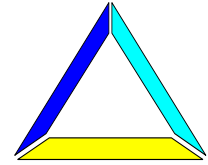




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**AgPP 3**

## **Policy Paper No. 3**

### **EU and WTO conformity of laws relevant to combating counterfeit agro-chemicals in Ukraine – Current status and future harmonisation needs**

#### **Disclaimer:**

This paper was prepared by the authors using publicly available information and data from various Ukrainian, EU and WTO sources. All conclusions and recommendations included in this article in no circumstances should be taken as the reflection of policy and views of the German Federal Ministry of Food, Agriculture and Consumer Protection.

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## Abbreviations

AIC	Agricultural Industries Confederation
ACG	Anti-Counterfeiting Group
AICC	Association of Independent Crop Consultants
BASIS	British Agrochemical Standards Inspection Scheme
BMELV	German Federal Ministry of Food, Agriculture and Consumer Projection
COSHH	Control of Substances Hazardous to Health
CPA	Crop Protection Association
COPR	Control of Pesticides Regulations 1986
Defra	Department for Environment, Food and Rural Affairs
EBA	European Business Association
FEPA	Food and Environment Protection Act 1985
HSE	Health and Safety Executive
IER	Institute for Economic Research and Policy Consulting
IP	Intellectual Property
MoH	Ministry of Health
MS	Member state
NAAC	National Association of Agricultural Contractors
NFU	National Farmers' Union
PPPR	Plant Protection Products Regulations
PSD	Pesticides Safety Directorate
SME	small and medium sized enterprise
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIPS	Trade Related Intellectual Property
UEPLAC	Ukrainian European Policy and Legal Advice Centre
WTO	World Trade Organisation

## **1 Objectives and Methodology**

### **1.1 Define the objective of the publication**

The objective of this publication is:

- To highlight the key regulatory issues in the fight against counterfeit agro-chemicals
- To present the relevant international regulatory framework (e.g.WTO TRIPS)
- To illustrate the ways in which the key regulatory issues are dealt with at both the EU and Member State (MS) level
- To propose appropriate measures to deal with the problem in Ukraine

### **1.2 The approach and methodology:**

Building on the work undertaken in the Bistro<sup>1</sup> project where the key issues were outlined and the principles of the EU and UK approach were presented, this analysis will widen the scope to consider the broader aspects of IP rights and their protection as well as a more detailed discussion of some of the regulatory mechanisms within the framework of the WTO TRIPS agreement and in the light of relevant regulation models.

In order to establish the most appropriate remedial action for the Ukrainian authorities, a comparative analysis will provide the most useful information. By examining the regulatory and institutional systems operating in countries and regions where counterfeit agro-chemicals does not represent a significant problem, approaches and mechanisms will be demonstrated which may then be considered in the Ukrainian context.

The regulation of the relevant issues at the EU level and at the MS level will provide an insight into the approach at supra-national/cross-border and national level. The framework for regulation in this area as provided at the international level by the WTO TRIPS agreement will also be outlined as this provides both the minimum level of protection and the maximum permitted level of trade restriction. The regulatory issues are wider than the agriculture and agrochemical sector and in fact concern the generic issues relevant to counterfeiting, intellectual property rights protection and organised crime.

The analysis will therefore work from the general to the specific in order to ensure that both the wider issues are dealt with and that the necessary detail is considered. Starting with the WTO TRIPS, working through the counterfeiting and then agrochemical issues at EU and lastly at MS level.

## **2 Background and Scope**

### **2.1 The problem - Ukraine**

Counterfeit pesticides are causing financial loss to:

- Producers – loss of sales or license payments
- Budget – loss of taxes (grey / black economy)
- Farmers – loss of pest protection and therefore yield or loss of crop

Annual losses in the state tax revenues are estimated as 30 million UAH; estimated losses in revenues of legal producers and distributors are about 18 million euro. No data for the losses to the end-users are available. Counterfeit pesticides also present a potential health risk – due to food chain contamination - and a potential environmental risk.

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<sup>1</sup> The legal component of Combating Counterfeit Plant Protection Products - Bistro Project Number:2004/84-670. Commissioned by the Agrarian Committee of the Verhovna Rada (Ukrainian Parliament), supported by the EBA agrochemical committee and financed by the EC. Findings, conclusions and recommendations in annex 2.

## 2.2 The problem - EU

Counterfeit pesticides are not perceived as a significant problem in the EU, despite the fact that counterfeiting and piracy of other goods do represent between 5% and 7% of world trade in value terms<sup>2</sup>. Certain sectors are more prone to counterfeiting or piracy. The European Commission notes that the levels of counterfeiting and piracy in relation to the turnover of some of the sectors concerned are considerable: 35% in the software industry, 25% in the audio-visual industry and 12% in the toy industry. The main copyright industries of music, films and software were very vulnerable to counterfeits, and that in the branded goods sector, the biggest problem currently exists in clothing and footwear. Fragrances and cosmetics, 'luxury goods', motor car parts, industrial goods, aircraft parts, pharmaceuticals, food and drink and industrial chemicals also face problems. The scale of the problem varies across Europe with luxury goods more counterfeited in France and Italy, and industrial goods and car parts much more counterfeited in Germany. Counterfeit goods are often accompanied by notarised paperwork certifying the goods as genuine. However, the problem is that in a lot of European countries notaries (a) have no legal training and (b) there is no come-back to them at all.

## 2.3 Current Ukrainian regulation in the sphere of counterfeiting

### 2.3.1 Definitions in Ukrainian legislation

Currently Ukrainian legislation defines "counterfeiting" in different ways in different legislation which leads to internal conflicts and using compulsory standards as a reference in a way which is inconsistent with a market economy and member of the WTO.<sup>3</sup>

- Criminal code of Ukraine

Article 227. Issue or realization of poor quality products

Issue to the commodity market or other realization to the users of poor quality, that such, that does not comply with the set standards, to the norms, to the rules and technical terms, or incomplete products and commodities, if such actions are of a sizeable nature,

Article 229. Illegal use of sign for goods and services, firm name, definition of origin of the commodity

1. Illegal use of sign for goods and services, of the firm name, definition of origin of commodity, or other intentional violation of right to these objects, if it inflicted sizable material harm,

- Custom Code

Article 1.

