

The EU and Ukraine: What Now?

Key Criteria and Sectoral Cooperation

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The parliamentary elections in Ukraine at the end of October 2012 were evaluated by the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (ODIHR/OSCE) as a step backwards for democracy. The members of the subsequently formed government were selected mainly on the basis of loyalty to the president, and the new government has yet to send any convincing pro-European signals. The European Union had urged the holding of free and fair elections with the aim of ushering in a change of direction in its relations with Ukraine and of pressing forward with the already initialled Association Agreement. Now the EU faces a dilemma. If it considers democracy and the rule of law genuinely important, then the EU must not abandon its critical stance vis-à-vis the Ukrainian leadership. But isolating Ukraine would not make sense either from an economic or from a security point of view and would send the wrong signal to the Ukrainian population.

The Conclusions of the EU Foreign Affairs Council on Ukraine published on 10 December 2012 represent an attempt by the EU to respond constructively. There it reaffirms its commitment to sign the Association Agreement by the next summit of the Eastern Partnership (EaP) in November 2013 if Ukrainian leaders demonstrate “determined action” and “tangible progress” in three areas: elections, the elimination of selective justice, and the implementation of the reforms defined in the jointly agreed Association Agenda. Progress in the third area would aim to bring about the economic integration of Ukraine into the EU and should make it possible for the free trade section of the agreement to come into

force soon. The EU had already urged Ukraine to take steps towards reform in these areas in May 2012. The Council Conclusions outline these in more detail, making reference to specific fields of reform. It is now time for the EU and Ukraine to reach agreement on key criteria and primary areas of focus in these fields. To accomplish this they should use the European-Ukrainian “informal dialogue” offered by the EU, which is designed to support progress on rule of law and economic integration and prepare the way for signing the agreement by the end of 2013. At the same time, to preserve the credibility of the EU, due attention should be paid to the European principles of democracy,

transparency, and broad participation in both competition and prosperity – principles that have been undermined by the Ukrainian leadership. In the following we will put forward proposals for these key criteria and main areas based on an analysis of the character of the political regime in Ukraine. Without such an analysis it is impossible to understand the contradictions of Ukrainian foreign policy, especially the lack of sustainability in Kiev's policy of European integration.

Clientelism and Foreign Policy

The regime currently in power in Ukraine is defined by a strong power vertical headed by the president and his administration as well as by the government dependent on him. It draws its support mainly from the Party of Regions (PoR), which is strongly rooted in the major industrial centre of the Donbass. Five or six groups of oligarchs and power networks close to the government have formed around this vertical, giving rise to a structure that exhibits autocratic tendencies and clear features of patrimonial rule, characterised among other things by clientelism, political corruption and official patronage as a precondition for economic success. The president, the PoR and the groups of oligarchs represented in the most important ministries do not, however, form a monolithic or conflict-free bloc, but have strongly varying foreign trade interests and hence foreign policy orientations and jostle for economic and political influence.

The president himself tries to maintain a balance of power among these groups as a way of establishing mutual control and thus strengthening the presidential leadership. To this end, key positions in the executive and the judiciary have been filled with loyal individuals belonging to the “family” of the president, undermining the rule of law and consolidating the absolute power of the vertical. Despite internal contradictions, the power networks supporting the president are held together by a consensus

whereby the power vertical secures them access to state resources and protects them from unwelcome competition, as well as from the rule of law and democratic control. In order to maintain this consensus, the president needs to concentrate on achieving a short-term balance among the sharply differing egotistical interests of the various groups. Under these circumstances it is hard to imagine him engaging in a coherent foreign policy geared to the national interest, let alone a consistent policy of European integration. Although the formation of the present government resulted in a strengthening of the “family” at the expense of certain groups of oligarchs, this fundamental problem is likely to remain relevant for policy towards the EU.

A Lack of Legal Certainty

Curtailing the rule of law has become a key instrument for combating the opposition and sheltering economic clientelistic interests from undesirable competition. In July 2012 a law on the judiciary was passed allowing the Supreme Council of Justice, of which the public prosecutor (a loyal servant of the president), his deputy and the representative of the presidential administration are members, to institute disciplinary proceedings against judges. This severely curtailed the independence of the organs of judicial self-administration (which had previously regulated disciplinary proceedings autonomously), compromised the independence of judges and established the control of the executive over the judiciary.

