



TRADEMARK
PROTECTION
in UKRAINE

A black billiard ball with a white circular sticker on its surface. The sticker contains the letters 'TM' in a bold, black, sans-serif font. The ball is positioned on a green felt surface, and other colorful billiard balls are visible in the background, slightly out of focus.

TM

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1

General legal framework

The basic principles and general regulation of trademarks ownership, right and duties of trademarks owners are specified in the Law of Ukraine “On Protection of Rights to Marks for Goods and Services” (hereinafter referred to as “the Law”)¹.

In addition to the provisions of the Law, some, mainly procedural, aspects of trademark registration are included in the Rules on Drafting, Filing and Examination of an Application for the Certificate of Ukraine on a Trademark for Goods and Services (hereinafter referred to as “the Rules”).

The Rules are quite a large document which provides detailed guidance on how to file application for a trademark, including requirements for the application, supporting documents, amendment of the application, appointment of representatives, communication with the IP Service, etc. Overall, the Rules are outdated and do not correspond to the best international standards and best practices.

¹ Please note that the information contained in this brochure is valid as of 1 October 2016 and does not constitute legal advice or consultation in any form, but provides some general overview of the applicable legislative framework regarding trademarks in Ukraine. If any information, data or issues covered in this brochure require additional clarification, please do not hesitate to contact lawyers at DLF attorneys-at-law, who will be glad to provide you with specific and detailed advice for your case.

2

Trademark registration process

2.1. Application for trademark registration

Trademark registration in Ukraine is conducted by the State Intellectual Property Service of Ukraine (hereinafter referred to as "IP Service"). However, recently it was announced that the IP Service will be liquidated and its functions will be fully transferred to the Ministry of Economic Development and Trade of Ukraine. Nevertheless, during the unspecified period of time (until the relevant procedural guidance is adopted by the Ministry of Economic Development and Trade of Ukraine), the IP Service will continue to perform its functions. Therefore, in this brochure we refer to the IP Service and its authority.

Any person wishing to obtain legal protection to its trademark should file appropriate request along with the supporting documents to the IP Service in order to receive relevant certificate indicating that such trademark is included into the State Register of Trademarks of Ukraine (hereinafter referred to as "the Register").

Pursuant to the Law, the request shall consist of:

- a) application for registration of a trademark;
- b) data about the applicant;
- c) clear image of a trademark;
- d) list of goods and services for which the trademark will be used.

Please see any applicable fees for submission of application for registration of a trademark in the Appendix. The request (as well as the supporting documents) is further examined by the IP Service in order to assess its compliance with the legal requirements under the Law. Usually this process may take up to 12-14 months from the date of submission of application. However, there is an option for fast-track registration, in which case it will be possible to register your trademark within 4-6 months.

If successful (and upon payment of the applicable state duty), the decision on issuance of a certificate on registration of a trademark is published in the official bulletin of the IP Service and the relevant entry is made in the Register.

2.2. What trademarks cannot be under protection?

The Law specifies that the legal protection is given to a trademark which does not contradict to the public order, moral and humanity principles. Furthermore, no legal protection is granted to trademarks which represent or imitate:

- a) national emblems, flags and other state symbols;
 - b) official names of states;
 - c) emblems, short and full names of international intergovernmental organizations;
 - d) official control and guaranty seal and stamps;
 - e) awards and other distinctions;
- or
- f) usually lack any distinguishing capacity and did not obtain such capacity throughout their use, such as:
 - marks, which consist only of one letter, number, line, simple geometrical figure, which do not require specific graphical implementation;
 - realistic images of goods, if such images are used as trademarks;
 - 3D-objects whose form is for purely made due to functional use, if such objects are used as trademarks;
 - generally used abbreviations;
 - marks which have been used as trademarks in Ukraine by other owners and lost their distinguishing capacity towards such goods;
 - g) consist exclusively of signs that are commonly used as trademarks for goods and services of a certain type, which:
 - due to long-term use for certain type of goods became

- relative to such type;
 - lexical units or symbols, which relate to certain area of science or economy;
- h) consist exclusively of signs or data that are descriptive, in particular indicate the kind, quality, composition, quantity, properties, purposes, value of goods and services, the place and time of manufacturing or sale of goods or rendering of services, such as:
 - name of goods;
 - category of goods;
 - qualities of goods, in particular exclusively beneficial;
 - material of goods;
 - weight, volume, price of goods and their manufacturing date;
 - historical data on establishment of manufacturing facilities, awards granted to the goods;
 - names and addresses of manufacturers;
 - i) are deceptive or misleading and which may lead to the customers' association with goods or services of the certain manufacturer, which is untrue;
 - j) consist exclusively of signs that are commonly used symbols and terms;
 - k) represent only the form caused by the natural state of goods, or by the necessity to get a specific technical result, or the form imparting the essential value to the goods.