"counterfeit commodities are commodities which contain the objects of right of intellectual ownership, the import of which on custom territory of Ukraine or export from this territory results in violation of rights for a proprietor, that are on the defensive in accordance with the current legislation of Ukraine and international agreements of Ukraine, concluded in the order set by a law;"

- Law of copyright

Article 1

Counterfeited copy of work, phonogram, video recordings are the copy of work, phonograms or video recordings, reproduced, published and (or) expandable with copyright and (or) contiguous rights infringement, including copies of the works protected in Ukraine,

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<sup>2</sup> Green Paper *Combating counterfeiting and piracy in the Single Market*, 1988

<sup>3</sup> As an interim measure only, the previous project commissioned by the Agrarian Committee of the Verhovna Rada, supported by the EBA agrochemical committee and financed by the EC suggested a definition for counterfeit pesticides "Counterfeit pesticides and agrochemicals – it is commodities, which do not correspond with approved requirements for pesticides and agrochemicals, including requirements on marketing and packaging, placing of information on products on its packaging and /or products, which contain registered trademark for commodities and services used without approval of its owner or with violations of rights of the owner of trademark."

phonograms and video recordings, that is brought in on custom territory of Ukraine without the consent of author or other author legal and (or) contiguous rights subject, in particular from countries, in which these works, phonograms and video recordings were never guarded or was left off to be guarded;

- Law of Ukraine "On the state adjusting of production and appeal of alcohol ethyl, a brandy and fruit, swizzles and tobacco wares" on December, 19, 1995 N 481/95-BP

Article 1.

falsification of tobacco wares - intentionally, with the mercenary purpose of making of tobacco wares with violation of technology either with the illegal use of sign for goods and services or by copying of form, packing, external registration, and similarly by the direct recreation of commodity of other businessman with the willful use of his name.

- Law of Ukraine on safety and quality of food products on December, 23, 1997 N 771/97-BP

Article 1

the counterfeit (international sanitary or veterinary) certificate is a certificate, which is not ratified to the use or given out with violation of the form set by the official organ of certification of country of exporter, or given out by the persons not empowered on it, and organizations, other subjects, or contains untruthful or unreliable information;<sup>4</sup>

Counterfeit medications are medications which are produced by producers, other than those declared in registration certification, intentionally wrong description in relation to an identity and/or name of producer. Both original and reproduced preparations can be counterfeit;

### **2.3.2 Current Ukrainian legislation**

The legislation relevant to this issue may be divided into two groups i) Counterfeiting – IP Protection and ii) Pesticides and Agrochemicals:

#### **i) Counterfeiting – IP protection**

##### 1) At the Border

###### i) Custom code

The Code contains definition "counterfeit commodity".

According to the article 1 point 10) counterfeit commodity – commodity, which contains objects of intellectual property rights, import to custom territory of Ukraine or export from the territory of the commodity entails violation of rights of owners, which are protected according to Ukrainian legislation and international agreements.

ii) Regulation on the procedure registration and passing state border of Ukraine commodities which contains objects of intellectual property, approved by Postanova<sup>5</sup> of Cabinet of Ministries of Ukraine April 28 2001 p. N 412 (with amendments)

The idea of the legislation is if a producer has registered trademark, he/she can refer to custom services to not allow trespass products with a trademark without special allowance of the owner.

##### 2) On Ukrainian Territory

###### Ministry of internal affairs

Main law regulating activity of MIA is Law of Ukraine "On militia" December 20, 1990 N 565-XII (with amendments). The law defines their competences and duties. (see 2.3.3)

###### State Custom Services

Main law is Custom code approved July 11 2002 N 92-IV (with amendments). The law defines their competences and duties.(see 2.3.3)

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<sup>4</sup> Article 1 of the edition was acting till Oct. 26 2005. the counterfeit food products are food products or food raw material, which with a mercenary purpose are given original appearance and/or separate properties of certain type of products

<sup>5</sup> Regulation

## Standards legislation - Derzhstandard<sup>6</sup>

Laws of Ukraine regulating activity:

- On standardization (with amendments made by Law of Ukraine "On standards, technical regulations and conformity assessment procedure")
- Decree of Cabinet of Ministries of Ukraine "On state control for performance of standards, norms and rules and responsibility for violations"
- On standards, technical regulations and conformity assessment procedure approved December 01 2005 (not enacted yet, while not published)
- On trademarks
- Criminal Code
- Code on administrative violations
- Regulation on State committee of Ukraine on technical regulations and consumer protection approved by Ukas<sup>7</sup> of President of Ukraine March 18, 2003 N 225/2003.

Responsibility of Derzhstandard according to the laws pointed above):

- to approve standards
- to provide supervision of the market
- to provide metrological control
- to provide consumer's protection
- to launch responsibility for violation of standards requirements

State department of intellectual property of Ukraine - Ministry of Education and Science. Legal foundation of the Department are intellectual property laws as follows:

- On protection of rights on inventions and useful models
- On protection of industrial models
- On protection rights on topographical integral chip
- On protection rights on trademarks for goods and services
- On protection of rights on origin marks
- On Distribution of Copies of Audiovisual Works, Phonograms, Video recordings, Computer Software, Databases
- Regulations on state inspector on intellectual property, approved by Postanova of Cabinet of Ministries 17 May 2002 N 674 (with amendments by Postanova March 24 2004 N 369)

State department of intellectual property of Ukraine - functions:

- registration of rights on intellectual property, keeping register of the intellectual property law
- registration of license agreements between owners and their partners
- control of fulfilment of intellectual property legislation.

State inspection on intellectual property can:

- provide control on usage of any intellectual property
- restrict activity of a legal entity in case of violation of requirements of intellectual property law;
- lunch administrative punishment.

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<sup>6</sup> State standards committee

<sup>7</sup> Order

## ii) Pesticides and agro chemicals

### Legislation on standardization:

- On standardization (with amendments made by Law of Ukraine "On standards, technical regulations and conformity assessment procedure")
- Decree of Cabinet of Ministries of Ukraine "On state control for performance of standards, norms and rules and responsibility for violations"
- On standards, technical regulations and conformity assessment procedure approved December 01 2005 (not enacted yet, while not published)
- On protection of rights on inventions and useful models
- On protection of industrial models
- On protection rights on topographical integral chip
- On protection rights on trademarks for goods and services
- On protection of rights on origin marks
- On Distribution of Copies of Audiovisual Works, Phonograms, Video recordings, Computer Software, Databases
- On defend of rights on plant varieties

### Criminal Code

- Code on administrative violations

### Legislation on pesticides:

- Law of Ukraine on pesticides and agrochemicals

This Law regulates official registration, production, procurement, transportation, storage, sales, and use of pesticides and agrochemicals in a manner safe for man and the environment, determining the rights and obligations of enterprises, institutions, organizations, and citizens, as well as powers vested in executive authorities and officials in this sphere.

