

The New Enhanced Agreement Between the European Union and Ukraine: Will it Further Democratic Consolidation?



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In March 2007 negotiations for a New Enhanced Agreement (NEA) began between the European Union and Ukraine. The EU-Ukraine Partnership and Cooperation Agreement (PCA), which was signed in 1994, expired in 2008. The New Enhanced Agreement will be a comprehensive and cross-pillar agreement introducing a contractual basis for integration, convergence and cooperation in various fields such as political reforms, rule of law, human rights, border management, migration, the Common Foreign and Security Policy and free trade between Ukraine and the EU.¹ But will this new agreement be sufficient to assist Ukraine's faltering process of democratic consolidation? Will the notion of an "enhanced" agreement serve as a new model for those states still denied a membership perspective? This paper outlines the advances to be made under the NEA but argues that the answer to both these questions is likely to be negative.

Ukrainian support for accession

Since 2005 EU-Ukraine relations have developed rapidly. The EU's internal and external environment has changed as a result of Eastern enlargement. The EU became a neighbour to Ukraine in 2004 with the accession of Poland, the Slovak Republic and Hungary, and in 2007 the common border was extended when Romania joined the EU. Moreover, Central and Eastern European (CEE) New Members States have altered the EU's foreign policy agenda, placing neighbourhood issues higher on the EU priority list.

Through the 2004 Orange Revolution Ukrainian society demonstrated its desire to be part of a united

Europe, based on democracy, rule of law and human rights. "We have chosen Europe: it is not just a question of geography, but a matter of shared spiritual and moral values", said the new Ukrainian leader in the European Parliament two months after the Orange Revolution.²

Although the Ukrainian population is regionally divided in terms of their geopolitical orientations, with the Western part of the country historically and culturally tied to Europe and the eastern and southern regions preferring close relations with Russia, there has been continuous country-wide majority support for Ukraine's membership of the EU.³ This fact cannot be ignored by the political parties in the parliament. As a result, projects contradictory to Ukraine's future in the EU, such as economic and political reintegration with Russia under the Single Economic Space, have not been pushed by the major political forces in the country since 2005.

The three main political forces in Ukraine (the pro-presidential bloc Our Ukraine People's Self Defence, Bloc Yulia Tymoshenko, and the Party of the Regions, led by Victor Yanukovych, Victor Yushchenko's rival for the presidency in 2004) are in favour of European integration. Our Ukraine is the most consistent in its support for Ukraine's EU integration, making the issue a priority in its electoral campaigns with repeated promises of achieving EU associate member status. It is the only Ukrainian political force supportive of Ukrainian membership of NATO as a step on the road to EU accession

Bloc Yulia Tymoshenko (BYT) has tended not to focus on EU integration issues in recent campaigns.

² Yushchenko, Viktor, "Ukraine's future is in the EU". Address by President of Ukraine to the European Parliament, 23.02.2005, *CEPS Neighbourhood Watch*, Issue 1, February 2005.

³ Polls that have been regularly conducted since 2000 show consistent public support for Ukraine's joining the European Union with about 56-60 percent in favour. The last results were presented by the Democratic Initiatives Foundation in March 2008: if there had been a referendum concerning Ukraine's membership in the EU, 78 percent of citizens would have taken part in it and 56 percent would have voted in favour, 25 percent against, and 19 percent didn't know. Support for Ukraine's membership of NATO is totally different - while 59 percent of Ukrainians are against, only 22 percent are in favour and 19 percent are undecided. The level of opposition to NATO grows from the West to the East of the country.

¹ Emerson, Michael., "Policies towards Ukraine, 2005-20: Status Quo Unintended", in *The European Union as a Normative Foreign Policy Actor*, CEPS Working Document No. 281/January 2008, p. 26, Emerson, Michael., (et al), *European Neighbourhood Policy Two Years on: Time indeed for an 'ENP Plus'*, CEPS Policy Briefs No. 12/March 2007, p.12-13, Hillion, Christophe., "Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'", *European Foreign Affairs Review*, No. 12 2007, p. 169-182.

Nonetheless, BYT is fully supportive of EU-related initiatives in parliament and within the governing coalition.

The Party of the Regions (PR), meanwhile, is slightly more ambiguous in its European policy, especially during election campaigns, promising both closer ties with the EU and better relations with Russia. This reflects the make-up of its voters, who are in general from Eastern and Southern Ukraine where pro-Russian sentiment is strong. PR's leadership states that EU membership is a strategic and long-term perspective for Ukraine.

PR represents the business interests of both those who benefit from European markets opening up to Ukraine and those who will suffer from the increased competition that EU integration will bring. The main beneficiaries are new businesses in Ukraine, which are united around the political figure of one of its leaders, Ukraine's richest man Rinat Akhmetov. This group is mostly interested in economic integration with the EU and has lobbied strongly within the Party of the Regions for WTO accession. Another group within PR represents the business elite from traditional rust belt industries and the "red directors" that profited from the privatisations of the 1990s. As these industries are most likely to suffer from higher levels of competition and the opening up of Ukraine's economy, they are potentially more resistant to European integration.

It is worth mentioning that regardless of their political orientations Ukraine's largest business groups, such as System Capital Management owned by Rinat Akhmetov, Industrial Union of Donbas (ISD), Interpipe, owned by ex-President Leonid Kuchma's son-in-law Victor Pinchuk, and Pryvat, would be the main beneficiaries of Ukraine's economic integration into the EU. All of these are exporters to the EU market and look to invest directly in the EU (eg. ISD possesses plants in Hungary, Poland and Italy). As such, they are interested in gaining improved conditions for international trade and investment and a more stable and transparent economic environment in

Ukraine (eg. through better protection of property rights).⁴

The wide support among Ukrainian parties for EU membership was confirmed by the adoption of the Verkhovna Rada Resolution "on the start of negotiations between Ukraine and the EU on a new basic agreement". Some 399 deputies, covering all parliamentary factions, voted in favour of the resolution in 2007. Ukraine's legislature called for negotiations on an agreement leading to EU membership, with Ukraine's participation in the EU single market as an intermediate goal along this path. Ukraine's legislature sought a legally binding agreement based on Europe's experience with the CEE countries. Moreover, the Verkhovna Rada Resolution committed the country to approximating EU legislation.