In addition, no trademark can be registered if it identical or confusingly similar to:

- a) trademarks registered earlier or applied for registration in Ukraine on behalf of other person for similar or related goods and services;
- b) trademarks of other persons if such trademarks are subject

to legal protection without their registration on the basis of Article 6 bis of Paris Convention for the Protection of Industrial Property 1883;

- c) firm names which are already known in Ukraine and owned by other persons;
- d) qualified indications of origin of goods (including alcohol and alcoholic beverages) which are protected under the Law. Such marks shall only be the elements that are not under protection of the marks of persons who are entitled to such indications;
- e) conformity marks (certification marks) that have been registered under the determined procedure.

No registration shall be granted to:

- a) industrial designs, the rights to which in Ukraine belong to other persons;
- b) titles of scientific, literary, and artistic works known in Ukraine or quotations and characters from such works as well as the artistic works and their fragments without the consent of copyright holders or their successors in title;

- c) surnames, first names, pseudonyms and their derivatives, portraits and facsimiles of persons known in Ukraine without their consent.

A mark is not subject to registration if it is identical or similar to the trademark which is under protection in Ukraine pursuant to article 6 bis of the Paris Convention for the Protection of Industrial Property 1883 or which is an undoubtedly well-known trademark.

2.3. Trademark expertise

The most important aspect, which is in detail provided in the Rules, is description of expertise for a trademark registration. Such expertise consists of the following stages:

- a) establishment of the date of submission of the application;
- b) formal features expertise;
- c) content mark expertise.

Date of submission of the application is established on the basis of the materials and documents provided to the IP Service. Formal features expertise, in essence, aims to establish whether the documents submitted are genuine and true as well as whether the application in whole could be subject to legal protection provided by the Law.

The purpose of the content mark expertise is to determine whether there are any reasons or circumstances present which do not allow the mark to enjoy legal protection granted by the Law. Thus, it is established whether the mark is in any way relates to a pornographic, racist image, emblem or name, or contradicts the public order, humane and moral principles. In addition, it is examined whether the mark is identical or similar to any existing trademarks.

Thus, the mark is considered as identical, if it imitates all elements of the other trademark. The mark is considered as similar if it is associated with the trademark despite certain differences.

Examination of the marks includes:

- a) check of existing identical and similar trademarks;
- b) determination of the level of similarity of the trademark and any existing trademarks;

- c) determination of similarity of goods and/or services of the trademark and any existing identical or similar trademarks.

In order to establish similarity of word signs, the sound (phonetics), graphic (visual) and content (semantic) similarity are analysed.

2.4. Certificate on a trademark

If there are grounds or circumstances exist under which registration of a trademark is not possible, the applicant is sent a motivated notice with description of all incompatibilities with the Law. The applicant may send appropriate comments or clarification which could be taken by the IP Service upon rendering the final decision.

Upon decision of the IP Service on registration of a trademark and payment of the registration fee for issuance of the certificate, the relevant entry is made in the Register and the certificate on a trademark is issued to the successful applicant. The certificate is valid for 10 years following the date of submission of the application and can be prolonged.

2.5. International registration

Furthermore, pursuant to the Law, any person may register a trademark in foreign jurisdictions.

According to the Madrid Agreement Concerning the International Registration of Marks 1891 and the Protocol Relating to that Agreement 1989, the application for international registration of a trademark shall be submitted through the IP Service along with the payment of national fee.

However, the Rules provide that the functions of the IP Service in relation to submission of international application are performed by the Ukrainian Intellectual Property Institute (Ukrpatent).

Interestingly, even if the international application for a trademark is approved, the IP Service shall also conduct expertise of a trademark application pursuant to Ukrainian law. Therefore, there might be cases when a trademark is approved for registration under the Madrid Agreement, but is not granted protection pursuant to Ukrainian legislation. It is always worth checking whether a trademark enjoys legal protection under Ukrainian legislation with the IP Service.

