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Abstract

Ukraine has been seen for a long time as a *threat-source* for Europe for different reasons. Although this approach has been somewhat re-valued after the intensification of the relations between Ukraine and the European Union in the post-Orange Revolution period, EU activities in the country still bear the marks of this previous attitude. A major evidence of this phenomenon is the outstanding share of the energy sector in total EU aid directed to Ukraine; this assistance is also important for Ukraine itself. Also the Ukrainian society and state face enormous challenges that have been even increased by the almost permanent domestic political crisis for about the past two years. These challenges should be addressed in a more active way by the EU, especially regarding the rule of law issue without which the permanent political instability and constitutional crisis cannot be solved.

Executive summary

Scope of the briefing: In line with the specifications, this briefing analyses the EU assistance and the relevant positions stated by the European Parliament in the spheres of democracy, the rule of law, the freedom of expression and of the media, human rights and civil society building in Ukraine. With regard to the peculiar challenges of Ukrainian nuclear energy sector and the outstanding focus of running and planned EU assistance projects on energy issues, the paper covers these topics as well. Two very topical points of view are also incorporated into this report related to the potential impacts of the coming New Enhanced Agreement between the EU and Ukraine and the continuous domestic political instability.

Main conclusions: Ukraine has been seen for a long time as a *threat-source* for Europe for different reasons. In earlier phase initiatives of the European Union targeted the elimination or at least the reduction of these “threats” including nuclear threat, the issue of illegal migrants, organised crime etc. A major evidence of this phenomenon is the outstanding share of the energy sector including nuclear safety in total EU aid directed to Ukraine. Still, it is evident that the Ukrainian energy sector needs foreign support, including both advice and funding. By providing this the European Union may reduce the feeling of being threatened both regarding the security of energy supplies arriving through Ukraine at the EU-borders and the threat of a nuclear accident with trans-border effects.

However, the Ukrainian society and state face enormous challenges: further progress is necessary in the field of the rule of law, freedom of expression and media, civil society and human rights. These challenges (even increased by the domestic political crisis in the last two years) should be addressed in a more active way by the EU. This is especially true regarding the rule of law issue without which the permanent political instability and constitutional crisis cannot be solved.

Main recommendations:

- To help achieve political stability, the EU should focus more on the issue of rule of law, including necessary institution building. Conditionality on essential progress regarding the rule of law should be more expressed in the New Enhanced Agreement which will have a binding character.
- Regarding EU assistance aimed at increasing the rule of law in Ukraine the focus should be not only on law-making, but even more on the implementation phase. This is a sphere where Ukraine still has lots to do and where there is scope for supporting activities.

The EU should continue to be active in the field of freedom of expression and media. The main issues to be addressed in this field can be grasped as two-dimensional. On the political level, the EU should focus on government in asserting the need to strengthen governmental regulatory bodies; to create independent public service together with denationalization of mass media (in the sense of transforming national media to public service media as there are still no public mass media in Ukraine); to promote transparency of ownership of the media .to improve public access to information. On the level of people-to-people contacts, the EU should promote and support an improvement of legal education of journalists, media lawyers and capacity building of judges; and of the quality of journalism and journalists’ ethics.

- EU action in the field of human rights should be more concrete. The ENPI Indicative Programme does not even mention the most pressing problems of human rights violations. At the same time, the Commission regards human rights as an issue which should be addressed primarily through the EIDHR. However, since human rights are one of the priorities in the EU-Ukraine relations, the ENPI should involve this dimension too. Without explicitly setting an agenda and goals for the Ukrainian government in these areas, no real progress (using the ENPI assistance) can be expected. Recently, the most important issue is a question of asylum seekers and immigrant, because their conditions might even deteriorate after the readmission agreement enters into force
- The EU should be more active in the sphere of promoting civil society. It should develop a clear strategy, including the creation of an overall coordination mechanism. This mechanism should provide for closer cooperation between EU and Ukrainian NGO's. Procedures for the approval of grants should be simplified.
- The EU should introduce concrete *pilot projects* aimed at increasing energy efficiency, similarly to those EU projects running in Russia since years. Taking into consideration the fact that Ukraine is among the biggest energy-wasting countries in the world, the emphasis most probably should be put on the issue of energy savings and energy efficiency rather than on renewables.

