

Norms and Conditionality: The EU and Ukraine

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Summary

As 2012 unfolded, what could have become the year when Ukraine concluded an Association Agreement with the EU proved the most 'political' year ever in EU–Ukraine relations. Especially the court case against Yulia Tymoshenko, former prime minister and presidential candidate in the 2010 presidential elections, has remained problematic as a glaring example of not only selective justice, but selective injustice. Subsequently, the EU has promoted a policy of strict conditionality in the observance of democratic elections, legal affairs and human rights as a condition for its Association Agreements.

Introduction

The literature on EU–Ukraine relations has focused on a central and recurrent set of challenges: does the EU have sufficient power of attraction for the leading European Neighbourhood Policy (ENP) country, Ukraine? and do the EU's policies have a normative governance effect on Ukraine? Some studies see this as a question of the usefulness of the ENP as a tool for the promotion of governance. While there is agreement that the EU should conduct a strict 'conditionality policy' in its neighbourhood, and that this effect has been more visible in the EU's immediate neighbourhood (Schimmelfennig and Scholtz 2008), some studies have indicated that the ENP is a 'phantom carrot' (O'Donnell and Whitman 2007), and its conditionality a 'conditionality lite' (Sasse 2008). Basically, these and other studies hold that the impact of EU incentives on internal political governance has been limited in Ukraine.

Still, Ukraine holds a central position in the ENP, and there has been steady progress in the development of new agreements. As the gradual step-by-step process of EU policies towards its eastern neighbourhood unfolded, the intention became to replace the PCA agreement, which regulated the EU–Ukraine relationship from 1994 (effective from 1998) until 2008, by an Association Agreement (AA). Recent research has indicated that, below the surface of political frays, Ukraine is indeed 'highly active' but also 'most reluctant' in the ENP, with sector-based convergence with EU standards in selected sectors (Langbein and Wolczuk 2012). Considerable EU funding has also been provided. Starting from 1991, the assistance provided by the EU alone has amounted to over €3 billion, and the European Neighbourhood Policy instrument has

allocated €470 million to Ukraine for the years 2011 to 2013 (EU–Ukraine Summit 2013).

Moreover, the EU has a long history of involvement with Ukraine, and the signing of an Association Agreement (AA) would have been the logical outcome. Indeed, the 906pp Agreement that was ready in 2012 was meant to solidify the ENP approach of ‘approximation without membership’, as well as providing strong incentives for Ukraine to enter into advantageous trade relations with the economically by far more powerful EU through a deep and comprehensive free trade agreement (DCFTA). However, as 2012 proceeded, a signing of the AA seemed further removed from the agenda, due to political controversies over Ukraine’s laggard compliance with democratic standards of governance.

This policy paper discusses the political conditionality of EU policies toward Ukraine. It holds that the primary obstacle to a more effective EU incentive policy has been the court case against former PM Julia Timoshenko, which is a blatant violation of EU legal norms. It does not posit, however, that EU policy of ‘political conditionality’ is ineffective. While any ‘Europeanization’ of Ukraine seems off the agenda, the EU still offers considerable incentives for Ukraine, echoing the observation that ‘EU conditionality is mainly positive, that is, the EU offers and withholds carrots but does not carry a big stick’ (Schimmelfennig and Scholtz 2008: 190). If ratified, the Association Agreement will become a ‘pilot agreement’ for all EU Eastern Partnerships and the first comprehensive agreement in a new set of agreements for the EU. Moreover, it will be a stepping stone to a Deep and Comprehensive Free Trade Agreement (DCFTA) between the EU and Ukraine. Thus, the EU provides considerable incentives for Ukraine to adjust its standards of government and economic restructuring, by outlining a process of clear-cut conditionality and rewards.

The EU: a ‘Reluctant’ Promoter of Governance?


The ‘political conditionality’ of withholding ‘rewards’ but not pushing for change is a well-established understanding of how the European Union works (Schimmelfennig and Scholtz 2008). This holds also for its role as a promoter of democracy and governance in the neighbourhood. Indeed, the EU ‘is not so much setting its own standards of formal democracy, but borrows them from other institutions, most notably the OSCE/ODIHR and the Council of Europe (including the Venice Commission)’ (Casier 2011: 960). The EU’s approach to issues of political governance is an indirect one: it does not instruct national governments on how to reform the polity, but works through international organizations, trans-governmental institutions and legal frameworks to shape a positive environment for the wider effect of a unified Europe.