3

Trademark disputes and fair use

3.1. Trademark disputes: out-of-court settlement procedures

While out-of-court settlement and pre-dispute resolution procedures could be very useful and, probably, the most correct way for resolving any disagreements regarding use of a trademark, it may not be the most efficient option in order to get the violator to stop breaching the IP rights.

Pursuant to the Law the owner of the trademark may demand the violator to stop breaching the IP rights and reimburse incurred losses. In particular, the owner has the right to demand the removal of the goods, the product packaging, labels, badges, or other object attached to the goods with the illegally used trademark, including prohibiting storage of such product, its subsequent offering for sale, import and export. Furthermore, the owner may prohibit use of a trademark by other persons during offering and provision of any services for which the trademark was registered, including in business documentation or in advertising and in the Internet or even to demand destruction of the images of such trademarks.

Unfortunately, under the current state of affairs the violators rarely agree to stop breaching IP rights in Ukraine in the out-of-court settlement arrangements. However, we advise the lawful owners of trademarks to use any pre-trial procedures only upon gathering of enough and proper evidence base against the violator, with which it would be easier to prove the violation in court in case of unsuccessful out-of-court settlement.

We also note that any pre-trial procedures are not mandatory under the Ukrainian legislation, and any person may choose to refer to the court immediately upon discovering of a violation.

3.2. Trademark disputes: court hearings

In the event that the out-of-court settlement has not resulted in elimination of the violation, the rightful owner of a trademark has only one option, which is to refer to a court.

Pursuant to the Law, the main methods of protection of the breached trademark right in courts are:

- a) establishment of the rightful owner of the trademark;
- b) issues of conclusion and performance of the licensing agreements;
- c) breach of the trademark owner's rights;
- d) failure to comply with the legal terms and conditions for protection of the trademark;
- e) existence of elements of the mark which were not represented in the submitted application for registration of the trademark;
- f) issuance of the certificate for a trademark with violation of the other persons' rights.

The dispute is heard in a commercial court of general jurisdiction of Ukraine. The dispute shall be resolved within two months following receipt of a claim. However, a court may prolong the term for resolving a dispute by 15 days, if there are some special circumstances present in the case and taken into consideration by the court.

3.2.1. Evidence in court

Special attention in disputes relative to trademarks shall be given to the issue of gathering of evidence in the Internet, including fixation of violations.

There is positive court practice regarding fixation of violations in the Internet in Ukraine. Thus, a respondent may be prohibited from use of a disputed trademark, including in the Internet advertisement or domain names. However, any violation committed in the Internet should be properly evidenced, such as represented on the website of the violator, in its domain name, in the advertisement, etc., which would undoubtedly lead to establishment of the fact of violation.

According to the established court practice in Ukraine, the mere fact of placement of a trademark or other object on the website of the respondent constitutes a violation, unless the respondent can provide evidence of the rightful placement of the disputed IP object. Reproduction of a trademark from the other website without confirmation of the lawful use of the IP object shall not be the ground for release of the respondent from any liability. The court shall aim to establish whether the website and information contained therein are in ownership of the respondent and how the violation of the trademark right is evidenced.

Under the current Ukrainian procedural legislation, web-pages treated as the electronic documents, which cannot be taken to the court. However, some information contained in such webpages might be useful for the case. Therefore, the court may decide to conduct examination of webpages with specification of all findings in the respective protocol, video or audio recording.

Generally, the print-outs of Internet webpages are not accepted as evidence in court. However, written evidence may include any certificates issued by the providers or online search services.

3.2.2. Implementation of a judgment

Any judgment of a commercial court in Ukraine shall be mandatorily implemented. Such implementation shall be made by the State Executive Service of Ukraine, which is a part of the Ministry of Justice of Ukraine.

The State Executive Officer shall perform all required actions for successful implementation of a court judgment within six months following opening of implementation proceedings (within two month in non-monetary claims). However, under the newly implemented law on reforming of the State Executive Service of Ukraine and establishment of the institution of private executive officers, the court judgment is implemented by the private officers within the 'reasonable terms'.

