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THE EU AND UKRAINE AFTER THE 2012 ELECTIONS

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SUMMARY

Relations between the EU and Ukraine are at an impasse after two years dominated by rows over the selective prosecution of regime opponents, in particular the conviction of former Prime Minister Yuliya Tymoshenko in October 2011, and authoritarianism and corruption in Ukraine. However, the real danger following the elections on 28 October is not electoral fraud but the way that the authorities are now entrenching themselves in power by every possible means. Members of the literal and metaphorical “family” around President Yanukovich are using their power to enrich themselves on an unprecedented scale. The EU cannot afford to simply wait until the next contest in 2015.

The EU must think creatively to find a way to move beyond this impasse. It should better define conditionality in the three key areas of selective prosecutions, the conduct of elections and “reform”. It should apply the Association Agreement and Deep and Comprehensive Free Trade Agreement with Ukraine that have been on hold since last December, if necessary selectively or provisionally, but take a tougher line in other areas, for example by imposing a visa ban on leading figures in the regime and auditing suspect “family” companies in the EU. At the same time, the EU should liberalise visas, encourage educational exchanges and support the emergence of new independent actors in Ukraine who are worried by the rise of the “family”.

Relations between the EU and Ukraine are at an impasse. The last two years have been dominated by rows over the selective prosecution of regime opponents, in particular the conviction of former Prime Minister Yuliya Tymoshenko in October 2011, and an accelerating trend towards a more authoritarian and corrupt style of rule in Ukraine. Attention has now turned to the parliamentary elections held on 28 October 2012 as a different test of Ukraine’s democratic bona fides. The opposition rightly feels aggrieved that the authorities have denied them a possible victory. There was some direct fraud, particularly in the new territorial constituencies.¹ But in general the authorities sought to rig the election by other methods such as the covert use of “political technology” and a change in the voting system that the opposition ironically agreed to back in 2011. Paradoxically, this meant that in many ways the election was more competitive than expected – but only because the authorities were confident they would win.

The recent focus on the elections has broadened the European view from the Tymoshenko case to look at how things have deteriorated across the board. But there is also a danger that the EU will move the goalposts and make the conduct of the elections the only criterion for deciding whether or not it should restart relations with Ukraine, or judge the authorities more on past than on present behaviour and use a critique of the elections to move towards a de facto

¹ The Ukrainian parliament has 450 MPs. After the “Orange Revolution” in 2004, it was thought better that all of them should be elected by proportional representation. But in 2011 the government forced through a return to the earlier system, under which half of MPs would be elected by PR, and the other half in territorial constituencies, where so-called administrative resources (that is, state-directed fraud) had more weight.

isolation policy. In November the Foreign Affairs Council will decide whether to move forward with the Association Agreement (AA) and Deep and Comprehensive Free Trade Agreement (DCFTA) with Ukraine that have been on hold since last December. The annual EU-Ukraine summit is still scheduled for some time before the end of this year, though neither side is particularly enthusiastic. Some in the EU are minded to sign the agreements, in part because the process of ratification by member states is likely to get bogged down anyway. Others want to use the agreements to enforce red lines on political prosecutions or democratic deterioration.

However, neither approach will help transform Ukraine into the kind of society the EU would like to see. Signing the agreements prematurely would undermine conditionality; leaving them on ice leaves the EU without leverage. The EU therefore needs to think of creative ways of regaining influence while maintaining red lines on values – not least because the political situation in Ukraine could easily deteriorate further. A tightening of the screws on independent media and on the still strong independent NGO sector is possible after the elections. The row over the Tymoshenko case was bad enough. But unless the EU regains traction, there will be worse to come. The authorities are entrenching themselves in power by every possible means, and members of the literal and metaphorical “family” around President Yanukovich are using that power to enrich themselves on an unprecedented scale. The EU cannot afford to wait until the next contest in 2015.