The consensus among the political elites, which is mirrored by popular support, has made EU integration a strategic choice for Ukraine not just in terms of foreign policy, but also in terms of Ukraine's internal development, representing a model for the country's modernisation. Ukraine's future within the EU has come to be viewed as a guarantee of Ukraine's further development as a consolidated democracy and market economy.

EU policy debates

The Orange Revolution was not only a breakthrough in Ukraine's transition to democracy and "Europeanisation", but also in EU policy towards Ukraine as the EU played a crucial role in the peaceful resolution of the post-electoral political crisis.⁵ Due to

⁴ See details Makobriy, Oleksandr, *Vplyv yevropeyskoyi integratsiyi Ukrayiny na dial'nist' velykogo vitchiznianoho biznesu*, Kyiv: Insitute for Euro-Atlantic Integration, Report No 9/2006, accessed http://www.ieac.org.ua/pics/content/6/1140171748_ans.doc, Rosaria Puglisi, "A Window to the World? Oligarchs and foreign policy in Ukraine", in Fischer, Sabine (ed.), *Ukraine: Quo Vadis?*, Paris: the European Union Institute for Security Studies, Chaillot Paper No 108 February 2008, pp. 55-86.

⁵ More in Youngs, Richard, "A door neither closed nor open: EU policy towards Ukraine during and since the Orange Revolution", forthcoming.

the position taken by Poland and Lithuania, the EU's High Representative for the Common Foreign and Security Policy Javier Solana was involved in mediating negotiations between the government and opposition parties to prevent the use of force. Prior to the re-run second round of the elections, the EU sent a special envoy, Nicholas Bigman, and a record number of election monitors. As Ukrainian analysts argue, "the swift and strong support of the European Union in Ukraine's internal struggle for a democratic election highlighted a shift in the EU's attitude towards its neighbour. From a cautious and primarily economic partner that was wary of aggravating Russia unnecessarily, the EU suddenly became a pro-active, lively defender of the democratic movement in Ukraine".⁶

Being encouraged by the visible shift in the EU approach and hoping to benefit from Ukraine's "minutes of fame" in Europe, the new leadership even considered applying immediately for membership. The EU New Member States advocated rewarding Ukraine's democratic achievement with a membership perspective. This position was also taken by the European Parliament.⁷

However, the EU's founding members, such as Germany, France, Belgium, Spain and the Netherlands, opposed making any, even long-term, commitments.⁸ The Commission warned Ukraine not to apply in the short term and instead concentrate on reforms. After consultations with its supporters among the EU member states, Ukraine's Ministry for Foreign Affairs decided not to apply for membership in 2005 and make diplomatic efforts to win a prospect for membership in the new agreement that would replace the expiring PCA in 2008.

In order to encourage Ukraine's democratisation efforts without making a new membership commitment, the EU has offered Ukraine several new

instruments within the European Neighbourhood Policy (ENP). However, although Ukraine has actively taken part in the ENP since its creation in 2003, the fact the EU applies the same membership neutral policy to Ukraine that is applied to the non-European Mediterranean countries has been the main basis for criticisms of the EU by successive Ukraine governments.

The main implementation tool of the ENP, the EU-Ukraine Action Plan, signed in February 2005, has been reviewed in order to include issues raised by Ukraine's new government. The Ukrainian side put significant efforts into including conditionality elements in this document. Before that the EU applied no conditionalities to the promotion of democracy in Ukraine. The PCA combined minor economic and financial incentives with a low-credibility threat to withhold them in the case of political non-compliance or promises regarding further relations.⁹ The ENP Action Plan makes the future of Ukraine-EU relations and further integration dependent on progress in the implementation of the Action Plan's priorities. For example, the start of consultations on the New Enhanced Agreement was conditioned on Ukraine's fulfilment of the political priorities of the AP, helping ensure democratic conduct in the 2006 parliamentary elections.

In 2005 the EU finally granted Ukraine market economy status, thereby putting Ukrainian exporters in a more competitive position. Furthermore, Europe offered Ukraine a perspective of "deep free trade" with the EU on condition of the country's accession to the World Trade Organisation. In addition, Ukraine and the EU signed several agreements launching sectoral cooperation in the fields of energy, aviation and satellite navigation. Ukraine was also given access to the lines of credit of the European Investment Bank. In 2006 the EU Commission cleared the path for the ENP countries' participation in certain EU agencies and programmes, from which the Ukrainian government is planning to benefit in the near future.

⁶ ICPS Political Commentary No 12(18), December 2004, pp. 8-9.

⁷ European Parliament Resolution on the Results of the Ukraine Elections, P6_TA(2005)0009, 13 January 2005.

⁸ Youngs, Richard., *op.cit.*

⁹ Schimmelfenning, Frank., and Scholtz, Hanno., *op.cit.*, p. 11.

The amount of EU technical assistance has been increased. From 2007 the EU introduced the European Neighbourhood and Partnership Instrument (ENPI), including national, regional, cross-border and thematic components with 494 million to be allocated in 2007 and 2008. The assistance is given through infrastructure and equipment funding and budgetary support. New cooperation tools borrowed from the enlargement policy, like Twinning and TAIEX,¹⁰ were offered to Ukraine to assist the implementation of the Action Plan priorities. The first Governance Facility allocations were made to Ukraine (22 million) in recognition of good progress made in reforms. The EU extended its direct support to civil society organisations in Ukraine under the Instrument for the Promotion of Democracy and Human Rights.