In addition, it deprived the Supreme Court, until then a relatively independent body, of important competences and powers of final appeal (cassation). The de facto supreme and final court of appeal is now the newly created Special High Court for Civil and Criminal Offences (VSS) presided over by judges close to the government. The deputy chairman of the court from 2010 to 2012, for example, was the brother of the general public prosecutor. It is thus scarcely surprising that this court

rejected all the grievances submitted by the lawyers of former Minister of the Interior Yuriy Lutsenko, who had been sentenced to imprisonment, despite confirmation by the European Court of Human Rights in November 2012 of its ruling of 3 July 2012 that Lutsenko had been arrested “arbitrarily.”

Public Procurement

There is a glaring contradiction between, on the one hand, the Ukrainian president’s repeated declarations that priority should be given to European integration and, on the other, the action taken by the government. This may be illustrated by the issue of public procurement, to which a separate chapter is devoted in the Association Agreement. The partners to the agreement enter into an obligation to adapt Ukrainian law to European law. Yet even while negotiations on the agreement were still in progress in 2011 the Ukrainian leadership committed major violations that ran counter to the spirit of the provisions underlying the agreement.

Large amounts of tax-payers’ money are spent every year on state purchases of goods, labour and services (a total of some 37 billion euros in 2011 according to the official exchange rate in July 2012). Much of the money is invested in the country’s infrastructure. The topic of procurement thus provides a good measure of whether the Ukrainian leadership is prepared to introduce the standards of a market economy, reduce restrictions on competition, guarantee broad participation in economic life and spend limited budgetary resources efficiently. A touchstone was the preparations for and management of the European Football Championship in Ukraine in 2012, which had been declared by members of the Ukrainian government and senior officials to be a dress rehearsal for European integration. In reality, however, the European Championship, the most important public investment project of recent years, was hijacked for other purposes, namely to

serve the interests of a government-friendly clientele (see SWP-Aktuell 29/2012). To this end a provision had already been introduced in 2010 stipulating that all goods and services connected with the European Championship could be purchased in tenders involving only one competitor.

In response to strong criticism of this practice by some members of the Ukrainian opposition, NGOs active in monitoring this sphere and members of the European Parliament, the Ukrainian government countered that the failure of previous “orange” governments to act meant that important infrastructure projects connected with the championship needed to be completed under massive time pressure, which did not allow time to engage in lengthy competitive tenders. In fact, however, there was method to the non-transparent tendering process. On 4 July 2012 the parliamentary coalition approved a law stipulating that procurements made by state and local government enterprises with more than 50 percent state ownership would be almost entirely exempted from the law on procurement. According to the Internet journal “Nashi Hroshi” this applied to public procurements to the tune of around 25 billion euros or roughly two-thirds of the entire value of public procurement in 2011. This meant that not only were state purchases exempted from competitive tendering on a massive scale, but access to information about these purchases was also blocked, making it impossible for the financial control organs, the justice administration or civil society to monitor what was going on.

This provision paved the way for the arbitrary and non-transparent awarding of contracts, and works in favour of those state enterprises with offshore structures, behind which often stand power networks with close ties to the government. Investments in the local infrastructure are made by the state-owned part of the enterprise, while the private offshore part is used to siphon off profits abroad. This neopatrimonial protectionist policy is further facilitated by the fact that control organs in the

realms of finance and competition do not function properly. They lack independence due to widespread official patronage, and are deprived of competences and/or the necessary powers of implementation. For these reasons the Ukrainian real economy outside of these influential groups of oligarchs and offshore companies is practically no longer able to participate in tenders for state contracts. As this financial and administrative culture becomes increasingly widespread, it is engulfing other areas of the Ukrainian economy with the result that tax-payers' money is being wasted or misused, the investment climate is deteriorating and the dominance of power networks engaging in anti-democratic practices is becoming ever more firmly established.

An Association Agreement with Strings Attached

The EU has good reasons for insisting that it will only sign the Association Agreement under clearly defined conditions. First of all, the Ukrainian government has yet to demonstrate convincingly that it intends to reverse the trend of dismantling democracy and rule of law. Until it does, signing the agreement would discredit the EU's image as an actor that espouses certain values.