### There are some sub law acts:

- Regulations on issuing allowance for import to Ukraine and usage of not registered pesticides and agrochemicals of foreign productions, approved by Postanova of Cabinet of Ministries of Ukraine March 4 1996 N 288;
- Regulations on state tests, state registration and re-registration of issuing of lists of pesticide and agrochemicals, allowed for usage in Ukraine, approved by Postanova of Cabinet of Ministries of Ukraine March 4 1996 N 295;
- Licensed conditions on providing business activity on production of pesticides and agrochemicals, wholesale and retail trade of pesticides and agrochemicals approved by the order of Derzhstandard and State committee of industrial policy of Ukraine February 22 2001 N 40/70
- Regulations on control of Licensed conditions business activity on on production of pesticides and agrochemicals, wholesale and retail trade of pesticides and agrochemicals approved by Order Derzhstandard and MAP March 18 2003 p., N 29/98;
- Regulation on providing state surveillance on requirements of legislation on pesticides and agrochemicals by bodies of MAP approved by Order of MAP August 6, 1996 p. N 239.

### The law on Plant Protection

The law regulates relation on plant protection of arable and other land, plantations and forests, trees, flora, products of plant origin from pest, disease and weeds, determines rights and duties of enterprises and organizations of all property rights, authority of all state bodies and officials



## Sub law acts

- Temporary regulation on state tests and registration of chemical, biological means of plant protection, fermons and regulators of rise and fertilizers in Ukraine, approved by the order of State inter-ministerial committee of Ukraine on issues of tests, and registration of means of plant protections and regulators of rise of plants and fertilizers June 15 1995 N 22

### 2.3.3 Institutional arrangements are currently as follows:

- Counterfeiting – IP protection

#### 1) At the Border (e.g. Customs)

State Custom Service may detain and provide check of commodities, transports, documents of natural persons which are passing through state border; provide fixation of violations of Custom rules.

Custom service may not allow passing through Ukrainian state border goods which are not corresponding to requirements of Ukrainian legislation.

#### 2) On Ukrainian Territory (e.g. Min Internal Affairs)

### Ministry of Internal Affairs

Main law regulating activity of MIA is Law of Ukraine "On militia" December 20, 1990

N 565-XII (with amendments). The law authorizes militia:

- to confiscate counterfeit products and commodities;
- to investigate crimes;
- to restrain people and legal entities from crimes and other illegal actions;
- to issue petition to legal and natural entities with requirement to restrain conditions and reasons of crimes and violations

### State Custom Services

Main law is Custom code approved July 11 2002 N 92-IV (with amendments). According to the Code the Custom service is authorized to:

- detain and provide check of commodities, transports, documents of natural persons which are passing through state border;
- investigate violations of Custom rules.

### State Department of Intellectual Property of Ukraine on Ministry of Education and Science

State Department functions are registration of rights on intellectual property, keeping register of the intellectual property law; registration of license agreements between owners and their partners; control of fulfilment of intellectual property legislation.

The Department has a State Inspection on Intellectual Property. The Inspection has the authority to provide control on usage of any intellectual property; to restrict activity of a legal entity in case of violation of requirements of intellectual property law; to lunch administrative punishment.

### Ministry of Agrarian Policy

Based on Regulations on control of Licensed conditions business activity on production of pesticides and agrochemicals, wholesale and retail trade of pesticides and agrochemicals approved by Order Derzhstandard and MAP March 18 2003 p., N 29/98 and Regulation on providing state surveillance on requirements of legislation on pesticides and agrochemicals by bodies of MAP approved by Order of MAP August 6, 1996 p. N 239.

The authority of the Ministry is:

- prohibit to provide work with pesticides and chemicals
- ban realization and usage of pesticides and agrochemicals etc

- to revoke license.

#### Ministry of Health Care

The ministry has authority to approve hygiene requirements for pesticides and agrochemicals and has power to provide control on following hygiene requirements

#### Ministry of environment

The ministry is responsible for environmental. It has an environment inspection. The inspection is authorized:

- to launch administrative responsibility for violation of requirements of environmental legislation;
- to control activity of business entity on following requirements of legislation in sphere of environment.
  - Pesticides and agro chemicals
- According to Ukrainian system of standardization (even with new amendments) standards can be approved by state or any other organization, but shall be registered by state.
- state register on intellectual property held by state
- state keeps register of pesticides (without registration is not possible to distribute it)
- state keeps hygiene register (MOH authority)

### **2.3.4 Key principles for establishing responsibility / liability in Ukrainian legislation**

#### Losses required for criminal responsibility

Ukrainian legislation provides for criminal responsibility for violation of intellectual property rights. (article 176 of Criminal Code). It contains provision: illegal intentional violation of intellectual property rights if it caused losses in "big amounts". Another part of the article contains criminal responsibility for "especially big amount".

Big amount – 3400,00 UAH.

Especially big amount – 17000,00 UAH

In case the amount of losses is lower than the big amount, no criminal responsibility, but rather only administrative responsibility can be imposed.

#### Administrative responsibility

Ukrainian legislation contains Administrative responsibility (Article 512 of the Code of administrative violations "Violation of rights on object of intellectual property rights"). Responsibility comes for unlawful usage of intellectual property. Penalty is 170-3400 UAH and confiscation of illegally produced commodities and equipment and materials which are intended for production.

#### Civil responsibility

Law of Ukraine on authors rights contains article 52 which deals with civil responsibility. According to the article if a person violates authors rights, author or other person suffered violation can do:

- require recognition and renewal their rights, including prohibit actions, which are violating rights or create threats of violation;
- sue to cover moral hazard or cover damage;
- to participate in inspection of industrial premises, storages, technological processes and business operation, related to production which are suspicious in line of not following legislation on authors protection rights;
- require in court publication in mass media information on violation of authors rights and court decisions on violations;

- require from the persons who are violating authors rights to provide information on the third parties, who are involved in production of counterfeit products on the channels of their distribution etc.

The court has rights to issue a decision and put on the person who breaches the law a penalty of 10% of the sum was awarded to the owner of intellectual property rights. The sum of the penalty shall be paid to the state budget. Court may impose confiscation of all of the counterfeit products and the gains of the counterfeit products.

### **2.3.5 Currently proposed changes in legislation and institutional arrangements**

One of the draft laws currently being considered is to approve a Decision of the council of Heads of Governments of CIS countries on Rules of custom control on the state border of the commodities which contain intellectual property objects.

More than 20 drafts on intellectual property issues were initiated in parliament in period 2003 till present and not approved yet. Amendments to the regulation of enforcement of IP rights at the border is currently being prepared and is due to be considered shortly.

## **3 WTO-TRIPS framework:**

### **3.1 General**

The WTO TRIPS Agreement is an attempt to narrow the gaps in the way IP rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it strikes a balance between the long term benefits and possible short term costs to society. Governments are allowed to reduce any short term costs through various exceptions, for example to tackle public health problems. And, when there are trade disputes over intellectual property rights, the WTO dispute settlement system is now available.

The agreement covers five broad issues:

- how basic principles of the trading system and other international intellectual property agreements should be applied
- how to give adequate protection to intellectual property rights
- how countries should enforce those rights adequately in their own territories
- how to settle disputes on intellectual property between members of the WTO
- special transitional arrangements during the period when the new system is being introduced.

