

**EUROPEAN COUNCIL ON FOREIGN RELATIONS
POLICY MEMO**

UKRAINE AFTER THE TYMOSHENKO VERDICT

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Summary

The trial and sentencing of the former Ukrainian Prime Minister Yuliya Tymoshenko in October 2011 generated many bad headlines. It also placed in doubt the two key agreements with the European Union that Ukraine has been negotiating since 2008: the Association Agreement and Deep and Comprehensive Free Trade Agreement (DCFTA).

This memo argues that the EU-Ukraine summit on 19 December should initiate a twin-track approach. The agreements cannot be formally signed, but should be kept alive until Ukraine is ready to implement the conditionality laid out in resolutions by the European Parliament and other bodies. But lecturing Ukraine on human rights at the summit will have little effect. The EU should also move towards sanctions that show its red lines have not been dropped; targeting the individuals most responsible for democratic backsliding and signalling more general vigilance against the Ukrainian elite's free-flowing travel and financial privileges in the EU.

The trial and sentencing of the former Ukrainian Prime Minister Yuliya Tymoshenko presents a double challenge for the European Union. Its credibility is on the line after the Ukrainian authorities first ignored clear warnings from Brussels and key member states and then failed to deliver on promises of compromise. But the impasse is also testing the EU's soft power and transformative capacity. Even Ukraine's friends, who have long recognised its difficulties in transforming itself, would claim that this is at least in part due to the absence of any reform incentive comparable to the membership perspective enjoyed by the accession states of the 1990s. The Association Agreement and Deep and Comprehensive Free Trade Agreement (DCFTA) that were due to be signed in December 2011 are the closest equivalent Ukraine has ever had or is likely to get.

Thus there seems no clear way out of the current impasse. While some would emphasise maintaining the red line over the Tymoshenko trial at the expense of the agreements, others argue that the agreements matter more in the long run. In fact, both are right. Once it is understood that the trial was only a part of a longer process, the logical policy for the EU should be to both initial the accords and impose sanctions at the same time.

Yanukovych's rollback of democracy

The early signals after Viktor Yanukovych's election in February 2010 were not all bad. His first foreign visit to Brussels suggested that the constant conflict and paralysis of the "orange" era seemed to be over. But it soon became clear that not only was Yanukovych's Ukraine still pursuing a "multi-vector" foreign policy, it was doing so in a manner very different to the Kuchma era (1994-2005). Unlike Kuchma, the Yanukovych approach is pendular and sequential. Kyiv constantly switches from one partner to another, without keeping the other side happy while it deals with the other pole. It is also far too obvious in using one side to trade off the other. This annoys Russia as much as it does the EU.

More seriously, it also soon became clear that Yanukovych's main priority was building his domestic power base. Even though he was only elected by a narrow margin, Yanukovych moved swiftly to bring every branch of state under executive control. Bribery and intimidation of MPs were used to create a new parliamentary majority, even though the same parliament had supported Tymoshenko as prime minister since it was originally elected in September 2007. The constitutional court was forced to reverse a previous ruling that only parties, not individual defectors from parties, could make up the "majority". A legal reform in the summer of 2010 imposed executive control over the judiciary. In October, the constitutional court was persuaded to order the reversal of the power-sharing constitutional changes agreed at the height of the Orange Revolution in 2004 and restore a much more presidential version of the constitution. To many analysts, this amounted to a "constitutional

coup d'état".¹ The media was increasingly restricted. Human rights violations became more widespread. In January 2011, Freedom House downgraded Ukraine to "partly free".²

Moreover, the purpose of rebuilding a strong state and "administrative vertical" was not to force through reform or crack down on corruption, but the opposite – to protect the power of the "national corporation", in which Yanukovich saw himself and his associates as the "majority shareholder".³ After the "chaotic corruption" of the orange era, grand larceny and state capture returned, particularly in the energy sector. Independent businesses, or businesses that used to support the opposition, were harassed or taken over. Growth in the SME sector stalled and then actually reversed, with small businesses' share of total sales dropping from 18.8 percent to 14.2 percent.⁴