Despite the visible success of enhanced EU–Ukraine political dialogue and increased sector cooperation, the opportunities open to Ukraine under the ENP remain a weak tool for democracy promotion. By contrast with the European Commission’s optimistic evaluation of the ENP results, in which Ukraine appears to be among the most successful EU neighbours, the last two years saw setbacks in terms of democratic consolidation. 2005 and early 2006 was the only period in which there was nationwide consent among the elite for further Europeanisation reforms and in which changes were introduced or launched in many sectors. By ironic coincidence, the 2006 parliamentary elections - the democratic character of which had been a principal condition for the start of consultations on the New Enhanced Agreement - became a benchmark in the country’s political development when obstructive confrontations between deeply divided political elites became the main obstacle to reforms.

Challenges for democratic consolidation

The Orange Revolution was a turning point in Ukraine’s transition from semi-authoritarian regime to democracy. Through the establishment of procedures of free and fair elections and political freedoms Ukraine made its shift to democracy. However, democratic consolidation in Ukraine has still to take place. Ukraine’s democracy has been characterised as “vibrant”, but “nonetheless fragile and dysfunctional”¹¹ or still not a democracy “in the European meaning of the term”.¹²

Ukraine lacks the establishment and stable functioning of democratic institutions and the formation of a civic political culture. Institutional weakness is the main issue to tackle and the main cause of political instability in Ukraine.

Since 2005 Ukraine has gone through two parliamentary electoral campaigns, including early elections followed by the dissolution of the parliament in April 2007, and several elections at the local level, including early elections of Kyiv City Council and of the city’s mayor. If no other early elections take place, a presidential campaign will get underway in early 2009. Three years on from the Orange Revolution, Ukraine has experienced four governments and an even larger number of political coalitions in parliament.

This political instability is mainly caused by strong political competition, with unreformed and weak political institutions. The government machinery can still be used for administrative leverage in political

¹⁰ Technical Assistance and Information Exchange.

¹¹ Emerson, Michael, “Policies towards Ukraine...”, p. 27.

¹² Solonenko, Iryna, “The EU’s impact on democratic transformation in Ukraine”, in Velychenko, Stephen., (ed.), *Ukraine, the EU and Russia: History, Culture and International Relations, Studies and Central and Eastern Europe Series*, 2007, p. 140.

struggles. Throughout 2005-2007 the Constitutional Court was paralysed and lost its credibility as a result of pressure from different political actors and corruption scandals in which the judges were involved. The judiciary is used as a political instrument by other branches of power and top officials do not execute its decisions. The rights of the opposition are not enshrined in law, the organisation of political parties falls far short of democratic standards and the levers of political influence available to civil society exist only formally. As a result, all political forces have systematically violated the principles of democracy and rule of law. Political competition has moved beyond the boundaries of law and started to threaten the basic tenets of democracy.¹³

The political crisis in spring 2007 that resulted in the dissolution of the Parliament by President Victor Yushchenko and early elections is a good example of the poor performance of institutions. The President's decision was provoked by the incapability of other institutions to guarantee the power of the democratic executive. Nonetheless, the presidential decree catalysed the political conflict.¹⁴ In the absence of a functioning constitutional court and legitimate judiciary, conflict between the President and the opposition, on the one hand, and the government coalition, on the other, came close to violent confrontation when both sides started to use politically dependent police forces against each other.¹⁵

There is a two-way dependence between political instability and weak institutions. While political instability comes from institutional weakness, it also means that competing political elites remain focused on the short term as institution- and capacity-building

only brings gains in the long term. Thus the policy agenda is dominated by populist issues, like increasing social expenditure or compensation for Soviet Oshchadnyi Bank deposits.

Legislative work is impeded as a result of election campaigns, blockage of the parliament by opposition factions and unstable parliamentary majorities. In the period of April–November 2007 the only laws adopted concerned WTO legislation and changes to the Law on Elections. Both a Party of the Regions-led coalition and a coalition between Bloc Yulia Tymoshenko (BYT) and Our Ukraine obstructed the parliamentary tribunal in an attempt to disrupt the parliamentary session. In 2008 the Parliament didn't work for more than month as the PR-led opposition blocked the tribunal, expressing their disagreement with the parliamentary speaker over NATO. The governments of Yulia Tymoshenko (February–September 2005) and Yuriy Yekhanurov (September 2005-August 2006) lacked the support of the parliamentary majority, which hindered reforms (adoption of WTO legislation was delayed for almost a year, for example, and the President's package of draft anticorruption laws was rejected by Parliament).

Ukraine's poor record in democratic institution building is confirmed by the evidence in recent evaluations of the EU-Ukraine Action Plan carried out by the Ukrainian Government and the EU Commission, as well as by the Ukrainian NGOs consortium.¹⁶ An alarmingly pessimistic picture of Ukraine's democratic progress is drawn in the latest PACE monitoring report on Ukraine's Council of Europe accession commitments.¹⁷

¹³ In 2007 a coalition led by PR, supported by a BYT faction in opposition, passed legislation, namely the Law on the Cabinet of Ministers, that was in conflict with the Constitution and the principle of rule of law. This law was one of the main stumbling blocks that provoked political crisis in spring 2007, pushing the President to dissolve the Parliament.

¹⁴ ICPS Political Commentary # 46, 2007.

¹⁵ In May 2007 the Minister of the Interior, a coalition representative, ordered the capture of the General Prosecutor's Office after the President had dismissed the General Prosecutor, who was loyal to the Party of the Regions. The President was ready to react by using Interior Armed Forces against the Ministry's troops.