The return of “political technology”

There were some encouraging signs of democratic vitality in the October elections. The mass media opened up a little, if only temporarily. The authorities were unable to prevail in several key hotly contested constituency races. The United Opposition coalition built around Tymoshenko’s Fatherland party came second, even though she was not allowed to stand. But while the EU has tended to focus on election fraud and the selective prosecution of political opponents, democracy in Ukraine is now being undermined in many other ways. The judicial “reform” pushed through in 2010 now gives the state the power to put anyone it wants in prison. The legal system has become totally politicised; conviction rates are over 99 percent. The judiciary is used to silence enemies and to legitimise the increasing problem of *raidertsvo*, or the theft by oligarchs of each others’ businesses. Even the release of Tymoshenko would not solve this more fundamental problem.

Where the opposition did well, it was despite its own weaknesses. Many of its leading figures played safe and stood on party lists rather than take on the ruling Party of Regions directly in the constituencies. The three main opposition parties – Fatherland, UDAR (known as “Punch” because it is led by the boxer Vitaliy Klichko) and the far-right Freedom Party – could only reach a partial agreement on withdrawing in each others’ favour in the constituencies. Each suspects

the other of acting as a Trojan horse and secretly planning to ally with the Party of Regions after the elections. Divisions within the main parties are manifold, and where they do not exist they are created by the authorities’ malign influence. The opposition shouldn’t even be the opposition in the outgoing parliament, as it won the last elections in 2007. But disunity in its ranks has repeatedly led to defections and failure to block or effectively resist key measures like the election law itself in November 2011 or the new Law on Languages in July 2012.

The position of the opposition is being further weakened by the revival of so-called “political technology” (the local black arts of covert manipulation). Many of the “opposition” parties running in the election were in reality covert projects of the authorities. Forward Ukraine! and its leader Nataliya Korolevska act like radical opposition forces, but are in reality what is known locally as “clones” – that is, copies of other parties financed by leading oligarchs that try to take the place of the old opposition – hence the choice of a young, glamorous female leader to compete with Yuliya Tymoshenko. The authorities prevented some opposition parties such as UDAR from campaigning in eastern Ukraine, where the Party of Regions is relatively sanguine about losing votes to other parties such as the Communists, as it knows the Communists will be a reliable part of any future super-majority.

Even the genuine opposition parties are now all financially dependent on oligarchic sponsors, often even from the authorities’ own ranks. Ukraine’s richest man, Rinat Akhmetov, supposedly spent \$80 million on Forward Ukraine! – though he allegedly cut funding because the project was threatening to take votes off the Party of Regions. The Communists are sponsored to the tune of \$25 million by Ihor Koletnik, the head of the Customs Service.² This financing illustrates how threatened some Ukrainian oligarchs feel by the rise of Yanukovich’s “family”. At the same time, however, such funding reduces the real independence of the “opposition”.

The opposition parties have also been seeded with so-called *tushki* – individuals who are known to be easily bribeable and are pre-programmed to defect after the election³. The problem of bribery and the defection of MPs has been around for a long time. In 2004, changes to the constitution were agreed that required MPs to stay in the parties they were elected to serve and to ensure that the government “majority” was made up of parties rather than individuals. But in a blatantly partial ruling in 2010 the constitutional court reversed that decision. At least 80 percent of “independent” MPs will be persuaded to join the authorities’ camp by the same means. Thus even though the Party of Regions did not win the headline vote, together with the fake opposition, “independents” and *tushki*, it still has a majority and is within reach of the 300 out of 450 seats in the new parliament it needs to change the constitution. The three

² Author interview with leading local political technologist Taras Berezovets, 20 September 2012.

³ *Tushka* means the corpse of a small animal – something like “roadkill”.

main opposition parties will have to show an uncharacteristic level of solidarity to prevent this happening.

The rise of the “family”

Corruption has also increased substantially since the 2010 elections. Yanukovich has increasingly vested power and wealth in a literal and metaphorical “family”. The president’s oldest son Oleksandr Yanukovich and his associates have taken over the central bank and tax, finance and law enforcement agencies, and used that power to take over rival businesses.⁴ This began with businesses owned by supporters of the losing side in 2010 and Ukraine’s vulnerable SME sector. Now the “family” has shifted to targeting major oligarchs. “Grabbing property started with the supporters of the orange elite, but now it is danger of spreading to the relatively loyal guys,” says leading Ukrainian analyst Mykhailo Honchar.⁵ Over the last year, the “family” has begun moving into the coal business, electricity, telecommunications and agriculture. Land privatisation is scheduled finally to move forward after the elections, but amendments to the law recently created a new state land bank that would have first right of purchase if peasant farmers chose to sell their land, leading to fears that “family” businesses will quickly accumulate the largest parcels of Ukraine’s rich farm land.