The purpose is to ensure that adequate standards of protection exist in all member countries. The starting point is the obligations of the main international agreements of the World Intellectual Property Organization (WIPO) that already existed before the WTO was created and its two key agreements:

- the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc)
- the Berne Convention for the Protection of Literary and Artistic Works (copyright).

For the purposes of this analysis the protection of Trade Marks and Patents are the most relevant aspects.

### **3.2 How is the TRIPS agreement relevant to the issue of combating counterfeit pesticides in Ukraine?**

On the assumption that Ukraine will soon assume all the obligations of WTO membership, the minimum limits of protection prescribed by the agreements should be observed as well as the trade intervention limitations when considering legislative change options e.g. it is not acceptable to consider:

- I) a measure which removes the right of suspension of release by Customs Authorities of goods (e.g. pesticides) suspected of being counterfeit or pirated.
- II) a measure which bans imports of all pesticides or raw materials for making pesticides from a particular country.

The reasons are as follows:

- I) contravenes Article 51 of the TRIPS agreement which requires all members to provide for suspension of release by customs authorities in appropriate circumstances - i.e. the minimum level of protection.
- II) contravenes the key WTO principles of *national treatment* (treating one's own nationals and foreigners equally), and *most-favoured-nation treatment* (equal treatment for nationals of all trading partners in the WTO) - i.e. the maximum level of trade interference.

All measures (regulatory and institutional change) to address the counterfeit pesticides issue, must take into consideration the future WTO obligations of SPS and TBT (notifications etc) and TRIPS. Using EU or MS models for such measures will provide a good reference point for compliance with the above agreements.

## **4 Institutional and regulatory arrangements at the EU and Member State level**

### **4.1 EU Regulation - Specific to agrochemicals**

Plant protection products:

- Placing on the market of Plant Protection Products (Directive 91/414/EEC) 'The Authorisations Directive', was adopted by the Council of Ministers on 15 July 1991 and published on 19 August 1991 (OJ L230, ISSN 0378 6978). It came into force on 26 July 1993

The main elements of the key directive are as follows:

1. To harmonise the overall arrangements for authorisation of plant protection products within the European Union. This is achieved by harmonising the process for considering the safety of active substances at a European Community level by establishing agreed criteria for considering the safety of those products. Product authorisation remains the responsibility of individual Member States
2. The Directive provides for the establishment of a positive list of active substances that have been shown to be without unacceptable risk to people or the environment
3. Active substances are added to Annex I of the Directive as existing active substances are reviewed (under the European Commission (EC) Review Programme) and new ones authorised.
4. Member States can only authorise the marketing and use of plant protection products after an active substance is listed in Annex I, except where transitional arrangements apply.
  - Restrictions of marketing and use of certain plant protection products (Directive 79/117/EEC)
  - Sustainable use of plant protection products

Biocidal products:

- Placing on the market of biocidal products (Directive 98/8/EC)

The key principles of this key directive are as follows:

Active substances have to be assessed and the decision on their inclusion into Annex I of the Directive shall be taken at Community level.

Comparative assessment will be made at the Community level when an active substance, although in principle acceptable, still causes concern. Inclusion to Annex I may be denied if there are less harmful, suitable substitutes available for the same purpose.

Member States shall authorise the biocidal products in accordance with the rules and procedures set in Annex VI of the Directive. They can only authorise products which contain active substances included in Annex I .

The producers and formulators responsible for the placing of the market of the biocidal products and their active substances must apply for authorisation and submit all necessary studies and other information needed for the assessments and the decision making.

A biocidal product authorised in one Member State shall be authorised upon application also in other Member State unless there are specific grounds to derogate from this principle of mutual recognition .

- Restrictions of marketing and use of certain chemicals (Directive 76/769/EEC)

Agrochemical Registration system

The EU system is based upon a two-tier registration system. Active ingredients are assessed at Community level for inclusion on a positive list (known as Annex 1). Products containing chemicals listed on Annex 1 must then be assessed and registered by Member states. These assessments need only consider areas relevant to the products that were not covered in the assessment for Annex 1 inclusion.

## 4.2 EU Regulation - Specific to Counterfeiting and IP protection

### 4.2.1 Key definitions

In October 1998 the European Commission produced a Green Paper *Combating counterfeiting and piracy in the Single Market*, the main aim of which was to gather information. The green paper attempted to clarify certain definitions and concepts – e.g.

(a) 'counterfeit goods', namely:

(i) goods, including packaging, bearing without authorisation a trademark identical to the trademark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the trademark-holder's rights under Community law, as provided for by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark (4) or the law of the Member State in which the application for action by the customs authorities is made;

(ii) any trademark symbol (including a logo, label, sticker, brochure, instructions for use or guarantee document bearing such a symbol), even if presented separately, on the same conditions as the goods referred to in point (i);

(iii) packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods referred to in point (i);

(b) 'pirated goods', namely goods which are or contain copies made without the consent of the holder of a copyright or related right or design right, regardless of whether it is registered in national law, or of a person authorised by the right-holder in the country of production in cases where the making of those copies would constitute an infringement of that right under Council Regulation (EC) No 6/ 2002 of 12 December 2001 on Community designs (5) or the law of the Member State in which the application for customs action is made;

(c) goods which, in the Member State in which the application for customs action is made, infringe:

(i) a patent under that Member State's law;

- (ii) a supplementary protection certificate of the kind provided for in Council Regulation (EEC) No 1768/ 92 (1) or Regulation (EC) No 1610/96 of the European Parliament and of the Council (2);
- (iii) a national plant variety right under the law of that Member State or a Community plant variety right of the kind provided for in Council Regulation (EC) No 2100/94 (3);
- (iv) designations of origin or geographical indications under the law of that Member State or Council Regulations (EEC) No 2081/92 (4) and (EC) No 1493/1999 (5);
- (v) geographical designations of the kind provided for in Council Regulation (EEC) No 1576/89 (6).

#### **4.2.2 The key piece of legislation at EU level is the recent regulation harmonising measure on countering IP infringements**

COUNCIL REGULATION (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

##### **Summary of the Regulation:**

- extends the scope of the former Regulation<sup>8</sup> to cover more intellectual property rights such as plant variety rights, geographical indications, designations of origin:
- improves the quality of the information provided by the owner of the rights to the customs services when a request is made for action. In addition the period of validity and the form of requests have been standardised and the use of computer links to make requests is encouraged:
- abolishes fees and guarantees so as to help small and medium sized enterprises (SMEs) to use the system without incurring costs. The idea of guarantees is replaced by having the owner of the rights enter into an agreement to pay instead:
- extends the scope of the "*ex officio*" procedure; which allows the customs authorities to react without a prior application for action. The use of this possibility has been considerably extended; which should be of particular benefit to SMEs:
- increases the quality and amount of information given by customs to intellectual property right holders.
- allows samples to be given to the owners of the intellectual property rights; but only for analysis in order to be able to pursue the procedure:
- ends the need for the owner of the intellectual property right to take an action on the merits of the case before being able to have the goods destroyed with the agreement of the holder of the goods or the person who declared the goods to customs; this should reduce the costs involved in some cases:
- allows for checks on of travellers to make sure that the use of couriers or 'mules' does not conceal a large flow of goods; in current legislation this kind of import, providing it falls imports within the limits set out for granting customs duty free allowances, falls outside the scope of the law. This is an important change for the owners of the rights concerned.