CONTENTS

Abstract	2
1. Introduction	6
2. Recent development in the identified fields	7
3. Relevance, effectiveness, efficiency and sustainability of EU action	14
4. Specific issues	18
4.1. The New Enhanced Agreement and EU support	18
4.2. Ukraine and Moldova	18
5. Conclusions and recommendations	19
References	22

1. Introduction

The last two years have not been easy in EU-Ukrainian relations. Although all the three major political forces in Ukraine are in favour of European integration with a continuous country-wide support for Ukraine's membership in the EU, political instability in Ukraine makes common activities rather difficult and risky. At the same time Ukraine is, on the whole CIS-space, the country that made the best progress in having democratic elections in line with OSCE and Council of Europe commitments. Due to the inadequate functioning of the democratic system, Ukraine also ranks first in terms of the frequency of elections.

However, overall results of democratisation are viewed very differently. While the European Commission tends to evaluate Ukrainian progress rather positively – regarding e.g. the freedom of media and democratic elections – Ukrainians themselves, at least at the expert level, see the situation in a different way. They even state that nothing much has changed in the period after the Orange Revolution, although the event itself is generally regarded as a milestone in Ukrainian democracy building.

In the meantime, the Ukrainian economy is performing rather well. With the exception of the critical year 2005, GDP has been growing dynamically and the country enjoys macroeconomic stability. However, this stability has very recently been put at risk by two major factors. On the domestic side, sharp rivalry between major parties raised the issue of increased unmotivated social expenditure threatening the fulfilment of the planned state budget. On the external side, critically worsened relations with Russia have made energy prices a hot issue. Under these circumstances the issues of energy-efficiency, energy saving and renewables have become crucial beside incentives for diversification of sources.

With all this in mind, this briefing analyses the EU assistance to Ukraine in the light of relevant EU objectives as well as recent political, economic and social developments potentially influencing initial EU objectives. In line with the specifications, the briefing concentrates on the spheres of democracy, the rule of law, the freedom of expression and of the media, human rights and civil society building in Ukraine. The paper also covers the challenges that the Ukrainian nuclear energy sector is facing and the outstanding focus of running and planned EU assistance projects on energy issues. Furthermore, the potential impacts of the coming New Enhanced Agreement between the EU and Ukraine and the continuous domestic political instability are dealt with in this paper.

Compared to previous EU support, the European Neighbourhood and Partnership Instrument (ENPI) provides a larger amount of technical assistance to Ukraine. Contrarily to the approximately €100 million/year support provided in the TACIS-framework in the previous years, in the period of 2007-2010, Ukraine will receive €494 million of the €4 116.5 million reserved for the ENPI country programmes. This means that with a 12% share of the overall ENPI budget, Ukraine is the fourth largest target country within this framework after Morocco, the Palestinian Authority and Egypt. However, in terms of EU aid per capita, Ukraine is only in the middle of the list of recipient countries.

There is a specific focus on energy in ENPI assistance to Ukraine. For the year 2007 energy may have received €87 million out of a total of €142 million. In the 2007 ENPI Annual Action Programme for Ukraine, the energy component will be implemented in the form of a sector policy support programme. This support is linked to the progress and the achievement

of benchmarks in the implementation of the energy component of the EU-Ukraine Action Plan and of the Memorandum of Understanding in energy. Besides, Ukraine is covered by Multi-Country Programmes, including the Regional Programme – East totalling € 223.5 million and Cross-border Cooperation Programmes amounting to €277.1 million for all the ENP countries.¹ Ukraine is also a recipient of the Neighbourhood Investment Fund and Governance Facility Fund. The latter is exclusively for the countries with the best performance in the reform process. Ukraine was the first country to receive an allocation (€ 22 million) from this Fund. Ukraine is also a beneficiary of Twinning and the TAIEX programmes aimed at assisting the implementation of the Action Plan. Ukrainian civil society organisations are supported through the European Instrument for Democracy and Human Rights (EIDHR).²