Yanukovich's rollback of democracy was designed to make him a southern version of Vladimir Putin, but he lacked the instruments that Putin had used to build his power, namely energy resources and the security services. In Ukraine these two factors led in different directions. Ukraine is an energy transit country not a producer country. Yanukovich's victory led to "the revanche of RosUkrEnergo", the controversial gas transit venture that had been squeezed out of the market by Tymoshenko in 2009. Rinat Akhmetov is well known as Ukraine's richest man; but Yanukovich's main sponsor in 2010 was the energy lobby linked to RosUkrEnergo. According to the leading energy analyst Mykhailo Honchar, they were more desperate to restore their business, other industries such as chemicals were desperate for cheaper gas from Russia, and they had a "stronger cash flow, better mobilisation of resources and synergy with the administrative resources of the new government to help enrich both".⁵ Second, Ukraine's security services are more independent and the last two years have led to empire building by the current head and energy lobby ally Valeriy Khoroshkovsky. Both groups wanted Tymoshenko out of the way.

¹ Author interview with political scientist Olexiy Haran, 8 November 2011.

² Freedom House, *Sounding the Alarm: Protecting Democracy in Ukraine: A Freedom House Report on the State of Democracy and Human Rights in Ukraine*, April 2011, available at http://freedomhouse.org/uploads/special_report/98.pdf

³ Author interview with Yuliya Mostova, editor of *Zerkalo tyzhnya*, 8 November 2011.

⁴ *Ukrainian Week*, No. 8 (September) 2011, p. 52, available at http://img.tyzhden.ua/Content/Files/UkrainianWeek/07.11/Book%20UW20_eng_new.pdf

⁵ Author interview with Mykhailo Honchar, 8 November 2011.

Ukraine sees Russia playing tough with the EU and getting away with it. The Yanukovich elite has therefore tried to build up its own alternative cash base, although the attempt by another Yanukovich ally Yuriy Ivanyushchenko (who has faced controversy over his visa applications to the USA) to utilise customs scams and monopolise the grain market has been only partially successful, because it was too public.⁶

Yanukovich's Party of the Regions still faces difficult parliamentary elections in the autumn of 2012. Their poll ratings are down, at barely over twenty percent. The economy is weak, with only 4.3 percent growth in 2010 and 5 percent likely in 2011 after a 15.1 percent contraction in 2009. The budget and the banking sector remain fragile. Ukraine cannot therefore risk the benefits of WTO membership (Ukraine joined in 2008), and needs to restore relations with the IMF. So-called "administrative resources" do not have the same effect in Ukraine in fixing elections as they do in Russia. Public institutions and channels of control are too thoroughly degraded.

As a result, the Ukrainian government has been forced to use the instruments that do work to try and ensure victory in 2012. Its most effective lever is tax terror: shaking down opposition business supporters and to build up local patronage power. Tax receipts are up 50 percent, though the public sector is hardly feeling the benefit.⁷ Another instrument is legal terror. Having weakened but failed to destroy the opposition at the October 2010 local elections, the authorities resorted to cruder judicial methods. The Tymoshenko trial was only one of many, and part of a longer process of tightening political control. The trial of Tymoshenko's former Interior Minister Yuriy Lutsenko, for example, involved an even broader catalogue of human rights abuses, carefully documented by local sources, including Lutsenko's ill-treatment in prison, the use of illegally-obtained evidence and the intimidation of witnesses.⁸ The same organisations have collected detailed evidence on the deteriorating human rights picture in general, including abuse of detainees, torture and deaths in prison.⁹

⁶ Sonya Koshkina, 26 November 2010, 'Junta Dreaming', http://lb.ua/news/2010/11/26/75725_Hunta_kak_predchuvstvie.html

⁷ Oleksandra Zorzhenyvska, 11 November 2011, 'Pedokratiya', <http://dt.ua/POLITICS/pedokratiya2-91381.html>

⁸ See the detailed report by Oleh Shubin, 'Investigation with the sign of an organised crime group', 4 November 2011, at http://dt.ua/LAW/slidstvo_z_oznakami_organizovanogo_zlochinnogo_ugrupovannya-90959.html