3.2.3. High Intellectual Property Court

The recent court system reform will also significantly affect protection of the IP rights in Ukraine. Pursuant to the adopted legislation, the High Intellectual Property Court will be established in Ukraine until 30 September 2017. This court will be the first instance for consideration of disputes relative to IP rights.

The High Intellectual Property Court will function pursuant to the procedural regulation included in the Commercial Procedure Code of Ukraine. Judgments of the High Intellectual Property Court will be subject to appellate review of the appellate commercial courts of Ukraine and cassation review of the Supreme Court of Ukraine (by Intellectual Property Chamber).

3.3. Fair use of a trademark

Another important issue is the fair use of the registered trademark by third parties without the consent of the owner of the trademark.

The Law specifies that the certificate of a trademark registration entitles its owner to prohibit any persons to use without the owners' consent:

- a) the registered trademark for the goods and services listed in the certificate;
- b) the registered trademark for goods and services relative to those listed in the certificate, if following of such use the customer may be confused about the manufacturer/provider of goods and/or services;
- c) the mark, which is similar to the registered trademark for the goods and services listed in the certificate, if following use of such mark the trademark might be confused;
- d) the mark, which is relative to goods and services listed in the certificate, if following of such use the customer may be confused about the manufacturer/provider of goods and/or services.

However, there is a list of exhaustive circumstances pursuant to which it is permitted to use a trademark without consent of its owner. Thus, the owner's right to prohibit any persons to use the registered trademark without the owners' consent is not applicable in the event of:

- a) exercise of any right which arose prior to the date of submission of application for registration of a trademark or statement of priority;
- b) use of the trademark for goods, which were permitted for the turnover by the owner of the certificate under such trademark, provided that the owner does not have any significant reasons to forbid such use due to further sale of goods, their change or deterioration;
- c) non-commercial use of the trademark;
- d) use of all forms of news and comments of such news;
- e) bona fide use of names and addresses.

4

Trademark protection in criminal proceedings

The Criminal Code of Ukraine provides that illegal use of a trademark, brands, qualified indications of origin of goods, or any other intentional violation of the rights to these objects, and if this caused a significant pecuniary damage², shall be punishable by a fine of between UAH 17,000 to UAH 34,000 (between approximately USD 655 to USD 1,310).

The same actions committed repeatedly or a group of persons upon their prior conspiracy, or where they caused gross pecuniary damage³ shall be punishable by a fine of between UAH 51,000 to UAH 170,000 (between approximately USD 1,960 to USD 6,535).

² Please note that pecuniary damage shall be deemed as significant if it equals or exceeds 20 non-taxable minimal incomes of citizens. A single non-taxable minimal income of citizens for the purposes of criminal law of Ukraine is calculated as 50% of the Ukrainian living wage. The living wage is established in the state budget for the appropriate year. The State Budget of Ukraine for 2016 provides for gradual increase of the living wage as follows: 1 January 2016 – UAH 1,330 (approximately USD 51), 1 May 2016 – UAH 1,399 (approximately USD 54), and 1 December – UAH 1,544 (approximately USD 60). Thus, the amount of one non-taxable minimal income of citizens for the purposes of criminal law of Ukraine as of October 2016 amounts to UAH 699.5 (approximately USD 27). Therefore, the amount of significant pecuniary damage is UAH 13,990 (approximately USD 540).

The above actions committed by an official using his/her position or an organized group or if they caused pecuniary damage on a large scale⁴ shall be punishable by a fine of between UAH 170,000 to UAH 255,000 (between approximately USD 6,535 to USD 9,800), with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

The object of a crime is the established legal regime for protection and use of trademarks, brands and qualified indications of origin of goods as well as fair competition.

³ Please note that the pecuniary damage shall be deemed as gross if it equals or exceeds 200 non-taxable minimal incomes of citizens, which as of October 2016 amounts to UAH 139,900 (approximately USD 5,400).

⁴ Please note that the pecuniary damage shall be deemed as on a large scale if it equals or exceeds 1000 non-taxable minimal incomes of citizens, which as of October 2016 amounts to UAH 699,500 (approximately USD 27,000).

The subject matter of the crime is:

- a) brand name;
- b) qualified indication of origin of goods;
- c) trademarks, which are:
 - registered in Ukraine;
 - protected without registration on the basis of the international treaties of Ukraine;
 - recognized as well-known in the appropriate procedure.