2. Recent development in the identified fields

Democracy building and the rule of law

The start of consultations on the New Enhanced Agreement was conditioned on Ukraine's fulfilment of the political priorities of the Action Plan, including respect of the rule of law. However, Ukraine has recently had serious difficulties in meeting this commitment. Rule of law is strongly affected by political instability and by the permanent struggle between different branches of power. Institutional weakness accounts for the main causes of political instability and standstills or even setbacks in reforms. This situation has roots in the short- to middle-term approach of Ukrainian leaders. The depth of legislative failures and obstructive approaches – as practical consequences of general problems of the rule of law – may be well illustrated by the fact that in April-November 2007, only laws related to WTO-adaptation and amendments to the Law on Elections were adopted.

Bearing in mind that the Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine, it is extremely problematic that it has failed to fulfil its role in the past period of political instability, for example after the 2007 spring elections. The Court lost its credibility as a result of political scandals related to pressures from different political actors and corruption affairs in which its judges were involved. Altogether the judicial system of Ukraine has been systematically misused by other branches of power and top officials simply do not execute the courts' decisions. Ukraine is still a country where "political agreements substitute for the law".

Judicial reform also faces big challenges under these circumstances. It is an urgent necessity to carry out a comprehensive judicial reform aimed at ensuring the independence of the judiciary, including the Constitutional Court, reforming law enforcement bodies, etc. Still the basic issue relates to the constitutional situation and the start of a new constitutional reform. Ukraine is still far from following the Venice Commission's recommendations on the constitutional reform process.

¹ Besides ENPI, the Ukrainian nuclear energy sector is a beneficiary of the EU's Nuclear Safety Instrument. Until 2006, measures to improve nuclear safety in Ukraine have been supported in the framework of TACIS (621,1 million euro between 1991 and 2006),

² Source of figures: http://ec.europa.eu/world/enp/funding_en.htm

In the Venice Commission's opinion, the Ukrainian Constitution lacks an efficient system of checks and balances, and also during the 2007 political crisis it failed to address issues of constitutional reference. In December 2007, the President established the National Constitutional Council charged with revising the Constitution, but its transparency and even inclusiveness is doubted. The Venice Commission also suggested amendments of the Constitution aimed at limiting excessive powers of the prosecution service. A draft law on prosecution reform still has to be adopted by the Parliament. Public administration reform has also collapsed due to the permanent dispute between the two centres of power in the executive branch.

The permanent political instability and struggle between the three major political forces ensures that corruption remains a top issue. A sign of this was the rejection of a presidential draft on anticorruption measures, although fighting corruption seemed to be among the first successes right after the Orange Revolution. The fact that the Ukrainian economy has an extreme oligarchic character, with different oligarchs linked to different political leaders, greatly complicates the fight against corruption. The uncertain domestic political situation also means low job-security in the bureaucracy. This uncertainty facilitates oligarch influence and contributes to perpetuating corruption also at the highest level.

Civil society has developed rapidly, a sign of which was the first Civil Assembly of Ukraine (CAU) held on 24 July 2007, gathering 383 representatives of about 350 public organisations in 25 separate regional discussions on reasons for the political and legal crisis and formulating recommendations to politicians. According to the Resolution of the CAU representatives, the civil society claims that "Ukraine needs a new Constitution, not a compromise of the elites or clans, but a new public agreement".³ This new Constitution should not be developed by the Secretariat of the President, but by a constituent body expressing the will of the citizens before being approved by the Verkhovna Rada (Supreme Council). The CAU also calls for reform of the public administration and for reforms aimed at establishing and guaranteeing independence of the judiciary

Freedom of expression and media

As opposed to the years 2001–2004, when the situation in the area of freedom of media deteriorated, the period between 2005 and 2008 brought about significant positive changes. The post-2004 Ukrainian governments took some key steps to abolish censorship and intimidation of journalists and they strengthened the freedom of expression. Recently, the government also introduced legislation ensuring transparency of media ownership and decriminalisation of defamation. It also adopted the "Law on Guarantee of Freedom of Speech".