⁹ See www.khpg.org/en/

The Tymoshenko trial itself was held in one of Kyiv's tiniest courtrooms to limit attendance, but that only made it noisy and chaotic. A young and inexperienced judge looked out of his depth, and made no attempt to stop a string of prejudicial comments from government officials while matters were still sub judice. Tymoshenko, on the other hand, was imprisoned before the trial ended on ill-defined charges of "contempt". Tymoshenko was accused of exceeding her authority in negotiating gas prices with Russia in 2009; but the trial provided no "smoking gun" evidence of any serious criminal act. After the verdict on 11 October, new charges of fraud and tax evasion were laid - but not before - confirming that trial had always been part of the authorities' election strategy for 2012, for which they plan to deliver cheaper gas from Russia and deliver the message that they solved the problem that Tymoshenko created in 2009. But by doing things this way round they only made the trial even more obviously political.

The same "legal" instruments are also being used against civil society leaders. Seven leaders of the "Tax Maidan" protests in November 2010 ("Maidan" is the name of the main square in Kyiv, the centre of the Orange Revolution in 2004) were charged with damaging the pavement. The printers of popular t-shirts using anti-Yanukovich slogans were charged with breaking UEFA Euro-2012 copyrights.¹⁰

A third instrument is so-called "political technology" to manipulate the political process in advance of the 2012 elections. The authorities are planning to split Tymoshenko's party from within (the Forward Party) and without (the Radical Party). Tymoshenko's last remaining business supporter, Kostyantyn Zhevaho, has just been forced to make his peace with the authorities. The authorities are also scheming to replace Tymoshenko's party with a "loyal", i.e. fake, opposition. In 2010, the original candidate for this role was Deputy Prime Minister Serhiy Tihipko's Strong Ukraine party, but he has accepted a merger with Yanukovich's Party of Regions. Now it is Arseniy Yatsenyuk, who is alleged to have sold half the places on his party list to Akhmetov. The boxer Volodymyr Klychko's Punch! party has allegedly been targeted by regime "parachutists".

¹⁰ See 'For thanking the citizens of the Donbass a fan of Dymano is threatened with four years in prison', 9 September 2011, http://lb.ua/news/2011/09/09/114096_Za_Spasibo_zhitelyam_Donbassa_fa.html and www.kyivpost.com/news/city/detail/112513/

The final element in the equation is the use of a “scarecrow party” to rally support for the authorities as Vladimir Zhirinovskiy does in Russia. In the Ukrainian case this is the ultra-nationalist Freedom Party, which is also useful for taking votes off Tymoshenko in west Ukraine, but is secretly backed by the First Deputy Prime Minister Andriy Klyuyev and former Deputy Prime Minister Volodymyr Sivkovich.

Another priority is to manipulate the election law to restore the system used before the Orange Revolution. Under this system, only half of parliament’s 450 members would be elected by proportional representation. The other half would come from territorial constituencies, where corruption and administrative resources will have a much greater effect. Other proposed changes to benefit the ruling party include the introduction of a five percent hurdle to get into parliament; banning smaller parties from forming coalitions; a blanket ban on those with criminal convictions (from politically-motivated trials) from standing; more easily corrupted election commissions; and a ban on the “against all” protest vote.

The uses of “order” in Ukraine

However, Ukraine is not Russia. It has neither the strategic options nor a coherent narrative to justify backing away from Europe. According to leading Ukrainian political scientist Oleksiy Haran, “the Yanukovich elite might think like the Russians, but they can’t talk like them – at least in public”.¹¹ According to another analyst Rostyslav Pavlenko, Yanukovich has “a kind of inner anti-Westernism”. However, “Ukraine is far less anti-Western than Russia: we have a ‘leave us alone’ approach instead of Russia’s ‘we are the only true path, and we’ll force you to join’”.¹² In late 2011, the Ukrainian media seemed to be preparing the ground for a rupture with the West, but the best that regime supporters could come up with was the idea that Ukraine’s alternative future rested on “Ukrainians themselves” and that “if we are strong, we will be reckoned with”.¹³

¹¹ Author interview with Oleksiy Haran, 12 May 2011.