¹⁶ "Joint evaluation report on the EU-Ukraine Action Plan", Brussels/Kyiv, March 2008; Commission of the European Communities, "Implementation of the European Neighborhood Policy in 2007. Progress Report Ukraine", Brussels, 3 April 2008, SEC(2008) 402; Assessments of the Ukraine-EU Action Plan implementation in 2005-2006, "National Security and Defense", 5(89) 2007, Ukrainian Centre for Economic and Political Studies named after Oleksandr Razumkov, p. 11-28; Laboratoria zakonodavchych initsiatyv, Fond Konrada Adenauera, Ukraina – Evropejskyi Soyuz: naperedodni ukladannia novogo bazovogo dogovoru, Materialy kruglogo stolu, Kyiv 2007.

¹⁷ Parliamentary Assembly of the Council of Europe. "Honouring of Obligations and Commitments by Ukraine. Information note by the co-rapporteurs on their fact-finding visit to Ukraine (14-16 January 2008)", 18 March 2008.

All the evaluations show limited progress in the implementation of Action Plan priorities in the fields of democracy, rule of law, human rights and fundamental freedoms detailed in the Political Dialogue and Reform chapter. Constitutional reform continues to be the “Achilles’ heel of any government-in-office in Ukraine”. The Ukrainian political establishment is not only far from having carried out the Venice Commission’s recommendations in the Constitution drafting process, on which the EU and the Council of Europe insist, but is also attempting to introduce a practice deemed “unacceptable in a democratic state”.¹⁸

Reform of the judiciary “aimed at ensuring its independence, impartiality and effectiveness”, and “the proper functioning and independence of the Constitutional Court”, along with reform of law enforcement bodies and “measures regarding the ill treatment of prisoners”, and the fight against corruption “remain a top priority for the government” in the repeated assessment reports. This means that Ukraine has failed to move forward with these most crucial issues since the Orange Revolution. Public administration reform collapsed in an internal dispute between the two centres of power in the executive branch.

Media reform remains among the main concerns voiced in the EU and PACE reports. Existing media freedoms are those inherited from the Orange Revolution, and no progress has been achieved in transforming state radio and TV companies into public and private broadcasters. If in 2005 public discussion was encouraged by the President and high-profile ministers on this issue, it has disappeared from the government agenda in recent years.

According to the assessment made by the Ukrainian NGO Consortium, “the nature of government in Ukraine actually did not change. More than that, the political crisis that arose in April 2007, at the end of the second year of the Action Plan’s implementation, revealed not only the shortcomings of the amendments

to the Ukrainian Constitution but also the critical state of the judicial system, law-enforcement bodies, the absence of a system of checks and counterbalances in the organisation of governance in Ukraine”.

The agenda for further democratisation reforms in Ukraine has remained challengingly extensive and unchanged for the last three years. Taking into account the forthcoming presidential campaign and growing tensions between the main coalition partners, along with a widening split in the executive branch, there is little chance of any substantial reforms in the coming years. Still, institutional reforms are crucial to Ukraine’s EU membership bid. Kyiv will have to achieve internal political consolidation to make progress through the New Enhanced Agreement.

Negotiating positions

Negotiations between the EU and Ukraine on the New Enhanced Agreement were officially opened in March 2007. By April 2008 seven rounds of negotiations on three respective parts of the agreement had been held, namely on Political Dialogue, Reforms and Cooperation and Convergence in the Field of Foreign and Security Policy; Justice, Freedom and Security; and Sectoral Cooperation.

Since February 2008, when Ukraine was invited to join the World Trade Organisation, negotiations for the Free Trade Area (FTA) were launched as part of the NEA process. A comprehensive and deep FTA will be a core part of the NEA. Encompassing liberalisation of trade in goods and services, the concept of deep free trade refers to harmonisation of the regulatory environment in certain sectors with that of the EU. According to the impact assessment, deep free trade will induce rapid and sustainable economic growth in Ukraine and will contribute to the prosperity, stability and democracy of the country.¹⁹

¹⁸ Parliamentary Assembly of Council of Europe. Resolution 1549 (2007), Functioning of democratic institutions in Ukraine, 19 April 2007.

¹⁹ Emerson, Michael., (et al), *The Prospect of Deep Free Trade Between the European Union and Ukraine*, CEPS, 2006, p. 126-128.

Ukraine has declared its desire to become a fully-fledged member of the EU²⁰ since 1998 and views the New Enhanced Agreement as an association agreement, equivalent to those signed between EU and CEE countries in the 1990s and granting a clear membership perspective for Ukraine. In the view of the Ukrainian government, the NEA will not be limited by the parameters of the European Neighbourhood Policy and will be built on the principles of political association and economic integration. This position is shared by all the political parties in Ukraine which, despite deep political divisions between them regarding other foreign policy issues, remain united around Ukraine's European vocation.

Ukraine's expectations of a membership perspective are not mirrored by the EU. The EU Council declined to give Ukraine any membership perspective in the agreement by stipulating that "this agreement shall not prejudge any possible future developments in EU-Ukraine relations".²¹ The EU position is that the NEA has to aim at building "an increasingly close relationship with Ukraine, aimed at gradual economic integration and deepening of political co-operation". Moreover, the EU regards the NEA as a part of the ENP and will likely use the agreement as a model for other ENP partners.

During the Council's discussions on a mandate for the Commission, a division among the EU member states over Ukraine's membership perspective has become visible. New member states, together with countries such as the UK, Sweden, and Finland expressed their support for a long-term prospect of membership for Ukraine. Old EU members, such as France, Germany,

the Netherlands and Belgium, along with Spain, opposed a firm commitment.

In February 2008 France made an informal offer to sign an associated partnership agreement with Ukraine outlining opportunities for sectoral cooperation, visa liberalisation dialogue, and possibilities for Ukraine to participate in policy-making processes. Even though EU member states viewed the French initiative reservedly, regarding it as being partly PR for the French leadership in the run-up to France's Presidency of the EU in the second half of 2008, the action has contributed to debate among member states over the NEA.