However, a closer look reveals a handful of shortcomings that have to be overcome in order to bring Ukraine into line with European standards. In the years 2006 and 2007, and notably prior to the March 2006 parliamentary elections, harassment and physical abuse of journalists who covered sensitive issues were still reported. The current political situation, characterised by strong polarisation of opinion, poses challenges to the freedom of opinion and expression. Many major media outlets are owned by business magnates and individuals with strong ties to

³ Resolution. The Civil Assembly of Ukraine. Kyiv, July 24, 2007.

the government. This often results in biased coverage, slanted in favour of specific economical and political interests. Political and economic pressure is executed both via direct harassing of journalists and via excessively close monitoring of journalist by the top management of the most important media outlets. This situation is further fostered by the fact that the State offers advantages, especially fiscal and financial, to the media. Political influence over media was most visible during the electoral campaign. Some key steps to abolish direct censorship were carried out after the Orange Revolution (e.g. the halt to authorities' well known practice of issuing instructions to the media on what to report and in which manner – so-called "temniki"). However, the inability of the police and the judiciary to elucidate such crimes as intimidation and attacks against media, contributes to a state of permanent tension and fear among journalists which often provokes self-censorship. Problems with politically biased media coverage also partly lie with media workers themselves as they are believed to seek ambitious relations both with the State and large companies.

To sum up, the remaining problems in the sphere of freedom of media/expression have top-down as well as grass-root dimensions insofar as they are directly aligned with the overall political and societal situation. In both of these dimensions, the ENP in general and the ENPI in particular have roles to play, especially in encouraging both the government and civil society to continue efforts. Presumably reflecting awareness of this need, “Ensuring respect for the freedom of the media and freedom of expression” was made one of the top “Priorities for Action” in the EU/Ukraine Action Plan. The Action Plan mentions two particular areas in which improvement is expected: 1) legal and administrative framework for freedom of media; 2) respect of freedom of media, including journalists’ rights. The December 2006 ENP Progress Report points out that freedom of expression was respected and that the media environment provided for genuine competition prior to the 2006 parliamentary elections. Further, this document mentioned the abolition of the “temniki” practice. It also noted that some steps were taken towards effective respect of the freedom of the media. It pointed to the fact that a step towards establishment of a public service broadcast was taken and noted that little measurable progress had been made. Similarly, the March 2008 “Joint Evaluation Report” of the EU- Ukraine Action Plan asserted the need for transformation of the state television and radio into public broadcasters. However, it acknowledged the existence of pluralism in electronic and printed media.

The ENPI Ukraine Strategy Paper (2007 – 2013) generally follows the structure of the Action Plan. Due to its more policy and assistance oriented nature it is expected to practically enhance the possibilities of assistance to Ukraine in the area of freedom of expression and freedom of media. As further specified in the ENPI National Indicative Programme (NIP) 2007 – 2010, this area is included as sub-priority 3 (Human rights, civil society development and local government) in Priority 1: *Support for Democratic Development and Good Governance*⁴. However, the stated expectations only amount to what was already briefly mentioned in the Action Plan. It should also be noted that the issue of the freedom of expression and media was not specifically mentioned in the recommendations to the Council and Commission with regard to the negotiation mandate for the enhanced EC-Ukraine agreement issued by the European Parliament in July 2007.