¹² Author interview with Rostyslav Pavlenko, 2 May 2011.

¹³ Dmytro Firtash, interviewed in *Den*, 8 November 2011, available at www.day.kiev.ua/218573

Isolationism does not make strategic sense for Ukraine. Although it is fashionable in Kyiv to talk of emulating the “Turkish model” – Ukraine would also like to see itself as a powerful state on the edge of Europe increasingly able to act on its own terms – Ukraine is not Turkey. Firstly, its economy is much weaker. Secondly, Turkey stands at the centre of concentric circles of interest – neo-Ottoman, Turkophone and the business world – whereas Ukraine doesn’t really get on even with its tiny neighbour Moldova. The world may be increasingly multi-polar, but Ukraine is not a rival pole to the EU like China. Nor is Ukraine really drawn to anyone else’s pole. After an initial rebalancing of foreign policy towards Russia in 2010, the Yanukovich regime stands or falls to the degree to which it stands up for local oligarchs’ economic interests.

As a result, Ukraine is not abandoning – and cannot abandon – democracy and human rights altogether. Instead, there is an obsession with the tropes of “order” and “stability”. The fact that political debate in Ukraine is conducted in this type of code is noteworthy in itself – Ukraine does not have an independent alternative dialogue to justify any more explicit backsliding on democracy. Instead of openly repudiating democracy and human rights, Yanukovich has therefore sought to justify his recentralisation of power in the name of “order” after the “chaos” of the orange era. At Davos in January 2011, Yanukovich tellingly attacked the events in Tunisia for “disrupting the stability there. In a state where on the outside everything was always stable...”¹⁴ His spokeswoman and deputy chief of staff Anna Herman was even more explicit when she told *Le Monde* that Russia could not allow “chaos”. When asked whether democracy and order were compatible, she replied: “Alas, no”.¹⁵

On closer examination, however, the trope of “order” has been used in four competing ways, none of which supplies the regime with a coherent alternative narrative. First, “order” was sold as an end in itself. In its first few months in office, the Yanukovich regime was able to exploit the very real phenomenon of “Ukraine fatigue” or “Orange fatigue”, just as Putin exploited “Yeltsin fatigue” in the early 2000s. This brought Yanukovich some breathing space, and the West forgave too much in 2010, but it is not a long-term justification for staying in power.

¹⁴ “Yanukovich Struck by the People of Tunisia, who destroyed the Country’s Stability”, 28 January 2011, available at <http://www.newsru.ua/ukraine/28jan2011/ikiyv.html>

¹⁵ Piotr Smolar, “Une ‘orangiste’ dans l’état”, *Le Monde*, 29 January 2011.

Second, “order” was promised in exchange for, and as a facilitator of, reform. But the new government has achieved little. Key proposals, such as the 2010 tax reform, have been warped to benefit its business supporters.

Third, “order” was used as a euphemism for control. According to one analyst, “the Yanukovich team understand order to mean the ability to control the political situation, without outside challengers disrupting the inner circle from self-enrichment. Stability means *not* making painful changes if they might threaten the elite’s position”.¹⁶ The elite is reluctant to complete pensions and utility reforms that threaten their popularity and future power, but has done enough to bring their ratings down. The Arab Spring, which has revived fears of the “Maidan”, has strengthened the elite’s perceived need for control. It has led them to crack down on seemingly innocuous environmental demonstrations and build a high fence around parliament. Yanukovich supporters are once again talking about the threat from George Soros and NGOs financed from abroad.¹⁷

A fourth possible meaning of “order” is the Putinist contract in which it is exchanged for prosperity. Neighbouring Belarus was also able to offer this deal until recently, albeit with Russian money. But this approach seems out of Ukraine’s reach: energy-rich Russia may still have the resources to buy off potential discontent; Ukraine does not.