Illegal use provides, first of all, that the use of a trademark is made without the consent of the trademark's owner, including in advertisement, on webpages, domain names, etc.

The specific feature of this crime is that it is considered as committed only following causing material damage of at least UAH 13,990 (approximately USD 540) (20 non-taxable minimal incomes of citizens), i.e. overall damage calculated as the sum of money, which the owner of the trademark:

- a) spent or had to spend for recovery of its violated right (real damages);
- b) proceeds, which could have been received under ordinary circumstances if the right to a trademark had not been violated (lost profits).

There are several methods could be employed for calculation of the damages incurred by the owner of the trademark and legal practice has not yet elaborated the single approach for calculation of damages within the criminal proceedings.

This results in the situation under which any offence committed without causing material damage in the amount of UAH 13,990 (approximately USD 540) (20 non-taxable minimal incomes of citizens) or more will result in imposition of administrative liability instead of criminal. Under the administrative liability the violator will be subject to a fine (which may be as low as UAH 170 (approximately USD 6.5) or as high as UAH 3,400 (approximately USD 130)) and confiscation of illegally produced materials and equipment.

5

Antimonopoly aspects of trademark protection

Pursuant to the Law of Ukraine “On Protection from Unfair Competition”, unfair competition is any action in the competition, contradicting trade and other fair customs in economic activities. Unfair competition in this sense also includes: use of name, commercial brand, trademark, advertisement, packaging, other marks and periodicals, etc., without consent of the business entity which has been using such marks previously or use of similar or identical marks, which results in confusion with activities of such entity.

Thus, the peculiarity of antimonopoly protection of a trademark is that it could be enjoyed by a person not on the basis of the document (certificate), but based on the actual primacy of use by the owner of such trademark.

The Antimonopoly Committee of Ukraine performs the following activities during implementation of the antimonopoly policy of Ukraine:

a) establishment of the fact of unfair competition;

- b) termination of unfair competition;
- c) official refutation (at the expense of the violator) of untrue, incorrect or incomplete statements or data;
- d) confiscation of goods under the illegally used trademark.

Use of unfair competition practices leads to a fine of up to 5% of income from turnover of the entity for the last fiscal year. Limitation period for any unfair competition violation is three years from the date of commitment or, in case of the on-going violation, from the date of the completed violation.

It is also worth mentioning that the date starting from which the legal protection against any illegal use is granted to a trademark is different under Law of Ukraine “On Protection of Rights to Marks for Goods and Services” and the Law of Ukraine “On Protection from Unfair Competition”. Thus, while the former provides such protection from the date of submission of application for trademark registration, the latter applicable only following the date of use of a trademark in commercial activities.

6

Trademarks and customs

6.1. Customs register of intellectual property

Any lawful owner, whose trademark's rights were violated while transferring goods through the customs border of Ukraine, may file an appropriate application to the State Customs Service in order to protect such rights.

All and any information included in the customs register of intellectual property is an integral part of the unified automated system of the State Customs Service.

In order to include the IP object into the register, the applicant shall file an application along with the appropriate request and the following documents:

- a) extract from the relevant register of the IP Service on registration of the IP object in Ukraine or notification on international registration;
- b) detailed description of the IP object and goods, which will allow the customs authorities to classify the goods;
- c) samples of goods which carry the IP object or their photographic images.

The customs authorities may decline in registration of the IP object in case of:

- a) failure to submit supporting documents;
- b) lack of distinguishing characteristics or impossibility to identify such characteristics;
- c) irregularities in materials and information submitted in the application;
- d) absence of legal grounds and/or capacity to submit such application.

Nevertheless, the applicant, if submission of the initial application due to some reasons was unsuccessful, may file another application.

The IP project is excluded from the customs register due to:

- a) expiry of the term of registration;
- b) the appropriate application of the owner;
- c) a court judgment;
- d) termination of the legal protection of the IP object;
- e) refusal of the owner to reimburse costs for storage of goods, customs registration of which is postponed, at the warehouses of the customs authorities;
- f) discovery of untrue data in the submitted application and supporting documents.

Registration of the IP objects in the customs register is valid either for six or twelve months. The term of validity could be prolonged for another six or twelve months upon filing of the appropriate application.

