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Ukraine and the EU

Needed: Less Tymoshenko, More Values

Susan Stewart

The EU has manoeuvred itself into a corner by insisting on freedom for Yulia Tymoshenko. The problems in Ukraine run much deeper and a broader approach is required to achieve any meaningful results. At the same time, the conflict over the Tymoshenko case provides an opportunity for the EU to recognise the seriousness of the “values gap” and its implications for Ukrainian domestic and foreign policy. There may still be a chance to rescue the Association Agreement and retain the EU’s credibility as a values-oriented actor. However, if the process regarding the agreement should be put on hold, consideration should be given to discarding the current overly ambitious EU approach to Ukraine and replacing it with a more realistic collection of “building blocks” better adapted to Ukrainian political, economic and social conditions.

The trial of former Prime Minister Yulia Tymoshenko has become a watershed in EU-Ukraine relations. However, recent dramatic developments mask the fact that the relationship has been problematic for years and has only become more so since President Viktor Yanukovych took power in February 2010. Thus, the Tymoshenko case is only one issue in a much broader context of difficulties with rule-of-law and democracy in Ukraine, as well as of inadequate reforms and a culture of decision-making based on the private interests of a small circle of influential politicians and businesspeople.

The Tymoshenko trial is primarily a domestic political issue for Yanukovych. He is personally interested in eliminating his former rival from the political scene, both

as an act of revenge and due to his fear of a strong and active political opposition. In addition, he does not want to appear weak to his political cronies, who could interpret his actions as giving in to Western pressure. The system he has fostered is one which requires that his own will be perceived by others as the key determinant of the course of events. Belief in a strong and powerful Yanukovych will ensure that influential members of the elite continue to seek his approval and will discourage the emergence of competitors within his own ranks.

However, the Tymoshenko case has developed unexpectedly strong foreign policy implications. The EU, which has become increasingly concerned about authoritarian trends in Ukraine, has selected the trial as a symbol of the problematic state of rule-of-

law in the country. In 2011 there were two competing tendencies. On the one hand, the negotiations on the Association Agreement (including a Deep and Comprehensive Free Trade Agreement, or DCFTA) acquired positive momentum. Both sides expressed confidence that it would be possible to initialise the text of the agreement at the EU-Ukraine summit planned for December and then move on to the signing and ratification phases. On the other hand, it has become ever more obvious that Yanukovich is not interested in the further development of democracy and the rule-of-law in Ukraine. This has led numerous observers to point to the unsavoury signal that would be sent by the EU if it entered into an ambitious agreement including commitments to democratic values and the rule-of-law with an increasingly authoritarian neighbour. The EU opted to require an indication from Kiev that it was willing to reduce persecution of the political opposition through selective justice and chose the Tymoshenko case as a litmus test.

Too much Tymoshenko

While it is laudable to be concerned with the treatment of the opposition, in this case the EU's approach has backfired. Even if other cases (such as that of former Interior Minister Yuriy Lutsenko) were regularly mentioned, the emphasis on the Tymoshenko trial led the Ukrainian political elite to believe that by manipulating the political system to achieve a result palatable to the EU in this one instance, they could preserve both their opportunities for political control and their relationship with the EU. Worse, the EU has contradicted itself by demanding independence of the judiciary and then implying that Yanukovich should intervene in the trial's outcome. This approach was in danger of achieving the opposite of the EU's long-term goal, which is a Ukraine that abides by democratic principles and implements the rule-of-law. Instead, Yanukovich would have had to utilise the judiciary's depend-

ence on the executive to bring about a situation acceptable to the EU. Even if Tymoshenko had been freed, it is highly unlikely that this would have been a harbinger of significant improvements in the treatment of the opposition. The measures employed in the run-up to and during the local elections in October 2010 demonstrate that there are many ways to harass opposition parties and candidates without resorting to prison terms.

Pressure from the EU could thus have accomplished at most a limited result that would have appeared positive in the short term, but would have completely failed to alter the Ukrainian elite's attitudes towards the opposition, thereby provoking further manipulations in the spheres of election law, media coverage, etc. in the coming months. In the final analysis, Yanukovich and many other Ukrainians do not believe that the EU is genuinely concerned with democracy and the rule-of-law in Ukraine. Rather, they view the EU's actions as a tactical move aimed at pressuring Ukraine to make concessions during the final negotiations of the Association Agreement – or worse, as an excuse to avoid entering into the Agreement at all, and therefore as a sign that the EU is not interested in pursuing Ukraine's further integration. Thus, they respond with what they see as similar tactics, such as implying that the only alternative for Ukraine is to move closer to Russia, e.g. by contemplating entry into the Customs Union, which currently includes Russia, Belarus and Kazakhstan.

The Russian embrace?

However, the EU should not be overly concerned that prolonging, or even suspending, the Association Agreement process would be tantamount to pushing Ukraine into Russia's embrace. Ukraine may indeed move closer to Russia in the coming months, but this would not be due primarily to the EU's actions. First, Ukraine must seek to preserve a functioning relationship with Russia simply due to geo-

graphical considerations and existing economic and cultural ties. This will not change even if the Association Agreement is ratified. Second, Ukrainian decision-making is usually based more on the private concerns of individuals (as the Tymoshenko case indicates) than on national interests. This means that Ukraine may drive itself economically and socially into a situation in which it sees little option but to take Russia up on its offers of immediate benefits in exchange for a certain loss of autonomy in the medium term. Thus, Ukraine's relationship with Russia depends mainly on key political and economic policy decisions of the Ukrainian elite, not on signals from the EU. It will take more than the prospect of EU membership to alter the entrenched interest structures within Ukrainian elite circles.