This Regulation provides for the Members States to provide for penalties in National Legislation which must be "***effective, proportionate, and dissuasive***" i.e. the measures should be sufficiently restrictive to make the risk of undertaking the unlawful activity dissuasively high but no more than absolutely necessary to achieve this policy goal.

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<sup>8</sup> Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods

### 4.3 Members state level

To see how the EU law is implemented at the MS level, the relevant UK legislation will be presented and analysed.

The UK example will be taken as it provides a model of how NGO voluntary industry standard-setting can develop into a legislative and institutional system.

#### 4.3.1 UK legislation on pesticides

- Food and Environment Protection Act 1985 (FEPA)
- The Control of Pesticides Regulations 1986 (as amended 1997 by The 1986 Regulations COPR (Amendment) Regulations 1997 (SI 1997/188))
- Plant Protection Products Regulations (PPPR). PPPR is the newer legislation and implements a European Directive (91/414/EEC) which regulates 'Plant Protection Products', these include agricultural pesticides and growth regulators.

#### 4.3.2 Responsibility for enforcing law

The Pesticides Safety Directorate (PSD) is an Executive Agency of the Department for Environment, Food and Rural Affairs (Defra) and is responsible for agricultural pesticides, most non-agricultural pesticides are the responsibility of Health and Safety Executive (HSE)

#### 4.3.3 UK Legislation to prevent or combat counterfeiting

**The key Principle to IP rights enforcement:**

*The best protection is provided by rights holders bringing actions through customs authorities*

#### 4.3.4 Definitions and clarifications of terminology

**The four main types of IP are:**

- patents for inventions - new and improved products and processes that are capable of industrial application
- trade marks for brand identity - of goods and services allowing distinctions to be made between different traders
- designs for product appearance - of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product itself or its ornamentation;
- copyright for material - literary and artistic material, music, films, sound recordings and broadcasts, including software and multimedia

#### **Proposed definition of "counterfeit"**

The Anti-Counterfeiting Group (ACG)<sup>9</sup> broadly campaigns on the definition of "the deliberate cheating of consumers by manufacturers, distributors and retailers who reproduce well known trade marks, packaging and product configuration to market goods that look identical to those produced by reputable brand owners".

UK legislation uses a number of mechanisms to enforce proprietors rights and for deterring rights abusers. Using both the civil system and the criminal system the risks for rights abusers are made too high for them to be a viable business proposition.

This means that the civil mechanisms are sufficiently effective and efficient to ensure that rights holders are willing and able to use them to prevent their rights being abused or obtaining compensation when the rights have been irrevocably breached. Compensation recovered is sufficient to make it worth the owners pursuing it and to dissuade the abusers from attempting it.

The criminal mechanisms are also effective enough to deter the abusers – the risks of getting caught and the consequent punishment act as an effective deterrent.

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<sup>9</sup> Eighth report - Select Committee on Trade and Industry Eighth Report of the UK parliament

The first piece of legislation makes it unlawful to describe something inaccurately. This would include e.g. labelling a pesticide with the name of a manufacturer not involved in the manufacture of this product or making claims about its efficacy which are unjustified.

#### 4.3.5 Key UK Laws to prevent or combat counterfeiting

##### Trade descriptions act 1968

- Prohibits the misdescription on the supply of goods.
- Prohibits false claims for services, accommodation and facilities.

##### What are the offences under the Act (relating to goods)?

The Act makes it an offence to:

- apply a false or misleading description to goods (e.g. by writing it down, making a verbal statement or by turning back a car's odometer); or
- supply or offer to supply goods to which a false or misleading trade description is applied. A person exposing goods for supply (e.g. in a shop) or having them in his possession for supply (e.g. in a storeroom) is deemed to offer to supply them for the purposes of the Act.

These offences are **strict liability** offences, i.e. it is possible for a trader to commit an offence without intending to do so.

##### What descriptions of goods are deemed to be trade descriptions?

- Person by whom manufactured, produced, processed or reconditioned. This would include such things as brand names on an item.

The second key piece of legislation protects trade marks:

##### Trade marks act 1994

Controls on fraudulent application of use of a trademark

1. - (1) In this Act a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging

A person commits an offence who with a view to gain<sup>10</sup> for himself or another, or with intent to cause loss to another, and without the consent of the proprietor-

(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for a registered trade mark, or

(b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or

(c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b) or makes packaging or copy machines.

(5) It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.

(6) A person guilty of an offence under this section is liable-

(a) on summary conviction<sup>11</sup> to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum<sup>12</sup>, or both;

<sup>10</sup> NB no requirement for actual loss. C.f. Ukrainian legislation.

<sup>11</sup> A summary conviction is for an offence which can be tried without an indictment. In practice, this often means a trial without a jury (i.e. by a magistrates court), jury trials being reserved for indictable offences.

<sup>12</sup> £ 5000-00 (five thousand pounds – approx 7300 euro)



(b) on conviction on indictment<sup>13</sup> to a fine or imprisonment for a term not exceeding ten years, or both.

#### **4.3.6 Responsibility for enforcing law**

Due to their geographical location along national borders, as well as their detailed knowledge of international trading routes, customs administrations play an essential role in protecting the EU market.

#### **4.4. Role of producers and consumers and NGOs**

In the UK and at the EU level there is a general policy of transferring primary responsibility and enforcement away from state. In essence, whilst the state has an interest in ensuring that counterfeit products do not come onto the market, the interest of the consumer and the producer are even higher and therefore they should be prepared to take a proportion of the responsibility. This is reflected in the important role played by producer and consumer associations in both the regulatory and representative spheres.

##### **4.4.1 Non-government Institutional framework**

The key UK NGO in this sphere is BASIS 'British Agrochemical Standards Inspection Scheme'

In the 1980's the 'British Agrochemical Standards Inspection Scheme' (BASIS) was one of the worlds first voluntary standard setters for pesticide suppliers.

BASIS standards and certification are now recognised under the **Control of Pesticides Regulations 1986**; the BASIS Storekeeper and Field Sales and Technical Staff certificates are now required, by law, by all those involved in the storage, sale and supply of pesticides.