⁴ The overall amount for Priority 1 (*Support for Democratic Development and Good Governance*) is €148,2 million (30 % of the indicative NIP financial envelope)

Civil society

Civil society plays an essential role in safeguarding democratic and pluralistic values and fostering accountable governance, which are one of the top priorities of the EU's approach towards Ukraine. It is beyond doubt that the Orange Revolution signified a great step forward for the recognition of civil society as an important actor in the policy-making arena even if the civil society organisations (CSOs) served not as an engine, but as a tool to channel existing public frustrations. Despite the tremendous success, deep suspicion and distrust of CSOs continues to exist in Ukrainian society. The influence of Ukrainian civil society organisations remains rather low and these organisations face many problems. Several internal factors contribute to a rather unsatisfactory state of the Ukrainian civil society. These factors stem from the political, cultural and societal heritage of the Soviet period, namely from the deeply penetrating structure of clientelist relations. Further, the NGO structure is atomised and NGOs in general do not enjoy mass support in the society at large. This situation is further worsened by the fact that most of the CSOs are funded by foreign donors. What is perhaps even more important is the fact that the approach of the government and especially of local authorities towards NGOs did not alter substantially after the Orange revolution. Thus, the tension between the large autonomy of the government in policy making and the principles of civil society NGOs persists.

As a comprehensive survey (Monfort, 2006) showed in 2006, the CSOs themselves feel the most urgent problems in the following areas: lack of material resources, lack of experienced staff, lack of clear legislation, low interest from government authorities and low interest from the business sector.

Human rights

Promotion of human rights is a regular point on the EU-Ukraine agenda. Respect of human rights is sub-priority 3 of the first Priority Area of the ENPI Country Strategy Paper. The ENPI Country Strategy Paper is rather vague on human rights (as on most other issues), stating only the need to "ensure respect of human rights (...) in line with international and European standards". EIDHR grants and projects are the main instruments. These projects reflected for instance the need of the improvement in the sphere of gender equality. The Action Plan generally follows the PCA and both evaluations of the ENP's Action Plan (2006 Progress report and 2008 Joint Evaluation) speak about considerable improvement since the end of 2004. In the legislative area, ratification of the protocols 12 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms took place in July 2006. These protocols grant additional rights in the area of prohibition of discrimination (12) and improving the efficiency of the control system of the Convention mechanisms. Progress with regard to respect of national minorities was noted, as Ukraine in January 2006 signed up to the European Charter for Regional or Minority Languages. Legislative changes also affected the issue of ill-treatment and torture. In September 2005, the law on Equal Rights of Women and Men was adopted.

The ENPI should take into account the continued existence of many HR problems. Specifically, ill-treatment of prisoners remains widespread. Despite certain governmental efforts beating and torture are considered unexceptional. This issue immediately touches another problem. While the Ukrainian government recently took some positive steps, in the

area of legislative and policy reform, to address the HIV/AIDS epidemic (a specific human rights issue in itself) evidence has been found that drug users are easy targets for arrest or ill-treatment by police needing to fulfil arrest quotas in the strengthened fight against HIV/AIDS.

Another pressing challenge is improving the treatment of immigrants. All efforts notwithstanding, Ukraine still lacks a clear migration policy. Detention conditions for migrants remain poor and fundamental rights to a lawyer, to information to third party of a detention, and to information about rights are routinely denied. Many asylum seekers are denied refugee status on procedural grounds and many migrants are at risk of forcible return. In spite of legislative changes designed to ensure gender equality in employment, women do not enjoy equal access to employment opportunities as a result of discriminatory attitudes among both public and private employers, including discriminatory recruitment practices.

There is also a persistent trend of racist and ethnic hatred propaganda (including anti-semitism and impositions of restrictions on Muslim religious activities). The arrival of an increasing number of refugees, asylum-seekers and migrants thus presents one of the most pressing challenges in the area of human rights and the tense political atmosphere does not contribute to dealing with these challenges. It is to be noted, however, that efforts have been made to reduce the incidence of racial attacks.