Second, it currently appears highly unlikely that the agreement would be implemented in an effective or appropriate way. Not only with respect to the rule of law but also with respect to the realisation of a free-trade zone, there is no evidence of a political will to carry out reforms inspired by market principles. If the agreement is to be implemented, a more or less functioning structure of independent and transparently operating judicial administration institutions will be required as well as authorities to monitor competition and public finance, in order to guarantee verifiability, fair opportunities to participate in competition and prosperity, and legal certainty.

Nevertheless, despite the political failings of the Ukrainian government it would

be wrong to shelve the agreement for the foreseeable future. The election results have shown that even under difficult conditions important foundations for pluralism and civic engagement do still exist. If it proves possible to implement the Association Agreement in a satisfactory way, this would bring Ukraine a major step closer to the EU politically and especially economically, yielding considerable gains for prosperity and social participation in the medium to long term.

The key criteria proposed here for Ukrainian-European dialogue should highlight EU concerns about democratic deficiencies and human rights violations and make plain to the Ukrainian government that market-based European integration and proper foundations for the rule of law necessarily belong together.

The Key Criteria

For this reason the partners should, bearing in mind the areas of reform identified by the EU in the Council Conclusions of December 2012, establish some primary foci (key criteria), following the principles of constructiveness, coherence and continuity. These could be used as a basis for making concrete decisions about the signing of the Association Agreement at the end of 2013.

Besides a reform of the election law that would bring about the permanent involvement of the opposition and relevant NGOs without political strings attached, a chief priority must be ending the practice of selective justice and thus strengthening the rule of law as a foundation for pluralism and market principles based on broad participation, which are, after all, two sides of the same coin. With respect to the rule of law, the dominance of the central public prosecutor's office should be reduced and its direct influence on judges and powers to discipline them eliminated. The Supreme Council of Justice should not be allowed to institute disciplinary proceedings. The independence of judges – as a first priority of the highest courts of appeal and the consti-

tutional court – should also be strengthened by eliminating politicisation and nepotism from judicial appointments. Transparency and the independence of the justice authorities should be further encouraged by providing more information to the public. All court rulings or verdicts could, for example, be recorded in a publicly accessible register. The Supreme Court should retain the right of final appeal (cassation) and its role as an independent court of appeal vis-à-vis the VSS should be given more weight.

As far as the free trade zone is concerned, the independence of the bodies responsible for monitoring competition and public finance must be guaranteed by putting a stop to official patronage and by granting these institutions sufficient competences. Leading functions in these institutions should be filled in a dialogue between the government, the opposition and civil society in order to inspire more trust in them and thus to facilitate changes which reflect the spirit of the agreement.

With a view to fighting corruption and instituting more open management of public finances – two areas mentioned in the Council Conclusions – the law of 4 July 2012 should be repealed and state purchases from companies that are more than 50 percent state-owned should be restored to the sphere of competitive tendering procedures. Public access to information about how tax-payers' money is spent must be greatly expanded, if necessary by passing a law to this effect. Ukrainian NGOs have already formulated constructive proposals to this end. If these measures were to be implemented they would ensure a high level of transparency, efficient use of budgetary resources and more competition. Together with the greater independence for the judiciary currently being sought, this would improve the investment climate in Ukraine. At the same time, the Ukrainian government should have a keen interest in realising these measures, since EU recognition of progress in the management of public funds would also strengthen Ukraine's

position in its negotiations with the IMF over badly needed loans.

The proposed key criteria are constructive because they are geared towards a signing of the agreement in the foreseeable future and entail only steps that can be directly implemented in practice (and hence monitored). At the same time they are primarily dependent on political will and hence do not burden Ukraine with new, excessive and time-consuming demands for reform. They are coherent, because they link the rule of law and democracy with institutional features designed to improve economic conditions in a way that will facilitate the practical realisation of the provisions of the free trade agreement. They follow the principle of continuity, because with respect to democracy and the rule of law they seek merely to re-establish what had already been achieved in Ukraine before 2010, in other words, to restore the conditions present when the mandate for the Association Agreement was conceived.

These key criteria should be discussed in the planned informal dialogue. The EU delegation in Kiev and the embassies of the member-states should insist on them and closely monitor their implementation. In addition, the EU should systematically involve relevant Ukrainian NGOs in the monitoring process.