In fact, even if the Association Agreement is ratified by all parliaments concerned, its implementation will no doubt be patchy and difficult. This has been the case with EU-Ukraine accords to date and stems from the lack of will on the part of many politicians and bureaucrats involved, as well as from the institutional weakness of the Ukrainian system. For many in Ukraine, the Association Agreement is less the beginning of a process of reforms leading to adoption of EU standards and a more competitive business sector, and more a tool to demonstrate to Russia that Ukraine has a political and economic alternative.

Even those oligarchs who would profit from the Deep and Comprehensive Free Trade Agreement can accept a situation in which it is not ratified. For one thing, they have already obtained certain advantages through Ukraine's WTO accession and are thus not overly dependent on the passage of the DCFTA. For another, the major oligarchs have diversified interests and most have preserved opportunities to expand their business with Russia as well as the EU. It is crucial to keep in mind that the oligarchs are principally interested in profits, not in some abstract political agenda of Ukraine's EU integration based

on common values. They need to keep (or establish) good relations with top-level politicians in order to obtain privileges that keep their profits high. Thus, they will be inclined to go "where the wind blows" politically, since going out on a limb to support the Association Agreement – if the political trend turns towards Russia – could jeopardise their hard-won privileges.

Broadening the approach

The situation in Ukraine is complex and calls for a more elaborate response than the one pursued to date. Simply suspending the Association Agreement because of the outcome of the Tymoshenko trial will encourage Ukrainian politicians to manipulate the system, thereby compounding the problems in the sphere of rule-of-law that the EU is trying to address. Or it will lead to a dead end in which the dialogue between Ukraine and the EU comes to a halt. Neither of these options is desirable. However, it is essential to continue criticising the disturbing developments in Ukraine if the EU wishes to retain its credibility as a values-oriented actor.

A sensible approach would be a broader one that makes it more difficult for the Ukrainian side to address the EU's concerns without allowing for at least some genuine improvements in both rule-of-law and democracy. This would be a strong indication that the EU is taking seriously the concept of "deep and sustainable democracy" outlined in the European Neighbourhood Policy review of May 2011. It could take the form of a brief catalogue of areas of concern (separation of powers; treatment of the opposition; election law; freedom of the media). Clear and concrete steps that the EU expects Ukraine to take in the short term in each area should be elaborated. Even if these have been mentioned in other contexts, uniting them in a coherent and limited catalogue with a specific time frame will send a clear message regarding the EU's concerns and expectations. It will

then be crucial to monitor the degree to which such steps are undertaken.

The presentation of the catalogue could be scheduled to coincide with the initialisation of the Association Agreement. This would preserve the formidable achievements of the negotiating teams while preventing Ukraine from portraying the conclusion of the agreement as an unadulterated success. If desired, the catalogue could contain a section that includes steps to be taken prior to signing the Association Agreement and another including those to be completed prior to ratification.

Ideally, monitoring of Ukraine's progress should be done in cooperation with the Council of Europe and the OSCE. Ukraine is a member of both organisations and, within the context of each, has entered into commitments regarding democracy and the rule-of-law. A coordinated approach between these two organisations and the EU could heighten the pressure on Ukraine to fulfil its commitments, emphasise the depth of concern about democratic values in the international community, and preserve the opportunity to continue the Association Agreement process if Ukraine demonstrates its willingness to comply with previous promises. If such compliance is not forthcoming, this should be taken as a sign that Ukraine is not ready to commit to the values enshrined in the agreement. Given earlier problems with implementation of accords between Ukraine and the EU, as well as the fact that Ukraine is openly violating its commitments vis-à-vis the Council of Europe and the OSCE, a lack of compliance should be seen as a sufficient reason for the EU to break off the Association Agreement process, either prior to signing or prior to ratification.

If the process continues, major implementation problems can be anticipated, since the agreement is in many ways too ambitious for the current Ukrainian context. Thus, should the process be suspended, both sides ought to take the opportunity to come up with a more realistic arrangement. A new situation could allow

for mutually beneficial cooperation without placing constant pressure on the EU to promise more than it is ready to commit, while also taking into account the problematic realities of contemporary Ukraine. This would require a search for more limited formats in which goals that build upon one another can be achieved, leading in the future to a potentially more fruitful relationship by starting from more modest aims. The existing action plan on visa liberalisation is certainly one such "building block", as is the cooperation planned in the realm of comprehensive institution-building within the Eastern Partnership. Thus, the current EU approach to Ukraine and its neighbours would not be fundamentally challenged. Rather, the focus would shift from one complex agreement to a series of smaller interactions. These should be selected to mesh with those areas in which Ukraine has already begun reforms, such as the gas sector, the tax system and the judiciary. Conditionality should be applied in each instance and the "deep and sustainable democracy" agenda should be integrated into the approach. A more democratic and economically stronger Ukraine will benefit both the EU and the Ukrainian population. This should be a sufficient goal for now. The difficulty will be selling it to the present Ukrainian elite.

The Tymoshenko case can serve as a useful wake-up call for the EU with regard to political developments and the attitudes of the ruling elite in Ukraine today. These attitudes not only run counter to the EU's values and political culture, but they also have major spill-over effects in the realms of both domestic reform and foreign policy. Unless these fundamental differences in attitude are addressed in a substantive manner, the current problems in the relationship are likely to recur.

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