The European Parliament expressed the most positive position on the new agreement with Ukraine. In its recommendations to the Council on the negotiating mandate it called for Ukraine to be offered an Association Agreement "aimed in the long term at the attainment of EU membership" and such instruments for integration as abolition of the visa regime and increased financial assistance.²² The European Parliament Committee for Foreign Affairs is currently preparing a report on the Commissions' 2007 Enlargement Strategy Paper. The main reporter Elmar Brok, the German representative of the European People's Party group, offered to fill the gap between the Enlargement Policy and the ENP in order to respond to expectations of the EU's Eastern neighbours. The European Parliament is likely to encourage the Commission and the Council further to differentiate the ENP by establishing a Free Trade Area, to be followed by close relations along the lines of the European Economic Area Plus and even a European Commonwealth. After adoption this report may have an impact on the enlargement discourse within the EU.

²⁰ In 1998 the then President Leonid Kuchma approved the strategy for Ukraine's integration to the European Union by his decree which proclaimed Ukraine's final objective to become a full-fledged EU member and an associated member as a mid-term goal. The Ukrainian Parliament declared this goal even earlier in 1993 by adopting the Resolution on Basic Directions of Foreign Policy for Ukraine.

²¹ Council of the European Union. Council conclusions concerning the negotiation of a New Enhanced Agreement between the EU and Ukraine. 2776th External Relations Council meeting Brussels, 22 January 2007, http://www.eu2007.de/en/News/download_docs/Januar/0122AASteinmeier/Council_Conclusions_on_Ukraine.pdf

²² European Parliament. Committee for Foreign Affairs Report with a proposal for a European Parliament recommendation to the Council on a negotiation mandate for a New Enhanced Agreement between the European Community and its Member States on one side and Ukraine of the other (2007/2015(INI)), 8 June 2007.

Accession conditionality: “nothing is ruled out and nothing is ruled in”²³

The EU enlargement policy remains the most successful tool for promoting democratisation and economic modernisation in third countries. Brussels offers membership to countries' based on achievement in meeting the “Copenhagen criteria” which are:

- (1) Functioning democracy: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- (2) Functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- (3) Ability to adopt and implement the *acquis*.

The crucial issue for the NEA seems to be the question of whether EU accession conditionalities will be applied to Ukraine. The discussions on the preamble of the agreement, that will give an answer to this question, started recently. However, it is clear that divisions among member states over the EU's possible commitments to Ukraine remain over the latter. In the case of Central and Eastern European countries, their agreements explicitly referred to a prospect of membership in the preamble by recognising that “the final objective of the respective country is to become a member of the Community and that this association, in the view of the parties, will help to achieve this objective”.

A compromise could be found in a more open wording of the preamble. It is not ruled out that the

NEA could contain some reference to Article 49 of the Treaty, establishing the European Union (eg. Ukraine is “a European country”, which “observes principles of freedom, democracy, respect for human rights and the rule of law”) which means that Ukraine's bid for membership of the EU is not rejected in the future. If the EU is serious about its commitments to promoting stability, security and prosperity in its neighbourhood, strengthening democracy and the rule of law in Ukraine as well as completing the transition to a functioning market economy will be mentioned among the aims of the NEA and both parties will take on commitments to assist Ukraine in achieving them. It will offer an opportunity to extend monitoring mechanisms to track Ukraine's progress in achieving these aims, which correspond to the first two Copenhagen criteria.²⁴

It seems that decisions on these crucial political aspects of the NEA will be postponed until the final stages of the negotiations. Both Ukraine and the EU are interested in delaying this politically sensitive decision. The issues of a membership perspective, combined with accession conditionality and association with the EU, are priorities for the Ukrainian negotiating team, while the EU lacks consensus on these issues. The NEA negotiations may last until 2009 or 2010, as the negotiations on the FTA, which is a core and integral part of the agreement, will take time. By then the situation may have changed. It cannot be ruled out that the positions of the main EU member states opposed to a new wave of enlargement will shift, especially after the ratification of the Lisbon Treaty. This argument is given to Ukraine to encourage it to wait for a membership perspective. Moreover, this will give Ukraine's political system time to achieve a higher level of stability and to proceed with further reforms in the wake of past elections and expected changes to the constitutional system. This could serve as an additional argument in favour of Ukraine's membership perspective.

²³ Quote from the EU Commissioner for External Relations and the ENP Benita Ferrero-Waldner speaking on Ukraine's eventual membership. *EU Observer*, “EU wants ‘targeted deepening of relations’ with neighbours”, 3 April 2008.

²⁴ Sushko, Oleksandr, (et al.), *The New Enhanced Agreement between Ukraine and the EU: proposals of Ukrainian experts*, KAS Policy Papers 8 2007, Konrad Adenauer Stiftung, pp. 11-15.

The withholding of a membership perspective, even in the long term, would be a painful disappointment for Ukraine. Ukraine has been investing too much of its political and diplomatic capital in these issues. Ukraine's President has repeatedly declared that his country will sign an association agreement with the EU with a prospect for membership. The main parliamentary parties are also expecting the EU will "finally overcome its internal divergence of opinion and give a concrete prospect to Ukraine and start a serious dialogue".²⁵ Following the EU's blocking of Ukraine's efforts towards a NATO Membership Action Plan,²⁶ refusal to give Ukraine a clear membership perspective could provoke a wave of disappointment about the EU and its policy towards Ukraine. "Europe values gas more than values" is how an overly pragmatic approach on the part of the EU could be regarded in Ukraine. Ukraine does not covet the NEA as a substitute for a membership perspective, but as a step towards the latter.²⁷

Influence beyond accession

In the event that democracy promotion based on accession conditionality cannot be applied to Ukraine, a question arises as to what extent the EU will be able to promote democracy through other instruments within the NEA. The ENP policy combines two basic models to promote democracy in the neighbourhood. Together with political conditionality, which appeared in the ENP Action Plans, the EU aims to promote democracy through assisting social and economic

development and socialisation in its neighbourhood. The EU assists social and economic development in neighbouring countries by offering the ENP partners "deep and comprehensive FTAs" and "support for reforms to improve trade and the economic regulatory environment and the investment climate", along with extension of the EU transport and energy networks and enhanced dialogue in key sectors.²⁸

The ENP concept envisages the promotion of socialisation through greater mobility (visa facilitation, removing obstacles to legitimate travel), educational, research and civil society exchanges, and enhanced civil society participation in the ENP, as well as the strengthening of political dialogue at the diplomatic and political levels on a larger number of issues within bilateral and multilateral frameworks. Both concepts of democracy promotion applied together with the aforementioned instruments will be incorporated into the NEA.