For its part the EU should concentrate EaP funding earmarked for institution building on the areas named here and on further expanding underdeveloped administrative capacity important for the implementation of the agreement. In this way the Union could facilitate the agreement's coming into force and becoming a strong "normative anchor". This would give the pro-Europe forces in the government and opposition instruments with which to effectively demand and implement far-reaching reforms of the state and society, in particular those connected with the section of the agreement dealing with free trade. Last but not least, the EU should strongly encourage Ukraine to accelerate coopera-

tion in the areas of visa and energy policy and should engage in a more profound dialogue with Ukrainian society.

Promote Visa Liberalisation

Cooperation between Ukraine and the EU on visa issues is now well established. Provisions making it easier for Ukrainians to obtain visas to travel to the EU came into force in 2008 but have been differently implemented by the various EU member-states. Further measures were approved by the European Commission in July 2012 and are waiting to be ratified by the European Parliament. Parallel to this Ukraine is currently in the process of implementing the Action Plan on Visa Liberalisation agreed upon with the EU at the end of 2010 and is close to completing the first phase, which mainly involves creating a legal basis for the envisaged changes. The law on the introduction of biometric passports, signed by President Yanukovych in late November 2012, had, in its original draft form, raised a whole series of data protection issues, prompting complaints from Valeriya Lutkovs'ka, Ombudswoman for Human Rights. This highlights the need to carefully examine this and other Ukrainian documents in regard to compliance with EU standards.

Nevertheless, Ukraine now has a good chance of soon completing the first phase of the Action Plan. The EU should regularly address the missing points and should push for implementation above and beyond the encouragement given in the Council Conclusions of December 2012. The fact that Moldova has already completed the second stage of a similar action plan introduces an element of competition in the region and may give Ukraine an added incentive to speed things up. When Ukraine embarks on the second phase, which will entail implementing specific regulations, the EU could aid it with support instruments that go beyond the goals of the Action Plan and touch on problems of coordination that will at any rate need to be solved later on. For example, further technical support

could be offered in the form of short-term (TAIEX) or medium-term (twinning) arrangements. This would enable Ukraine to gain more expertise and facilitate inter-agency cooperation with respect to migration, anti-corruption measures and steps to combat trafficking in human beings. The last is also a priority of the Ukrainian Chairmanship of the OSCE, which began in January 2013.

Strong EU involvement in this issue would demonstrate that the delay in signing the Association Agreement does not mean that relations between the EU and Ukraine have been frozen or reduced to a purely symbolic level. What is more, it would send a signal to the Ukrainian population that the EU seriously intends to make their access to the EU easier. If Ukraine succeeds in implementing the Action Plan, the EU should ensure the necessary degree of internal consensus to rapidly approve tangible improvements in this area.

Strengthen the Energy Community

Even if additional pipelines have been constructed or planned in Northern and Southern Europe, Ukraine will still remain the most important gas transit country for the EU for the foreseeable future. For this reason alone the two sides have a shared interest in intensifying their cooperation in the energy sector. Back in March 2009 an ambitious cooperation agreement was reached on modernising the gas transit network, yet so far this has amounted to little more than a feasibility study. In February 2011 Ukraine became a member of the European Energy Community (EEC). Before that, on 1 July 2010, the state leadership under President Yanukovych had passed a law "On the Basis for Domestic and Foreign Policy" in which it pledged to "transfer Ukrainian gas, oil and electricity distribution networks to a functional framework valid in the states of the EU". If Ukraine implements the measures to which it has agreed, this will do much to bring the

Ukrainian energy sector into line with that of the EU. What is more, recent developments show that the Ukrainian leadership is desperately trying to reduce the country's dependence on Russian gas. As a result the first agreements have been reached with western energy companies such as Chevron and Shell, and gas imports from Germany via Hungary are planned, while deliveries through Poland began in November 2012. In addition Ukraine has considerably reduced the volume of gas it buys from Russia even at the risk of being sued by Russia before the Stockholm arbitration tribunal.