The BASIS Registration Board consists of representatives of all trade associations with pesticide interests such as the Crop Protection Association (CPA), National Association of Agricultural Contractors (NAAC), National Farmers' Union (NFU), Agricultural Industries Confederation (AIC), Association of Independent Crop Consultants (AICC) and County Council representatives. The Board also has members elected by distributors as well as representatives of both DEFRA and HSE as observers. It is headed by an independent Chairman.

#### **4.5 Regulating access to agrochemicals**

Only approved suppliers have the right to sell agrochemicals i.e. no resale by farmers is permitted. All suppliers must be approved by BASIS and suppliers will not be approved unless they can demonstrate that they have adequate storage facilities. Transportation of agrochemicals is only permitted by approved transportation and therefore all agrochemicals are sold with transportation included.

In order to be approved for storage, advising on usage, spraying, individuals must undertake approved training and pass exams.

#### **4.6 Record Keeping**

##### **4.6 1 Storage**

Both supplier and consumer must keep accurate records of purchase and sale of agrochemicals including what was bought, when, and what remains stored.

##### **4.6.2 Application (putting onto the land)**

Storage records must be reconciled with the records kept on application.

Farmers are required to keep records on a field by field basis<sup>14</sup> – including quantity, date and time, details of chemical, weather conditions in a set form. The sprayer operator maintains a record of his own.

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<sup>13</sup> Conviction on indictment - indictable offence is an offence which can only be tried on an indictment after a preliminary hearing or by a jury

<sup>14</sup> Form in annex

In this way there is almost complete traceability<sup>15</sup> of all agrochemicals. This prevents unauthorised resale which in turn makes sale and purchase of counterfeits practically impossible.

## **4.7 Codes of practice**

In order to make compliance with the regulations easier, guidance is provided by PSD for farmers and suppliers - Code of Practice for the Safe Use Of Pesticides On Farms and Holdings ("Green Code")<sup>16</sup> and Code of practice for suppliers of pesticides to agriculture, horticulture and forestry ("Yellow Code")<sup>17</sup>

### **4.7.1 Green code**

204. Keep records in any convenient way. But make sure that they can be completed easily and without error, and that they can be quickly consulted and understood.

205. Records can be handwritten in a book (preferably not a loose-leaf binder where pages can be lost) or on computer. A suggested format for an adequate log book is given in Table 7.(see annex 3)

If you think that an alternative format to the one shown in this Code would be better in your case, consult your adviser or pesticide supplier. It is recommended that records are kept for at least three years.

206. If an enquirer suggests that they may have been affected by a pesticide used on the farm or holding, it is most important to give them or their advisers full and accurate information without delay. That means the full name of the product, including prefixes or suffixes, and any other information which may be needed for the treatment of people or animals, or for a decision to be taken on whether crops will be safe to eat.

207. So that information is readily accessible, records should be kept on the farm or holding

### **4.7.2 Yellow code:**

#### **1.1 Stock Control**

Records should include details of:

- (a) all movements of stock in and out of the store, including sales;
- (b) the date of manufacture or delivery, so that the oldest stock is supplied first.

### **4.7.3 Status of codes of good practice**

Whilst non-compliance with the codes does not in itself constitute an offence, it can be used as evidence in a prosecution for contravention of the relevant legislation.

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<sup>15</sup> Whilst the term traceability is normally applied to the whole system of inputs into the food chain, it is logical to apply it to the individual inputs as well i.e. each link in the chain knows and records who he bought from and who he sold it to thus ensuring an intact paper trail.

<sup>16</sup> [http://www.pesticides.gov.uk/uploadedfiles/Web\\_Assets/PSD/Green\\_Code\\_intro.pdf](http://www.pesticides.gov.uk/uploadedfiles/Web_Assets/PSD/Green_Code_intro.pdf)

PSD has recently issued a consultation paper, the Draft Code of Practice for the Safe Use of Plant Protection Products. This new Code is intended to provide practical guidance to professional pesticide users on how to use pesticides safely under the existing legislation. It will replace the 'Green Code'.

<sup>17</sup> [http://www.pesticides.gov.uk/uploadedfiles/Web\\_Assets/PSD/yellow\\_code.pdf](http://www.pesticides.gov.uk/uploadedfiles/Web_Assets/PSD/yellow_code.pdf)

## **5 Needs and impact analysis**

### **5.1 What are the key elements of a successful legislative and institutional structure for combating counterfeit goods?**

From the above presentation of EU and EU MS legislation and institutional arrangements it is evident that the following elements are key for a successful system to combat counterfeiting of agrochemicals within the framework of WTO TRIPS and other international obligations:

5.1.1 A clear and harmonised definition of what constitutes counterfeiting

5.1.2 Clear allocation of primary and secondary responsibility with coordination and communication mechanisms provided by law i.e. Prime responsibility on rights holders with provision for adequate mutual technical and material support as well as ex officio initiatives.

5.1.3 Legislative and institutional provision for and enforcement of record keeping to ensure traceability of all agrochemicals.

5.1.4 Legislation which provides the rights owners and the enforcement bodies with a number of avenues for proceedings and which facilitates prosecution and punishes offenders in such a way as raise the level of risk and the awareness of the risk of transgression to deter repetition or first offences.

5.1.5 A well informed consumer – both on how to identify counterfeits and the risks both financial and criminal of buying counterfeits – supported by NGO's.

### **5.2 Where are the major deficiencies in the Ukrainian legislative and institutional arrangements?**

5.2.1 Currently there are inconsistent definitions of counterfeiting throughout Ukrainian legislation. Many definitions still refer to compulsory state standards as their reference point. As the system of standards is changed in line with WTO requirements the reference point will be lost and the legislation will become ineffective.

5.2.2 There are a number of bodies involved in enforcement of IP rights and combating counterfeiting. Their efforts are insufficiently coordinated and communication channels and shared information mechanisms are inadequate.

5.2.3 Whilst there are limited record keeping requirements in current law ORDER state account of presence and use of pesticides and agrochemicals (see annex 3) they are incomplete and are not enforced.

5.2.4 Whilst progress is being made in investigating counterfeiting<sup>18</sup>, the number of successful prosecutions indicates that there are still weaknesses in the laws which allow defendants to escape consequences of their actions.

5.2.5 The level of knowledge of the consumer on identifying counterfeits and the awareness of the consumer of the consequences of buying counterfeits is low despite a very successful awareness raising campaign in the previously mentioned Bistro project.

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<sup>18</sup> A huge increase in the number of criminal cases under paragraph 229 of the Criminal Code – unlawful trade mark use. In 2005 - 50 (of which 21 concerning agrochemicals) 2004 - 3 and 2003 - 1. Source Ministry of Internal Affairs.