Under the framework of the NEA, the EU will continue to apply to Ukraine a conditionality model developed within the European Neighbourhood Policy in which the ENP partner is offered deeper political and economic integration on condition of its "commitments on rule of law, democracy, human rights, market-oriented economic and sectoral reforms and cooperation on key foreign policy objectives".²⁹ For example, the level of opening of the EU internal market to Ukrainian producers will depend on the Ukrainian Government's implementation of its commitments on the approximation of legislation. Ukraine's progress in implementation of the NEA within Justice, Freedom and Security will likely impact on the EU-Ukraine dialogue on visa issues.

Moreover, ENP conditionality will be increased through the NEA. In contrast to the PCA and the ENP

²⁵ Author's interview with Member of the Parliament of Ukraine, April 2008.

²⁶ Owing to the positions of France and Germany, the NATO members decided not to offer Ukraine a Membership Action Plan (MAP) for NATO at the Bucharest summit in April 2008. MAP is a plan of reforms and activities through which a country is to prepare for eventual membership of the Alliance.

²⁷ Press-Service of MFA of Ukraine. Comment on the Communication from the European Commission on Implementation of the European Neighbourhood Policy in 2007 to the EU Council of Ministers and the European Parliament, 3 April 2008, <http://www.mfa.gov.ua/mfa/ua/news/detail/11971.htm>

²⁸ Commission of the European Communities. Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy, Brussels, 4 December 2006, COM(2006)726 final.

²⁹ Landaburu, Eneko., Director General, DG External Relations, European Commission, *From Neighbourhood to Integration Policy: are there concrete alternatives to enlargement?*, CEPS Policy Brief No. 95, March 2006.

Action Plan, which are both political documents, the NEA will be legally binding in many of its provisions. A dispute settlement mechanism for binding provisions will be established which will define a timeline for implementation, consequences if provisions are not implemented or delayed, and responsive measures to be taken.

In addition, the institutional architecture of the NEA, that is currently being discussed within the negotiation process, will be similar to that which exists under Europe's Association Agreements. It means the Ministerial Council will be empowered to adopt legally binding decisions on those provisions of the NEA which are legally binding. This provides instruments for a potentially successful implementation of the agreement.

Benchmarking, monitoring and evaluation mechanisms which are crucial elements of conditionality will be implemented under the NEA. The Commission will elaborate an implementation tool for the NEA which will be reviewed and monitored jointly on an annual or bi-annual basis. The monitoring and evaluation system that exists under the ENP will not be efficient so long as benchmarks are absent. The ENP progress reports remain very general in their evaluation: they do not specify how "significant progress", "real progress", "good progress", "considerable progress", "some progress", "little progress" and other levels of progress have been measured. The ENP progress reports reflect political relations between the EU and the ENP country rather than the state of reforms. Moreover, as popularity of the ENP is low in the ENP countries, including Ukraine, the ENP progress reports are taken seriously by neither the government, political parties, nor the press and, as a result, citizens. There is a need for a more potent tool to measure progress made in the course of the NEA implementation. If the political incentives offered in the NEA are strong enough, regular evaluation reports will be echoed in public opinion thereby creating bottom-up pressure on the Ukrainian political elite.

Two chapters of the NEA, namely "Political Dialogue and Reforms and Cooperation in the field of CFSP"

and "Justice, Freedom and Security", will contain provisions directly referring to the further consolidation of democracy and the rule of law in Ukraine. These will include provisions for cooperation on a wide range of issues such as, *inter alia*, joint efforts to promote respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, domestic reforms and implementation of legislation related to the International Criminal Court, protection of personal data, cooperation on migration, asylum and border management, migration, money laundering and terrorist financing, cooperation on illicit drugs, the fight against organised crime, combating terrorism, and legal cooperation.³⁰ The NEA will be built on the positive experience of the EU-Ukraine Action Plan on Justice, Freedom and Security and will go beyond it.

Together with increased conditionality, the NEA will promote democracy by focusing on socioeconomic development and socialisation processes. In spirit, the NEA is an integration agreement and goes much further in substance than the Europe agreements. It introduces an opportunity for deep trade and sectoral integration of Ukraine into the EU and multifaceted cooperation in various fields such as energy, transport, education, common foreign and security policy, and justice, freedom and security. Moreover, it is able to implement a further socialisation model of democracy promotion by multiplying personal and institutional contacts that have already been envisaged by the enhanced ENP.

Along with improving the trade and business environment, the FTA will have a direct impact on public governance reform in Ukraine. First, a comprehensive customs reform aiming at simplification of customs procedures and elimination of corruption is envisaged.³¹ In tandem with other reforms to be implemented within

³⁰ Joint Progress Report. Negotiations on the EU-Ukraine New Enhanced Agreement, 14 September 2007, <http://www.mfa.gov.ua/mfa/en/publication/content/13612.htm>

³¹ See Emerson, Michael., (et al), *The Prospect of...*, pp.81-83; Shumylo, Olha., (ed.), *Free Trade between Ukraine and the EU: an Impact Assessment*, Kyiv, International Centre for Policy Studies, 2007, pp. 27-56.

the Justice, Freedom and Security framework, Ukraine will also get an opportunity to build up a transparent and accountable public administration system on its borders. Smoothly functioning borders will also facilitate people-to-people contacts in the frontier regions between Ukraine and EU countries.