Nevertheless, domestic political and economic interests continue to block full Ukrainian cooperation in the framework of the EEC. A study of the first year of Ukraine's membership revealed that it has not adhered fully to any of its obligations. Some promises have been fulfilled in part, but the majority not at all. Nevertheless, the Ukrainian and European gas sectors are gradually being harmonised, at least on the legal level, which together with Ukraine's membership of the EEC provides a sufficient basis for the EU to intensify cooperation.

As with visa liberalisation, there are two hurdles to be overcome in the gas sector: First, as described above, there are a number of strong special interests that have a major impact on official decisions. These can make it difficult for Ukraine to fulfil its international obligations or even prevent it from doing so altogether. Second, a lack of administrative capacity combined with rigid hierarchical structures hampers the efficient tackling of tasks in both sectors. For this reason the EU would do well to take a two-pronged approach: On the one hand it makes sense to engage in a permanent dialogue with major actors in the gas sector and to undertake a sober analysis of their interests, because these define the limits of what is politically and economically feasible. On the other, the EU should also pursue a visible and systematic exchange with the institutions of the EEC, so as to address central concerns of the Ukrai-

nian gas sector and identify areas in which Ukraine is very close to fulfilling key obligations. This would allow the EU to give the EEC more clout and at the same time to pursue its own agenda more effectively with respect to the development of the gas market. Through such an exchange the EU could offer assistance to its Ukrainian partners in improving the administrative structures in the gas sector, albeit no doubt in the face of resistance, since the gas sector is one of the least transparent in Ukraine.

Not least out of self-interest the EU should encourage efforts to tap unconventional gas reserves in Ukraine. This would enhance its own energy security and hence also the stability of Ukraine as a transit country. Since energy security under environmentally friendly conditions is a priority of the Ukrainian Chairmanship of the OSCE, EU efforts in this sphere may fall on fertile ground.

Address Society Directly

Although visa liberalisation would send an important signal to Ukrainian society, the EU should not limit itself to this sphere in its attempts to reach Ukrainian citizens. Many of them will still not travel to the EU even if visa arrangements are further liberalised. The EU therefore requires a communications strategy with which to inform the Ukrainian population about Brussels' view of the relationship and to explain the advantages of further rapprochement between Ukraine and the EU.

A first step in this direction was the EU's publication of a short summary of the central points of the Association Agreement. More important, however, would be to portray the advantages of past and future cooperation with the EU in the media and at numerous events using examples that mean something to Ukrainian citizens. Since the European External Action Service has only limited personnel resources in Ukraine itself, it would make sense to involve Ukrainian NGOs more closely in the communication process. This would, firstly,

serve to provide the population with more targeted information, since the staff of Ukrainian NGOs are in a better position to judge what kind of communication will be well received. Secondly, it would be a further step on the way to the EU's goal of providing greater support to certain parts of Ukrainian civil society.

Consequences for the Eastern Partnership

By delaying the signing of the Association Agreement and making further progress provisional on certain conditions being fulfilled, the EU has sent a clear signal – not only to Ukraine but also to the other countries of the Eastern Partnership – that its hitherto value-oriented approach is meant seriously and that states which fail to keep their promises with respect to reforms and adherence to certain values will have to do without central elements of what the EaP has to offer. The EU must get this message across loud and clear if it wishes to maintain its credibility with neighbouring states.

At the same time, the approach advocated above would communicate to Ukraine that the EU remains open-minded with respect to further cooperation in key areas such as visa liberalisation and the gas sector. This too may be of interest for the other Eastern Partners, since it demonstrates that the EU will not completely turn its back even on “difficult” EaP states and is always on the look-out for areas in which cooperation is possible.

By pushing ahead with visa liberalisation and conducting a more intensive dialogue on the advantages and disadvantages of EU integration, the EU would send the Ukrainian population the message that it is by no means indifferent to its concerns. A successful and functional communications strategy for the Ukrainian context could also be used in a modified form in other EaP countries, and particularly in Moldova could provide an important basis for a successful reform process.

Although the Ukrainian parliamentary elections confirmed that democracy and the rule of law have suffered serious setbacks in the country, the EU should not see this as a reason to freeze relations with Ukraine completely. Rather, it should formulate clear criteria for the signing of the Association Agreement and simultaneously intensify existing sectoral cooperation. Finally, it should engage in a much more intensive dialogue with Ukrainian society in order to create a broad social basis for further integration with the EU.

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