## 6 Recommendations and policy implications

### 6.1 What activities to be undertaken by whom?

- **Regulatory and legislative change**

**Activity** - Harmonisation of the definition of counterfeiting in the various spheres of legislation

**Responsibility** – All key stakeholders including producers and NGO's

**Activity** – Clarification of realistic record keeping requirements and provision for enforcement

**Responsibility** - Plant protection services

**Activity** – Consideration of clarifying the primary responsibility of the rights holder and the introduction of appropriate mechanisms for initiating actions.

**Activity** – Consideration of removal of requirement to prove "loss" in criminal IP responsibility

**Activity** – Consideration of gradual introduction of strict liability for possession of counterfeit agro chemicals

**Activity** – Consideration of use of using trade descriptions and other non IP legislation<sup>19</sup> as back-up or alternative for IP legislation<sup>20</sup>.

**Responsibility**– Law enforcement bodies.

**Resources for the above** Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC<sup>21</sup> project.

- **Institutional change**

**Activity** – Clarification of coordination role in combating counterfeiting and mechanism for coordinating joint approach, communication and data sharing.

**Responsibility and resources** – All key stakeholders at ministerial level. Minimum of resources required but political will and willingness of stakeholders to participate a prerequisite.

**Activity** – Provision of institutional resources for enforcement of record keeping requirements

**Responsibility and resources** – Plant protection services. The thorough checking of record keeping would require huge resources but ad hoc checks and an information campaign would minimise resource requirements. The increased role of the NGO sector in voluntary standards would assist greatly in this process.

**Activity** – Building on the results of the very successful awareness campaign undertaken by the previously mentioned Bistro project, information campaigns should be conducted at all points of purchase of agrochemicals and aimed at all participants in this activity, providing information on;

i) How to identify genuine products from counterfeits and what to do if counterfeits are discovered – (e.g. telephone hotline)

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<sup>19</sup> **Criminal code of Ukraine** Article 225. Deception of buyers and customers 1. Intentional false measure, false weight, shortchanging or other deception of buyers or customers during realization of commodities or grant of services, if these actions are accomplished in considerable sizes **Code of administrative violations** Article 170 and 170-1 Introduction to the circulation of products, in relation to which no certificate of accordance or certificate about confession is accordance or declarations about accordance, and also illegal application of national sign of accordance Article 83-1. Violation of legislation about protection of plants

<sup>20</sup> Bearing of course in mind the changes in standards law required for WTO conformity.

<sup>21</sup> Ukrainian European Policy and Legal Advice Centre – Tacis 2003

- ii) The potential commercial and other losses of using ineffective or dangerous counterfeits
- iii) The administrative and criminal sanctions of dealing with counterfeits

**Responsibility and resources** – the producers, the state enforcements bodies and NGO's. The producers should be encourage to bear the main burden of an increased information campaign on the basis of long term reduction of losses through counterfeits. This combined with the advertising and positive publicity should ensure that producers and their representatives will be prepared to co-finance such campaigns.

## 6.2 The expected impact of such measures

- The harmonisation of the definition of counterfeiting will ensure that all agencies are pursuing the same objective and that opportunities for avoiding culpability will be reduced. Harmonisation with EU definitions in line with WTO TRIPS ensures compatibility for cooperation efforts and compliance with international obligations.
- Clarification of the primary role of the rights holder in enforcement of IP rights and the provision of appropriate inexpensive and simple mechanisms for their participation ensures that the state has a valuable and well resourced partner in the battle and allows the state to focus on activities which are most suited to its resources and allowing the rights holder to fulfil a more complete role in this process which is after all very much in his interests.
- Requiring and enforcing record keeping will ensure traceability of agrochemicals. This will restrict the possibilities for resale of genuine agrochemicals and therefore make sales of counterfeit pesticides more easily detectable
- The gradual introduction of strict liability will reduce the evidence requirements for prosecutions and will make it an offence to possess counterfeits whether knowingly or not. This will be legitimate because the record keeping measures will make it obvious to all purchasers that they are buying counterfeits.
- Removing the requirement of loss will reduce the evidence requirements of the enforcement agencies which will make prosecutions less easy to avoid<sup>22</sup>. The crime is the theft (unauthorised use) of the IP or the intent to defraud and this is already committed when goods are offered for sale.<sup>23</sup>
- Introducing the trades description and other non-IP avenues of prosecution for counterfeiting, provides a back-up or alternative to IP rights protection as it is generally easier to prove and does not require involvement of the rights holder. It also enlists the assistance of another key agency in this battle namely the consumer protection bodies.
- A well informed consumer is a useful source of information for the enforcement bodies and the rights holders. A well informed consumer may also justifiably be considered to know when he is buying a counterfeit and may therefore be subjected to strict liability.

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<sup>22</sup> This has already been demonstrated by the increase in the number of prosecutions for counterfeit compact discs where the threshold for loss has recently been reduced. Source Ministry of Internal Affairs.

<sup>23</sup> See UK "Trades Description" legislation

## Annex 1

### Summary table of recommendations, actions and proposed impact

Major deficiencies in the Ukrainian legislative and institutional arrangements	Recommendations - What activities to be undertaken and by whom?	Expected impact of such measures
<p>1) Currently there are inconsistent definitions of counterfeiting throughout Ukrainian legislation. Many definitions still refer to compulsory state standards as their reference point. As the system of standards is changed in line with WTO requirements the reference point will be lost and the legislation will become ineffective.</p>	<p><b>Regulatory and legislative change</b>  <i>Activity</i> - Harmonisation of the definition of counterfeiting  <i>Responsibility and resources</i> - Law making and enforcement bodies. Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC project. All key stakeholders including producers and NGO's should be consulted.</p>	<p>The harmonisation of the definition of counterfeiting will ensure that all agencies are pursuing the same objective and that opportunities for avoiding culpability will be reduced. Harmonisation with EU definitions in line with WTO TRIPS ensures compatibility for cooperation efforts, trade purposes and compliance with international obligations.</p>
<p>2) There are a number of bodies involved in enforcement of IP rights and combating counterfeiting. Their efforts are uncoordinated and communication channels and shared information mechanisms are inadequate</p>	<p><b>Regulatory and legislative change</b>  <i>Activity</i> - Consideration of clarifying the primary responsibility of the rights holder and the introduction of appropriate mechanisms for initiating and coordinating actions.  <i>Responsibility and resources</i> - Law making and enforcement bodies. Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC project. All key stakeholders including producers and NGO's should be consulted.</p> <p><b>Institutional change</b>  <i>Activity</i> - Clarification of coordination role in combating counterfeiting and mechanism for coordinating joint approach, communication and data sharing.  <i>Responsibility and resources</i> - All key stakeholders at ministerial level. Minimum of resources required but political will and willingness of stakeholders to participate a prerequisite.</p>	<p>Clarification of the primary role of the rights holder in enforcement of IP rights and the provision of appropriate inexpensive and simple mechanisms for their participation ensures that the state has a valuable and well resourced partner in the battle. This allows the state to focus on activities which are most suited to its resources and allows the rights holder to fulfil a more complete role in this process which is after all very much in his interests.</p>