Ukraine’s co-hosting of the Euro 2012 football championship finals was marred by controversies over the privileged role of shadowy contractor companies linked to the “family” like Altcom. Rake-offs and over-payments cost the Ukrainian taxpayer hundreds of millions of dollars. In August 2012, Yanukovich signed a law cancelling the obligation of state companies to hold tenders for the purchase of goods and services when they use their own funds. Yuliya Mostova, the editor of Ukraine’s main independent paper *Mirror of the Week*, argues that Yanukovich’s goal is simple. “He wants to be the richest man in Eastern Europe”, she says. “Yanukovich is the first president of Ukraine who needs a controlling share not only of all power in the country but of all its business too.”⁶

The power of the “family” is likely to grow further after the elections as Serhiy Arbuzov, the current head of the central bank and “curator” of the many “family” businesses, moves to become first deputy prime minister or even prime minister. Because the interests of the “family” are currently all within Ukraine, its members are immune to the argument that Ukraine needs the agreements with the EU. However, other oligarchs who trade or invest abroad are deeply worried about the threat to their business interests.

Fragile pluralism

The authorities are not far short of a two-thirds majority in the new parliament that would allow them to change the constitution. For example, they could decide to allow Yanukovich to be “re-elected” by parliament in 2015 rather than directly by the people. Alternatively, as the authorities now control almost all political branches of state, they could target remaining independent centres of power before any such challenges arise. Since 2010, the authorities have been gradually tightening control over independent media, not by restoring direct censorship, but by challenging and redistributing oligarchic control. As Serhiy Kudelya puts it, “control over the leading television channels by oligarchic moguls close to Yanukovich has produced a more decentralized system of self-censorship”.⁷ The new preference is for so-called *usnyky*, or verbal instructions from the presidential administration to TV owners in person. Thus the media remains pluralistic but is highly corrupt. According to one UDAR adviser, “all media is now paid for, and we have to play that game”.⁸

The authorities may drop their relatively hands-off approach to the media once the vote is over, just as they did once the Euro 2012 final in Kyiv was out of the way, in part so that the “family” can muscle in on the local media market. The campaign that began in the summer against Ukraine’s last remaining TV channels like TVi and independent outlets like the paper and popular web site Left Bank, as well as sites modelled on Alexey Navalny’s campaigns in Russia like *parklikeidiot.com.ua* and *nashigroshi.org* (“Our Money”), which looks at corruption in public contracts, may well be resumed.

Meanwhile Ukraine’s relatively free NGO sector looks like an increasing anomaly. The number of registered NGOs has actually grown in recent years. Ukraine has not yet followed Russia by forcing out “foreign” NGOs and substituting them with Kremlin-friendly “government-organised NGOs” or GONGOs (Russia’s own measures were ironically a reaction to Ukraine’s Orange Revolution in 2004). But the Ukrainian authorities are now setting up “clone” NGOs such as For Fair Elections, which predictably gave the October elections a clean bill of health.⁹ Ironically and sadly for the country that staged famous mass protests against the last rigged elections in 2004, the organisation of crowds and demonstrations is now a professional business – demonstrators, often students, are paid to turn up.¹⁰ Precisely because many NGOs played a key role in election monitoring, a “final front” against them could be opened after the elections.

⁷ Serhiy Kudelya, “Politics and Democracy in Ukraine”, in Taras Kuzio and Daniel Hamilton (eds.), *Open Ukraine: Changing Course Towards a European Future* (Washington, DC: Center for Transatlantic Relations, 2011), pp. 1-20 and pp. 10-11.

⁸ Author interview, 19 September 2012.