This has consequences for the formulation of EU policies towards Ukraine, and also for the specific role that the EU plays in promoting democratic standards. Casier (2011) distinguishes between *formal* democracy (institutions and procedural rules) and *substantive* democracy (societal control over politics), and holds that the EU provides incentives for compliance in both fields – and demands it. Whereas Ukraine made progress in the field of formal democracy from 2006 to 2010, the main obstacle to ‘progress’ in substantive democracy today is the dominant role of competing oligarchies in the country (Casier 2011: 965). This is reflected in a recent report indicating that ‘informal’ relations constitute the backbone of Ukrainian politics, whereas formal institutions have less significance (Matuszak 2012).

Casier (2011) notes that the EU has had an effect on formal democracy in Ukraine, and that most assessments have deemed the institutional changes to the country’s electoral law and the relationship between the government and the presidency ‘progressive’. However, the annulment of the 2004 agreement between the Orange camp and the Party of Regions and the reintroduction of a presidential system stand out as a reversal of this progress (Flikke 2011). Since 2010, there has been a steady decline in democratic standards. Two Freedom House reports from 2011 and 2012 sounded the alarm on reversals in Ukraine’s regional electoral legislation, the concentration of power in the Ukrainian presidency and the Party of Region bloc in the Rada, as well as changes made in the Constitutional Court (Kramer et al. 2012). As the 2012 report concluded, ‘The Ukrainian government is pursuing contradictory policies. On the one hand, Ukraine’s leadership seeks to integrate Ukraine into Europe, hence its pursuit of the DCFTA; at the same time, it is trying to emasculate the domestic opposition and civil society’ (ibid. 2012: 5).

The Timoshenko Case: the EU at the Fore

The arrest of Ukraine’s former PM Julia Timoshenko in October 2011, as well as of former Timoshenko associates like Yuri Lutsenko, former Minister of Internal Affairs, put the EU in a difficult situation. First and foremost, these cases accentuate a *political* dilemma: the EU cannot and will not pursue a forward-leaning policy that would simultaneously undermine the validity of norms and governance in the EU neighbourhood. Nor will the EU make any concessions on issues of formal democracy with a country in line for an AA. That said, these cases are only the tip of the iceberg: more fundamental structural changes have been made to the electoral law, the regional elections and the constitutional court. The danger is that the issue of ‘personalities’ will usurp the focus, diverting attention from more substantial structural changes.



In fact, the EU has succeeded in focusing less on personalities, and more on issues of norms, or rather – the problem of the lack of formal and substantive democracy. In his statement at the Plenary Session of the European Parliament in Strasbourg on 22 May 2012, the Commissioner for Enlargement, Stefan Füle, moved beyond the rhetoric of systemic reforms, noting: ‘Politically-motivated justice is a systemic problem in Ukraine, and it needs a systemic solution in the form of a comprehensive judicial reform’ (Füle 2012a). Following up on this at the EU–Ukraine Parliamentary Committee in June 2012, he stressed explicitly: ‘the European Union no longer wants explanations from Ukraine, it wants visible action, and in particular in three areas’: these he identified these as parliamentary elections, selective justice, and governance reforms (Füle 2012b).

These demands were linked to the EU incentive policies. At the 16th EU–Ukraine summit on 25 February 2013, the EU demonstrated a clear logic of conditionality concerning the planned signing of the AA at the November 2013 Eastern Partnership summit, holding as a precondition that ‘concrete action [is] being taken in the three key areas set out in our joint communiqué: changes in the electoral code; overall political and economic reforms and decisively addressing the issue of selective justice. These are real and feasible benchmarks, which have to be tackled in the very ‘short term’ (Barroso, 2013). This clear-cut conditionality prepares space for a more comprehensive and organized EU policy, linking the Timoshenko case to the issue of formal democracy (institutions and procedural rules) and not to a specific ‘hobby-horse’ of this or that politician. Indeed, the ruling of the European Court of Justice from 30 April 2013 has served to reinforce the indirect approach to issues of legality, formal democracy and substantive democracy of the EU. By deeming the arrest and imprisonment of the former prime minister as ‘arbitrariness’ and calling the review of the lawfulness of her arrest ‘inadequate’, the Court lifted the issue to the level of formal democracy.

