded to domestic firms.
- Over US\$ 14 million⁷ of budgetary funds are still spent without any procurement procedure, despite the law.

EU APPROACH IN OTHER AGREEMENTS

Most EU FTA agreements (including those with the Mediterranean) contain general, non-specific articles relating to government procurement requiring mutual opening of procurement markets. However, the EU Association Agreement with Chile has a detailed procurement chapter following the GPA equivalent measures on transparency, market access, national treatment and non-discrimination. Coverage of this chapter was to open all bids over set levels for central, sub-central government and other entities (including utilities) for works, supplies and services contracts.

² Studies by the ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement and, Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations estimate 5% of GDP but recognise that this is a low estimate as it excludes many state owned enterprises; a study by CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine estimates that total procurement, including these state owned enterprises (especially in the gas and energy sector) is between 10% and 20%.

³ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

⁴ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁵ Ibid.

⁶ Ibid.

⁷ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

The EU Stabilisation and Association Agreements with Croatia and Albania provided for full access to public procurement in each market based on national treatment, with immediate effect for Croatian and Albanian companies in EU procurement and within 3 and 4 years respectively of the entry into force of the relevant agreement for EU companies.

ISSUES FOR UKRAINE

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

Implications: Should the EU and Ukraine agree on a Croatian/Albanian style coverage in public procurement the outstanding issues on public procurement will be:

- *What timeframe should be allowed for Ukraine to open up its procurement market to full EU participation with national treatment?*
- *Are any sectors to be excluded? On what basis?*
- *What level of international publication will be required, which languages etc?*

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe for opening procurement to EU participation:

- *Representatives of producers who believe opening up will improve competition domestically may urge immediate opening or conversely, may urge a longer period if they believe EU companies will have more advantage until Ukrainian legislation/procedures improve;*
- *Ukrainian procurement agencies should determine whether or not any sectors should be excluded, if so they need to fully justify the proposed exclusion;*
- *Ukrainian negotiators should determine the costs of any international/e-publication requirements;*
- *Stakeholders can then prepare a joint position with the government on the timeframe for opening up Ukraine's procurement to EU participation.*

Implications: Approximation with EU legislation has been agreed, but the extent and speed of this process has not:

- *How quick should Ukraine adopt EU public procurement laws?*
- *How much of the EU legislation should it adopt (all or part)?*

Next Steps: Stakeholders will need to engage with government negotiators to agree the extent and speed of approximation:

- Representatives of stakeholders who believe the current system effectively precludes them from procurement may urge deeper and faster approximation;*
- Ukrainian procurement agencies should consider the capacity requirements of adopting EU legislation and justify timescale and extent of approximation;*
- Stakeholders should prepare a position paper detailing the extent and timeframe for approximation. Negotiators and procurement agencies should also specify the needs and resources that it needs to comply with this timetable (whereby support from EU could be sought for quicker opening).*