⁹ “The observers from For Fair Elections saw no serious violations and talk about the ‘new developments’ in the upcoming elections in Ukraine”, *Komsomolskaya Pravda in Ukraine*, 25 October 2012, available at <http://kp.ua/daily/251012/362845/>

¹⁰ Yegor Vasylyev, “The Funny Business of Ukrainian Political Rallies”, *Transitions Online*, 9 February 2012, available at www.tol.org/client/article/22988-the-funny-business-of-ukrainian-political-rallies.html; Richard Boudreaux, “Bucks Populi: Making Democracy a Going Concern in Kiev”, *The Wall Street Journal*, 5 February 2010.

⁴ See the analysis of his expanding empire by Sevgil Musaeva, “How the Business of the President’s Elder Son Works”, *Forbes Ukraine*, 3 September 2012, at <http://forbes.ua/magazine/forbes/1336398-kak-rabotaet-biznes-starshego-syna-prezidenta>

⁵ Author interview, 8 November 2011.

⁶ Author interview with Yuliya Mostova, 8 November 2011; Yuliya Mostova, “Semostiinyi Yanukovich”, *Dzerkalo tyzhnia*, 1 June 2012, available at http://dt.ua/POLITICS/semostiinyi_yanukovich-103152.html.

On the other hand, the opposition has a strong defensive position in the new parliament and there are signs of dissatisfaction and division within the ruling elite. The EU should support political and economic pluralism wherever it can.

The customs union bluff

Even before the AA and the DCFTA were frozen in December 2011, the EU was not good at explaining the benefit of them to Ukrainians. Since the agreements were frozen, the Ukrainian media has been increasingly stressing their downside – which is not insignificant, given the cost of implementing such a large proportion of the *acquis communautaire*.¹¹ This argument has particular traction with hard-pressed SMEs, which are suffering as the Ukrainian economy seems to be going into another recession. Ukraine's SME sector was already too small for an economy of its size, but has actually shrunk in recent years to less than 20 percent of GDP. Banks have virtually stopped lending to SMEs, particularly because they have been renationalised since 2008 – the share of banking assets owned by Western banks has fallen from a peak of 42 percent in early 2009 to 25 percent in the first half of 2012.¹² The new owners favour lending to big oligarchs – which often means themselves.

The Ukrainian authorities intend to use the elections to restore their legitimacy in the West. If it is not forthcoming, they will blackmail the West by threatening to join the Russia-led customs union. But this is a bluff. In fact, only a handful of oligarchs, mainly the so-called gas lobby, would see gains in such a union. Ironically, it is the hard-pressed SME sector, rather than the oligarchs, that may be tempted by the idea of a customs union with Russia. Even more ironically, the “family” would not gain at all if Ukraine were more open to Russian capital.

Policy recommendations

The current impasse means that doing nothing will simply allow these worrisome trends to get worse. The mooted solution of signing the agreements if the elections are deemed “not too bad” is just as dangerous. It would completely undermine conditionality, which was originally applied over selective prosecutions, and deepen the regime's current sense of impunity. Creative thinking is therefore needed in order to get round the impasse and move relations onto another page. The Tymoshenko case is only one of many problems. Her release should be an ultimate goal but not the only immediate goal.

The first step is to better define conditionality in the three key areas of selective prosecutions, the conduct of elections and “reform”. There are too many EU voices in all three

areas, particularly on the Tymoshenko case: some EU leaders have asked for her release; others have complained at new charges being laid against her; and others have criticised the conditions in which she is held. The EU therefore needs to agree a standard that is both substantive and actionable: asking the Ukrainian authorities to comply fully with any ruling of the European Court on Human Rights is one possibility. On elections, the final OSCE-ODIHR report should be as rounded as possible, looking at “political technology” as well as simple fraud, but also noting areas in which the authorities' will or schemes did not prevail. The EU should press for “reform” in areas that enable progress on other fronts, such as dropping the provisions in the anti-discrimination legislation that are incompatible with visa liberalisation.

The second step should be provisional application of the agreements with the EU. If necessary, the AA could be split to allow the DCFTA and sectoral parts to be enacted on their own without the “political” and justice sections. Alternatively, the agreements could remain in deep freeze, but the EU could continue with sectoral integration on the basis of parallel sectoral agreements. Defining a dividing line between what is EU competence (most of the DCFTA) and what is member-state competence will be difficult but not impossible.