Second, in the context of improving the investment climate, the FTA envisages approximation of Ukrainian legislation to that of the EU in competition policy, corporate governance, taxation and public procurement. This will require institutional reforms in the governance system resulting in the establishment of more transparent administrative procedures, reduced corruption and further impact on the introduction of an independent judiciary in Ukraine.³²

The sectoral policy dialogue between the EU and Ukraine will be extended. This will assist the promotion of democratic governance as a side effect of transgovernmental cooperation in which the ENP country's state actors gradually familiarise themselves with democratic practices.³³ The EU considers sectoral policy dialogue a crucial platform for the "partnership-for-reform" that supports the transition, reform and modernisation of ENP partner countries' administrations and public institutions and responds to the needs and rights of citizens.³⁴ Dialogue on agriculture and intellectual property issues have already been set up between the EU and Ukraine within the Action Plan framework. Company law, public procurement, taxation, movement of capital and enterprise policy can follow as priorities for EU-Ukraine sectoral dialogue and the NEA can ensure a government-wide political commitment to look for greater policy convergence in these areas.

FTA provisions will also have a positive impact on socialisation. Civil aviation is a robust component of

FTA in this context. Deeper integration of Ukraine's air transport sector into the EU's common civil aviation area would be a powerful catalyst for the expansion of people-to-people contacts, business travel and tourism.³⁵ Access for European low-fare airlines to the Ukrainian market and increased competition in the sector will give Ukrainian citizens an opportunity to travel to EU member states more.

The FTA provisions will also concern movement of workers between the EU and Ukraine. As free movement of persons does not fully function within the EU internal market, there is no chance for any significant liberalisation in this area. However, greater flexibility of movement and social security guarantees can be granted to Ukrainians legally employed in the EU as well as their families.³⁶

The major obstacle to people-to-people contacts between the EU and Ukraine is the visa regime for Ukrainian nationals. Along with other CIS countries, Mongolia, Western Balkan countries (except Croatia) and the Mediterranean countries (except Israel) Ukraine remains on the EU's "black" visa list, while the Ukrainian government abolished their visa regime for EU nationals unilaterally in 2005.

The Agreement on the Facilitation of Issuance of Visas has been in force since January 2008. However, it offers the possibility of long-term and free of charge visas only to certain categories of citizens (students, journalists etc.) and problems with proper implementation are still observed in certain consulates. The Ukrainian government wants the NEA to lead to a visa-free travel regime. Ukraine insists on establishing Ukraine-EU visa dialogue on the conditions to be met for lifting the visa requirement. The EU launched such a dialogue with Western Balkan countries in 2008.

The European Commission takes an open position on this issue, but visa policy remains in the competence of the Council of the European Union. In February 2008

³² See Emerson, Michael., (et al), *The Prospect of...*, pp.98-108; Shumylo, Olha., (ed.), *Free Trade...*, pp. 175-213.

³³ Freyburg, Tina., Skripka, Tatiana., and Wetzel, Anne., p.8.

³⁴ Commission of the European Communities. Communication from the Commission to the Council and the European Parliament, Implementation of the European Neighbourhood Policy in 2007. Sectoral progress report, Brussels, 3 April 2008 SEC(2008) 403, p.2.

³⁵ See Emerson, Michael., (et al), *The Prospect of...*, pp.171-176.

³⁶ See Shumylo, Olha., (ed.), *Free Trade...*, pp. 215-225.

France proposed to establish dialogue on a visa abolition regime with Ukraine. However, there are a few EU member states (Germany, Austria, and the Netherlands) which oppose such an initiative on economic and political grounds. First, there is a fear that abolition of the visa regime would provoke an influx of illegal migration from Ukraine. Second, opponents of making any commitments with regard to Ukraine on visa issues argue that such a dialogue can only be launched with candidate or potential candidate countries.

In such a situation Ukraine can still expect to establish a visa dialogue following the example of Russia. However, Russia-like dialogue envisages that concrete conditions must be met for a visa-free travel regime, and this in turn weakens incentives for reform. A clear and time-limited perspective, and conditions for a visa-free travel regime, could serve as a potent “carrot” for reforms to the Justice, Freedom and Security sector, and could be used by the EU to encourage successive Ukrainian governments to proceed with other reforms. The political weight of visa-free travel is comparable to that of a membership perspective, as this issue is one of a handful of priorities for the NEA that have been explicitly declared by all Ukrainian political parties.

Apart from visa liberalisation, the NEA can channel opportunities for cooperation and exchange in education, culture and research spheres as envisaged by the enhanced ENP. Ukrainian students, academics and higher education institutions already have access to the Erasmus Mundus programme, the Jean Monnet Programme and scholarships to the College of Europe. The Tempus Programme continues to underpin reform of higher education.³⁷ Ukraine-EU policy dialogue on improving efficiency and labour-market relevance of education and training can encourage reform of professional education in Ukraine and will enable Ukraine to participate in EU professional education programmes.

³⁷ Commission of the European Communities, Implementation of the European Neighborhood Policy in 2007. Progress Report Ukraine, Brussels, 3 April 2008, SEC(2008) 402.

The NEA could lead to new mechanisms for exchange in education. The Agreement could also envisage tools enabling Ukraine to fully benefit from the FP7 for Research which has been introduced on a bilateral country basis, but which Ukraine has thus far not been able to take full advantage of despite the establishment of a structured EU-Ukraine dialogue on science and technology.³⁸ There is still a lack of any significant progress in the area of culture, though the NEA promises an ambitious agenda for cultural cooperation. In the area of youth, Ukraine benefits from the opportunities offered by the Youth in Action Programme, but further efforts aimed at promoting intercultural dialogue through youth exchanges and informal education could be developed in the NEA.