Will EU conditionality have an effect? Strictly speaking, clarity from the EU should induce a sense of clarity also in Ukraine. For the EU, the fact remains that selective justice is still a highly problematic issue with Ukraine, simply because it cannot easily be framed as one that mirrors the level of relations offered by the EU. Concerning the former prime minister, the standard statement from Victor Yanukovich, current president of Ukraine, has been that due legal process should decide the fate of Yulia Timoshenko. This ‘due process’ has been a dubious one, however. Indeed, the set of charges has been expanded from the initial accusation that the former prime minister jeopardized

national energy security by signing a gas contract with Russia in 2009. As Kuzio (2012: 433) held in 2012, ‘the imprisonment of Timoshenko, former Interior Minister Yuriy Lutsenko and other members of her 2007–2010 government, has derailed Ukraine’s Association Agreement with the EU’. Even though Lutsenko was released in April 2013, this remains a stumbling block in Ukraine–EU relations.

Conclusions

This policy brief has discussed the effect of EU conditionality and incentives on Ukraine. As the European Neighbourhood Policy has developed toward an Association Agreement, the question of norms and governance has become more acute for both parties. At present, the issue of normative compliance overshadows even potential sector-level cooperation. This is unfortunate, since, as Langbein and Wolczuk (2012: 864, 878) point out, convergence should not be studied solely as a ‘wholesale’ system of democratic governance: ‘It is only at a sector-level that the domestic configuration of actors and their preferences can be fully assessed in the context of non-accession.’ Sector-level cooperation is possible – especially if the AA is adopted – and could improve governance in Ukraine, providing valuable assistance to restructuring vital sectors. Moreover, it could give Ukraine greater legitimacy. As Casier (2011: 970) notes, legitimacy is a primary incentive that the EU can choose to give, or not: ‘Ukraine seeks legitimacy with the EU, a symbolic reward, which it perceives to increase chances of accession in the longer term. The EU may grant or withhold the legitimacy, as well as material forms of assistance.’

In order to be granted anything more than simply a symbolic reward, Ukraine will have to understand the importance of norms, and of complying with these. The EU may very well decide to give Ukraine this significant symbolic reward – but not at the cost of compromising basic values of the European Union.

References

- Barroso, J.M. (2013). 'Statement by President Barroso following the 16th EU-Ukraine Summit', available at: http://europa.eu/rapid/press-release_SPEECH-13-157_en.htm
- Casier, T. (2011). 'The EU's two-track approach to democracy promotion: the case of Ukraine', *Democratization* 18(4): 956-77.
- Flikke, G. (2011) 'Ukraine: Precarious post-electoral reversals', *NUPI Policy Brief* (1). Oslo: Norwegian Institute of International Affairs (NUPI).
- Füle, S. (2012a). 'Statement on the situation in Ukraine, case of Yulia Tymoshenko', European Parliament Plenary Session, 22 May 2012, available at: http://europa.eu/rapid/press-release_SPEECH-12-373_en.htm?locale=en
- Füle, S. (2012b). 'Speech at the meeting of the EU-Ukraine Parliamentary Cooperation Committee', European Parliament 14 June 2012, available at: http://europa.eu/rapid/press-release_SPEECH-12-448_en.htm?locale=en
- Kramer, D. J., R. Nurick, O. Sushko, V. Syumar, D. Wilson and M. Schaaf (2012). 'Sounding the alarm round 2: protecting democracy in Ukraine', *Freedom House Special Report*. Available at: <http://www.freedomhouse.org/sites/default/files/Ukraine%202012%20English%20FINAL.pdf>
- Kuzio, T. (2012). 'Twenty years as an independent state: Ukraine's ten logical inconsistencies', *Communist and Post-Communist Studies* 45: 429-38.
- Langbein, J. and K. Wolczuk (2012). 'Convergence without membership? The impact of the European Union in the neighbourhood: evidence from Ukraine', *Journal of European Public Policy* 19(6): 863-81.
- Matuszak, S. (2012). *The Oligarchic Democracy: The Influence of Business Groups on Ukrainian Politics*. Warsaw: Centre for Eastern Studies.
- O'Donnell, C. M. and R. G. Whitman (2007). 'The phantom carrot: A flaw in the ENP's construction', *Osteuropa* 57(2-3): 95-104.
- Sasse, G. (2008). 'The European Neighbourhood Policy: Conditionality revisited for the EU's Eastern neighbours', *Europe-Asia Studies* 60(2): 295-316.
- Schimmelfennig, F. and H. Scholtz (2008). 'EU democracy promotion in the European neighbourhood: political conditionality, economic development and transnational exchange', *European Union Politics* 9(2): 187-215.

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