There was always a strong case both for the agreements, which will help transform Ukrainian society in the long run, and for red lines. But it makes little sense to block the agreements to punish Ukraine. Rather, the EU should take a tougher line in other areas in order to allow the agreements to be revived. The advocates of a tougher approach will hopefully feel happier about the agreements going forward if they can see that action is being taken elsewhere. The resolution on Ukraine passed by the US Senate in September is the beginning of a trend towards the construction of a Ukrainian equivalent of the “Magnitsky List”.¹³ The European Commission is investigating Gazprom. The EU should start with a visa ban on Renat Kuzmin, the deputy prosecutor responsible for the trials of Tymoshenko and former Interior Minister Yuriy Lutsenko.

The EU should also audit the activities of suspect “family” companies in Austria, Cyprus and Luxembourg (and in Liechtenstein and Switzerland), which break existing EU law. This need not be formal “sanctions”; it can be undertaken by national financial security agencies. The US is currently taking a tougher line, but most of the Ukrainian elite's financial malfeasance is within the EU and dependencies like the British Virgin Islands. For example, the Activ Solar company, which is based in Vienna, allegedly acts as a front for government circles that are siphoning off budget money and circulating it back home tax free.¹⁴ In this sense, the lack of Western interest would be fatal for Ukraine.

¹¹ See Rafal Sadowski, “The Prospects for the EU-Ukraine free trade agreement”, Centre for Eastern Studies, 18 October 2012, <http://www.osw.waw.pl/en/publikacje/osw-commentary/2012-10-18/prospects-euukraine-free-trade-agreement>

¹² Yevhen Hrebenyuk, “Foreign Banks Flee Ukraine”, *Ukrainian Week*, 23 October 2012, <http://ukrainianweek.com/Economics/63007>.

¹³ The text can be found at http://inhouse.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=26d65aab-4ed1-4173-8f61-c05809c5boac.
¹⁴ See the article by Serhiy Leshchenko “Tax Haven of Yanukovych and Kluyev”, 22 January 2012, translated at <http://eastbook.eu/en/2012/01/material-en/news-en/serhiy-leshchenko-tax-haven-of-yanukovych-and-kluyev/>

The third step should be to press ahead with parallel measures. The authorities' propaganda relies heavily on the argument that the EU cares only about Tymoshenko and not about ordinary Ukrainians. Visa liberalisation should therefore be a part of any scenario. Ratification by the European Parliament of the new amended Visa Facilitation Agreement signed in July has also been blocked because of the Tymoshenko affair, but should now move forward. Now that Ukraine has introduced biometric passports it should be within sight of the second, post-legislative stage of its Visa Liberalisation Action Plan. Wider travel will liberalise Ukraine in the long run. So would easier internal travel, if budget airlines could be attracted to Ukraine as a result of an Open Skies Agreement.

Changes to the Erasmus education exchange programme will also benefit Ukraine, but the EU needs to be wary of encouraging a "brain drain" from Ukraine and should instead encourage a two-way process with schemes to encourage visiting students and experts from the West.

The EU should also be much more proactive about advertising the economic and social benefits of the agreements. It should develop a positive communication strategy, involving local NGOs, to sell the agreements to local stakeholders.

The EU should also support the emergence of new independent actors in Ukraine. Western loans and investments, for example, help protect business against raiders. The EU should help revive lending schemes for SMEs, which are not working as they might – from the European Bank for Reconstruction and Development and the World Bank.

Finally, the EU should open other channels to circumvent the current dialogue of the deaf. The European Parliament's Kwasniewski/Cox mission to monitor selective prosecutions, which is currently suspended for the duration of the elections, can be replicated and expanded. The EU should give a voice to business circles that are worried by the rise of the "family".

Conclusion

Ukraine's leaders behave like they have immunity and impunity, as if Ukraine were a vital raw material supplier or possessed of other geopolitical importance. In reality, they only have power in isolation. The EU should not fear continuing to apply tough standards to Ukraine. But the EU needs leverage and should also work harder to show it is on the side of Ukraine's beleaguered democratic, liberal and economically constructive forces. Once Ukraine develops proper relations with Europe appropriate to its size, location and economic potential, the EU's leverage will be much higher. It's time to show Ukraine some tough love.

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