Thus the current debate about “order” is largely chimerical. It also reflects the contradictions of Ukrainian public opinion, which sees democracy both as a check on power and as a threat to stability. About 40 percent of Ukrainians demand stability but over 60 percent believe in freedoms and rights such as free elections and speech, private property and entrepreneurship. People would rather have both democracy (in the sense of protected rights and freedoms) and order (low corruption and crime, coherent work of government bodies).¹⁸ Often these two discourses exist in parallel and are not seen as mutually exclusive. In any case, Ukrainian

¹⁶ Author interview, 12 May 2011.

¹⁷ See “Grant wants to limit ‘food’: New Bill would Restrict Funding from Abroad to Public Organisations of Ukraine”, 21 April, 2011, available at <http://www.segodnya.ua/news/14244290.html>

¹⁸ See the poll at <http://ua.korrespondent.net/ukraine/290190-40-ukrayinciv-upevneni-v-tomu-shcho-poryadok-vazhlivishij-za-prava-ta-svobodu-gromadyan>

society is famously divided, and “not every part of society is ready for the idea of a strong hand”.¹⁹

The EU’s mistakes

It is therefore a myth that Ukraine can turn its back on Europe. It is also myth that Ukraine will be “lost” geopolitically to Russia if it is cold-shouldered by Brussels. Despite its pendular foreign policy, Ukraine will not swing too far towards Russia. Frustrated isolation is a much more likely option. The EU still has leverage with the Ukrainian people. In a recent survey carried out by ENPI, 68 percent of Ukrainians believed that EU cooperation aids the promotion of democracy in their country, and 61 percent thought that the EU could help bring peace and stability to the region.²⁰ Elites may be wary of the EU agreements in the long run as they will put pressure on them to clean up their act. But in the short term, Russia is actually a bigger threat to the elite’s key priority, which is maintaining asset control.

The EU needs to recover from the opposite mistakes it made in 2005 and 2010. In 2005, it failed to give Ukraine sufficient credit for making the Orange Revolution and bolster fragile political momentum. In 2010, when the EU was suffering from “Ukraine fatigue” after the chaos of the orange years, it gave Yanukovich the benefit of the doubt for too long. Earlier and stronger protests against democratic rollback may have prevented the situation from deteriorating to its present point.

In 2011, EU leaders found a welcome degree of unity to condemn the Tymoshenko trial. However, they were guilty of wishful thinking when Yanukovich maladroitly hinted at compromise. The Ukrainians have complained there were too many foreign-policy entrepreneurs, particularly at the Eastern Partnership summit in Warsaw in September 2011, all eager to gain political capital from condemning Ukraine – though a chorus of disapproval is exactly what the Ukrainians deserved. Kyiv betrayed its own arrogant assumption that the

¹⁹ Author interview with Haran, 12 May 2011.

²⁰ “ENPI Survey Series “Perceptions of the EU in Neighbourhood Partner countries”, European Neighbourhood Policy Instrument (ENPI) survey, 20 May 2011, available at http://eeas.europa.eu/delegations/ukraine/documents/more_and_more_ukrainians_see_eu_as_good_neighbour_en.pdf

EU is a “soft power” by complaining that Brussels and Moscow had swapped positions, with Russia suddenly forgiving and the EU playing Russia’s traditional “bad cop” role.

There are now at least three positions within the EU. Some member states have used Ukraine’s backsliding on democratic standards to keep it where they have always wanted it: at arm’s length. Even Ukraine’s dwindling band of friends is divided, however. One group would emphasise the need to hold the red line that had been drawn in the clearest possible terms. The Ukrainians have not even met the minimal conditions laid down by the European Parliament in its resolution on 25 October.²¹ If the agreements fall, they argue, so be it. Ukraine has shown it is not ready.

Another group recognises Ukraine’s faults, but argues that this is precisely why the agreements still need to be signed. Their transformative power will not match the membership perspective enjoyed by the accession states of the 1990s, but it is the best Ukraine can get. Without the agreements, the abuse of democracy will get worse, and Russia will be even freer to build up its influence within Ukraine.