3) Whilst there are limited record keeping requirements in current law they are incomplete and are not enforced.	<b>Regulatory and legislative change</b> <i>Activity</i> – Clarification of realistic record keeping requirements and provision for enforcement	Requiring and enforcing record keeping will ensure traceability of agrochemicals. This will restrict the possibilities for resale of genuine agrochemicals and therefore make sales of counterfeit pesticides more easily detectable.
	<b>Institutional change</b> <i>Activity</i> – Provision of institutional resources for enforcement of record keeping requirements <i>Responsibility and resources</i> – Plant protection services. The thorough checking of record keeping would require huge resources but ad hoc checks and an information campaign would minimise resource requirements. The increased role of the private sector in voluntary standards would assist greatly in this process.	
4) Whilst progress is being made in investigating counterfeiting, the number of successful prosecutions indicates that there are still weaknesses in the laws which allow defendants to escape consequences of their actions.	<b>Regulatory and legislative change</b> <i>Activity</i> – Consideration of removal of requirement to prove “loss” in criminal IP responsibility <i>Responsibility and resources</i> – Law enforcement bodies. Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC project.. All key stakeholders including producers and NGO’s should be consulted.	Removing the requirement of loss will reduce the evidence requirements of the enforcement agencies which will make prosecutions less easy to avoid. The crime is the theft (unauthorised use) of the IP or the intent to defraud and this is already committed when goods are offered for sale.
	<b>Regulatory and legislative change</b> <i>Activity</i> – Consideration of gradual introduction of strict liability for possession of counterfeit agro chemicals <i>Responsibility and resources</i> – Law enforcement bodies. Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC project.. All key stakeholders including producers and NGO’s should be consulted.	The gradual introduction of strict liability will reduce the evidence requirements for prosecutions and will make it an offence to possess counterfeits whether knowingly or not. This will be legitimate because the record keeping measures will make it obvious to all purchasers that they are buying counterfeits.

<p>5) The level of knowledge of the consumer on identifying counterfeits and the awareness of the consumer of the consequences of buying counterfeits is low.</p>	<p><b>Regulatory and legislative change</b>  <b>Activity</b> – Consideration of using trade descriptions and other non IP legislation as back-up or alternative for IP legislation.  <b>Responsibility and resources</b> – Law enforcement bodies. Law drafting processes are undertaken as part of normal legislative processes and do not in themselves require additional resources. Consultation on technical issues may be undertaken as part of bilateral or EC donor activities e.g. the proposed UEPLAC project.. All key stakeholders including producers and NGO’s should be consulted.</p>	<p>Introducing the trades description avenue of prosecution, provides a back up or alternative to IP enforcement as it is generally easier to prove and does not require involvement of the rights holder. It also enlists the assistance of another key agency in this battle namely the consumer protection bodies</p>
	<p><b>Institutional change</b>  <b>Activity</b> – Building on the results of the very successful awareness campaign undertaken by the previously mentioned Bistro project, information campaigns should be conducted at all points of purchase of agrochemicals and aimed at all participants in this activity, providing information on;  i) How to identify genuine products from counterfeits and what to do if counterfeits are discovered  ii) The potential commercial losses of using ineffective or dangerous counterfeits  iii) The administrative and criminal sanctions of dealing with counterfeits  <b>Responsibility and resources</b> – the producers, the state enforcements bodes and NGO’s. The producers should be encouraged to bear the main burden of an increased information campaign on the basis of long term reduction of losses through counterfeits. This combined with the advertising and positive publicity should ensure that producers and their representatives will be prepared to co-finance such campaigns</p>	<p>A well informed consumer is a useful source of information for the enforcement bodes and the rights holders. A well informed consumer may also justifiably be considered to know when he is buying a counterfeit and may therefore be subjected to strict liability</p>



## Annex 2

**Legal component results of the project "Combating Counterfeit Plant Protection Products - Bistro Project Number:2004/84-670". commissioned by the Agrarian Committee of the Verhovna Rada, supported by the EBA agrochemical committee and financed by the EC**

### *Findings*

1 Neither supply nor demand issues are currently being addressed adequately by Ukrainian legislation or institutions.

#### *1.2 Supply*

Currently the risks for the counterfeiters and handlers are minimal due to the low chance of getting caught, the opportunities of circumventing and utilising the weaknesses in the law and the relatively low financial and other sanctions.

#### *1.3 Demand*

There is sufficient demand to justify the supply as there the real risks of litigation are minimal and the potential risks of commercial damage to the farmer are either not understood or are underestimated.

2 The problems of counterfeit pesticide are not unique to the agrochemical sector but are generic to the business of counterfeiting and organised crime in general.

### *Conclusions*

1) Measures to address the problems should seek to tackle both the demand and supply side where possible.

2) Whilst some interim measures may be taken to specifically address the issues in the counterfeit pesticide sector, the long term solution will require a wider approach.

### *Recommendations*

1) Consider the institutional and legislative mechanisms used within the EU which practically undermine the demand and therefore the supply of counterfeit pesticides.

2) To consider requesting support to address the wider issues required to tackle this problem as a whole bearing in mind WTO TRIPS and EU experience.

3) To undertake limited interim measures e.g. raising the level of the fine. (see Bistro project report)

## Annex 3

### **Format for records of pesticide treatments from Green Code (UK)**

(Code of Practice for the Safe Use Of Pesticides On Farms and Holdings)

- Name of operator
- Date
- Site of application
- Crop, material or structure to be treated
- Reason for treatment
- Product used
- Dilution and application rate
- Hours pesticides used
- Weather conditions
- Other relevant information

### **Record keeping requirements in Ukrainian legislation**

#### **ORDER state account of presence and use of pesticides and agrochemicals – from November, 2, 1995 N 881**

ORDER state account of presence and use of pesticides and agrochemicals:

1. This Order determines the requirements in relation to the account of presence and use of pesticides and agrochemicals, volumes of accounting through this question.

2. The account of presence and use of pesticides and agrochemicals is conducted by enterprises, establishments, organizations in a record where is marked:

- name of pesticide, agrochemicals
- date of receipt and date of the use or realization;
- name of document, after which acted, used, realized pesticide, agrochemicals
- weight of present pesticide, agrochemicals (kilograms, tons);
- remainder of pesticide, agrochemicals after the use, realization (kilograms, tons).

A record is kept at the proprietor of pesticides, agrochemicals

Enterprises, establishments, organizations register also the use of pesticides after their having a special purpose setting.

3. At the end of year proprietors make an inventory of pesticides and agrochemicals.

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Date:15.01.06