The NEA has an opportunity to implement an initiative presented in the enhanced ENP on strengthening “civil society exchanges, reaching beyond governmental contacts to build bridges in many areas – for example, contacts among trade unions, regional and local authorities (including city-twinning programmes), health practitioners, NGOs, and cultural groups”. Moreover, through the NEA, Ukraine and the EU seek to “allow appropriate participation by civil society representatives as stakeholders in the reform process, whether in the preparation of legislation, the monitoring of its implementation or in developing national or regional initiatives related to the ENP”.³⁹ The latter objective can be realised through establishing a civil society platform to support the negotiations and implementation of the NEA.

The NEA will be the first agreement between the EU and a European third country containing a chapter on civil society.⁴⁰ The proposal on the content of this chapter will be drafted by the European Economic and Social Committee (EESC), a consultative body to the EU institutions which represents economic, social and

³⁸ Ibidem.

³⁹ Commission of the European Communities. Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy, Brussels, 4 December 2006 COM(2006)726 final.

⁴⁰ The EU-Chile Association Agreement (2002) contains an article on the civil society.

civic organisations from the EU member states. Ukrainian civil society organisations will be invited to give their feedback on this draft before its submission to the Commission.⁴¹ In the view of the EESC, a permanent structure for dialogue and cooperation between the EESC and organised civil society in Ukraine should be established under the NEA. The EESC envisages using the experience of candidate and associated countries, where joint consultative committees are composed of an equal number of members from EU member states and a third country. These committees are empowered to cooperate with the Joint Parliamentary Committee and entitled to make recommendations to the Ministerial Council. The Committee will assist the government and the EU in the implementation and monitoring of the Agreement encompassing issues of cooperation between economic and social actors, promotion of social dialogue and suggesting priorities for future cooperation.

The EESC considers that the Ukrainian National Tripartite Social and Economic Council will be its partner in the joint committee. At the same time, the Tripartite Council in Ukraine represents trade unions, employer's organisations and the government and remains top-down in nature since being created by presidential decree in 2005. There is a need to establish a wider civil society platform for consultation on EU-Ukraine relations. This should include other civil society organisations, such as consumer and environmental organisations, cultural and educational groups, non-governmental organisations providing social services, and academic and research institutions in both Ukraine and the EU.

The Ukrainian government makes some fragmented efforts to inform civil society organisations on the NEA and include them in the negotiation process, but limited success has been achieved so far. The government has involved independent experts to provide consultations during the negotiations, but this could not be

considered as genuine consultation with civil society. Thus, creating a civil society platform would bring more transparency and accountability to EU-Ukraine relations and could serve as a potent tool to boost further civil society development in Ukraine.

Conclusions

The New Enhanced Agreement between the EU and Ukraine will be an example of further "narrowing" between the European Neighbourhood Policy and the Enlargement Policy. It will envisage integration of Ukraine into the EU without defining the end result of this process. While Ukraine's economic integration with the EU, that shall be implemented through deep free trade, is a major goal of the NEA, the democracy promotion objective is not sufficiently supported by the relevant instruments. The most potent tool for democratic transformation outside the EU - a membership perspective combined with accession conditionality - is not offered at this stage and other political incentives appear weak to Ukraine given its strong and continuing desire for membership.

The NEA will apply ENP conditionalities to Ukraine by offering deeper economic and political relations as a reward for political, economic and legal reforms. The strength of the NEA in comparison with the ENP is that it will be legally binding with an enhanced system of monitoring and evaluation that increases the chances of successful implementation.

Through deep free trade the EU tries to use trade liberalisation as a tool for the promotion of democratic governance. The opening of EU markets to Ukraine will be conditioned upon reforms in many sectors of public administration. Moreover, deep free trade will lead to a multiplication of personal and institutional contacts, namely intensification of business contacts as a result of enhanced economic activities, and greater mobility as a result of easier access to cheap travel operators.

⁴¹ The EESC will prepare its opinion on the NEA and will present it at a conference with Ukrainian civil society organisations in Kyiv in September 2008 to discuss it and get feedback. After that, a common position on the civil society article in the NEA will be sent to the negotiating team.

The NEA will strengthen the socialisation component of democracy promotion. The agreement envisages intensified political dialogue as well as more opportunities for people-to-people contacts in the areas of culture, education, research and civil society. The NEA will be the first agreement between the EU and a European country to include a separate article on civil society, which will be empowered to provide its recommendations. The question over whether the NEA will lead to the elimination of the main obstacle to people-to-people contacts, namely the EU's visa requirements for Ukrainian nationals, remains open. The EU has not reached consensus on this issue thus far. The prospect of a visa-free travel regime could be a very strong

incentive as it would bring benefits for every Ukrainian citizen.

Despite a variety of strengthened monitoring and conditionality tools applied in the NEA the agreement will not serve as an alternative effective enough to substitute for accession-driven Europeanisation. The NEA's comprehensive reform agenda is unlikely to be implemented in Ukraine - where no major democratisation reforms have been implemented since the democratic breakthrough in 2005 - unless strong political incentives like a prospect for membership or at least visa free travel are conceded. Only these measures are likely to compel divisive political elites to restrain their personal ambitions for a common policy agenda.

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In March 2007 negotiations for a New Enhanced Agreement (NEA) began between the European Union and Ukraine. The EU-Ukraine Partnership and Cooperation Agreement (PCA), which was signed in 1994, expired in 2008. The New Enhanced Agreement will be a comprehensive and cross-pillar agreement introducing a contractual basis for integration, convergence and cooperation in various fields such as political reforms, rule of law, human rights, border management, migration, the Common Foreign and Security Policy and free trade between Ukraine and the EU. But will this new agreement be sufficient to assist Ukraine's faltering process of democratic consolidation? Will the notion of an "enhanced" agreement serve as a new model for those states still denied a membership perspective? This paper outlines the advances to be made under the NEA but argues that the answer to both these questions is likely to be negative.

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