On the other hand, it could be pointed out that Ukraine hasn’t followed the provisions of the European Energy Community since becoming a member in February 2011. It has ignored the unbundling clauses by talking to Gazprom about forming a consortium. Nothing has been done to split up the main state energy concern Naftohaz, despite a promise to divide it into three separate companies by the end of 2011 (though technically the Ukrainians could take until 2015). The prospects for Ukraine doing the hard work of actually implementing the DCFTA do not look good. Another group therefore advocates a long pause after the agreements are formally approved, as various technical details and translation will take six months or so. This would allow the EU to monitor the build-up to the 2012 elections. This position overlaps with that of the final group that wishes to avoid confrontation, as in present conditions several member states will refuse to ratify the agreements anyway.

Sign and sanction

²¹ See www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2011-0543&language=EN

The answer is for the EU to combine these approaches with a “sign and sanction” policy that would allow it to initial, or note the completion of, the agreements on 19 December with a minimum of fuss and at the same time impose targeted sanctions on Ukraine. The paradox is only superficial. In fact, the combination would align Ukraine policy more closely with the EU’s emerging line on Russia and Belarus, where it is trying to combine simultaneous policies of selective engagement and proactive sanction. The EU has several “partnerships for modernisation” with Russia, but several EU states are also contemplating following the US lead by creating a “Magnitsky list”. Similarly, the EU had imposed sanctions on Belarus since the December 2010 elections, but has also tried to broaden its outreach to civil society.

The EU should go ahead and impose visa bans on Ukrainian officials, as many states like Germany are already discussing, but also recognise that the Tymoshenko trial is only one element in a strategy for consolidating power. The current Ukrainian authorities are flouting European values across the board. As well as sanctioning those involved in the Tymoshenko trial, the EU should show its concern for the treatment of every prisoner in Ukraine, closely monitor “political technology” and “administrative resources” abuse in the run-up to the 2012 elections, and keep a much closer eye on the elite’s financial crime.

More generally, the Ukrainian leaders who have been so disingenuous on a personal level should be held at arm’s length. The EU should engage much more directly with the Ukrainian dialogue on “stability”. The EU should speak up for democracy in all its aspects. In particular, it should increase its outreach to NGOs, but concentrate on empowerment, public outreach, educating activists and strengthening the role of organisations defending human rights. It should keep negotiating on general visa policy and open skies to show that ordinary Ukrainians will not suffer.

It should impose sanctions, beginning with the judge and the prosecutor who put Tymoshenko behind bars, but also signal more general measures against regime malpractice. The Ukrainian siloviki, the “men of force” who have been reducing democratic rights and harassing the opposition, should have their diplomatic passports and visa rights removed, especially when the Ukrainian authorities have been quietly celebrating the fact that even their most odious members are still allowed freedom of travel, even after the Tymoshenko verdict. Key officials from the Procuracy, SBU and Interior Ministry should be placed on a warning list. The constitutional court judges who undermined their credibility by agreeing to

the coup d'état in 2010 should also be targeted. There should also be much closer monitoring of Ukraine's follow-up on ECHR judgements.

It is high time to introduce closer monitoring of financial transactions for all East European states, not least in EU states like Austria and Cyprus. Removing Ukraine from the Financial Action Task Force (FATF) blacklist in October 2011 was bad timing. Ukraine should now be reincluded. The Ukrainian economy has not built up its defences against double-dip recession; but any IMF assistance in 2012 should be conditional on liberalising conditions for SMEs and removing monopoly privileges in the state sector.

The EU should project confidence in its leverage with Ukraine rather than constantly responding to the spectre of Russian influence. It should draw Ukraine closer in return for respect for the fundamental values of the *acquis communautaire*. The negotiating capital that exists currently within the discussions over the DCFTA should be used to insist on tough language on democratic standards and a keen focus on the 2012 elections. EU leaders should consider a boycott of official ceremonies at the 2012 European Football Championship Finals, if the prospects for those elections do not look good.

Ukraine is not a lost cause, but it is a difficult case. If Ukraine fully de-democratises after the hope invested in the Orange Revolution in 2004, it will be the worst possible example for potential new democracies in the Arab world. If, on the other hand, the EU holds the line, it will show that inevitable setbacks in the transition to democracy need not be fatal.