6.2. Actions combating the illegal IP products

The State Customs Service is entitled to perform any actions regarding combating the illegal IP products only following registration of an IP object in its register.

Thus, if the customs authorities, on the basis of customs registry of intellectual property, discover signs of violation of intellectual property rights to goods presented for customs control and customs clearance, the customs registration is suspended for up to 10 days and the goods shall be stored in a warehouse.

The State Customs Service informs the owner of goods, and if within 10 business days following receipt of notice on suspension of customs registration the owner fails to refer to a court with the recourse to the protection of intellectual property rights or fails to refer to such customs agency with a written reasoned request for extension of the suspension of customs registration, then, in the absence of violations of customs regulations goods, customs registration resumes. Otherwise, the suspension of customs clearance of goods is extended (but not more than by 10 business days).

Furthermore, if the owner presents to the customs authority, that suspended customs registration of goods, a court order prohibiting certain actions due to infringement of intellectual property or other decision on this issue rendered (made) by

other authorized state bodies, the customs authority shall continue suspension of customs registration of goods for the period prescribed in the court order/decision of the appropriate state authorities.

It is worth pointing attention that in the event of suspension of customs registration in the abovementioned circumstances, the owner of goods reimburses any expenses incurred by the State Customs Service during storage of goods.

Thus, even a bona fide owner of trademark shall be well aware that if within 10 days following receipt of the notification from the State Customs Service on suspension of customs registration of the alleged illegal goods he/she would not be able to present to the court enough evidence for rendering an injunction on performance of certain action, such owner will be subject to various expenses and losses.

In addition, the State Customs Service may act at its own initiative in the event that IP rights of any person could be violated and suspend the customs registration (even if no application for inclusion into the customs register was filed by the owner of goods/trademark). There is an exhaustive list of such circumstances provided in the regulations.

Thus, the customs register is an effective mean of the state protection of the intellectual property rights during the customs procedures. In addition, information included in the customs register, is available to all fiscal authorities, which enhances legal protection of a trademark.

Appendix

ACTION	PRICE IN UAH	APPROX. PRICE IN USD ⁵
Application for a trademark (filed by a single applicant):	1,000	39
• <i>for each additional class under International (Nice) Classification of Goods and Services</i>	1,000	39
• <i>for a coloured trademark</i>	500	19
• <i>for each additional class, if such additional classes were indicated following the expertise</i>	1,500	59
• <i>for a trademark that includes name 'Ukraine'</i>	6,000	231
Application for a trademark (filed by two or more applicants)	1,300	50
Separated application	1,700	66
Extension of term for submission of a fee payment confirmation document	400	15
Correction of the mistake in the application, which is not evident or technical	800	31
Change of the application information by the applicant:		
• <i>name</i>	100	4
• <i>address</i>	100	4
• <i>correspondence address</i>	100	4
• <i>name of the representative person</i>	100	4
• <i>address of the representative person</i>	100	4
• <i>for the same correction in two or more applications</i>	120	5
Change of the applicant	600	23
Extension/renovation of term for submission of additional materials required following the expertise	400	15
Submission of complaint on a trademark due to its inappropriateness for legal protection	1,000	39
Changes to the trademark due to its separation	500	19
Official publication of issuance of the certificate on a trademark (black and white)	150	6
Official publication of issuance of the certificate on a trademark (coloured)	250	10
Inclusion of a trademark in the State Register of Trademarks of Ukraine	800	31
Issuance of the duplicate certificate on a trademark	100	4
Submission of complaint on a trademark to the Appellate Chamber	1,700	66
Extension of validity of the certificate on a trademark (one owner) – per class	3,000	116
• <i>per each additional class</i>	300	12
Extension of validity of the certificate on a trademark (several owners) – per class	3,900	150
Publication of information regarding issuance of a license for use of a trademark	400	15
Publication of information regarding change of ownership to a trademark	600	23
International registration/its prolongation	600	23
Territorial extension of international registration	400	15
Submission of application for recognition of the trademark as well-known	4,000	154

⁵ Pursuant to the official currency exchange rate of the National Bank of Ukraine as of 01 October 2016.

Contacts

DLF attorneys-at-law

Torus Business Centre
17 d Hlybochytska Street
04050 Kyiv, Ukraine

+380 44 384 24 54
info@DLF.ua
www.DLF.ua

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