Regarding migration and asylum, due to the nature of the issue, national programmes alone cannot be sufficient. This is why it is important that the EU also approaches (and intends to reinforce this approach) the problem in a regional context, as part of the ENPI Eastern trans-national/regional programme. The programme includes actions on customs and border management, the fight against trans-national organised crime and migration and asylum management. This approach is welcome and should be strengthened.

Energy

Energy is a key issue not only in EU-Ukrainian relations, but for the Ukrainian economy and national security as well. Ukraine's dependency on imported energy is exacerbated by the huge weight of energy-intensive sectors in the Ukrainian economy. Much energy is, however, wasted. Energy transit is a significant source of revenue.

Since 2001, when energy co-operation was launched between the EU and Ukraine, the security and safety of gas transit is in the focus. About 40% of the gas that the EU imports is transited through Ukraine. In 2005 it was decided to extend the energy cooperation to reform of the Ukrainian gas and electricity market based on convergence of the regulatory framework with EU legislation; promotion of concrete infrastructure projects of common interest; energy efficiency and the issue of renewable energy. The Memorandum of Understanding on Energy signed in December 2005 serves as a basic document. Concrete tasks and goals are indicated in the four "sectoral" road maps on nuclear safety, electricity and gas markets integration, the security of energy supplies and the transit of hydrocarbons, and safety and environmental standards in the coal sector (coal sector is outstanding in Ukraine's energy security, providing some 50% of energy production). Later, a fifth road map on issues of energy efficiency, renewables and climate change was added. EU action and support to Ukrainian energy industry is provided in accordance with objectives and tasks indicated in these road maps. Ukraine expressed its intention to become member in the Energy Community, and is currently an observer in this organisation.

The EU initiated several important projects related to energy. Some of them are connected to the safety and security of gas and (in the future) oil transit, like the examination of the possibility of the extension of the Odessa-Brody oil pipeline to Plock, in Poland, or the analysis of reform options for the gas transit network. The EU-Ukrainian Action Plan itself has seven specific energy-related objectives aimed at the gradual convergence of EU and Ukrainian energy legislation and integration of the respective energy markets.

The EU initiated a Twinning project targeted at elaboration and implementation of a comprehensive action plan to reduce Ukraine's energy intensity. The already existing Boyarka gas metrology centre has been co-financed by the EU and Ukraine, and it is planned to be further developed to cover oil as well. The EU has funded studies of different options for the establishment of minimum oil stocks. The TACIS-funded "Coal sector support programme" project was a great contribution to implementing reforms in the coal sector. A twinning project has been initiated to support the Ukrainian energy efficiency agency. Twinning and other programmes are planned to promote the introduction of energy efficient technologies, alternative and renewable energy, the improvement of domestic energy metering system, etc.

As a preparation for Ukraine's possible accession to the Union for the Co-ordination of Transmission of Electricity (UCTE), a TACIS-study has been carried out to support the progressive participation of Ukraine in the electricity Trans-European Networks. A wider study on the feasibility of a possible synchronous interconnection of the UCTE and IPS/UPS⁵ systems part of the latter is the Ukrainian system is also underway. A coal sector policy support project has been planned to start at the end of 2007 with three main objectives: to develop and maintain a sector program for the period 2007-2016; to provide means to implement this program; and to improve mine safety in Ukraine.

Nuclear safety

Since the 1986 Chernobyl Nuclear Power Plant (NPP) catastrophe, enormous attention has been paid to the Ukrainian nuclear sector worldwide. The European Union has been among the most active, providing support from the beginning with regard not only the Chernobyl NPP, but also to other NPPs of similar type. Nuclear energy is of key importance to Ukraine's energy supply, representing 26.1% of the total electric power generating capacity. All these facts motivate the sector's position at the top of the EU assistance agenda.

The Nuclear Safety Programme (NSP) has been launched within the TACIS framework. Until 31 December 2006 EU assistance to ENP target-countries was provided under this TACIS programme. From 1991 to 2006 TACIS NSP allocated €1.3 billion to the improvement of nuclear safety in the NIS by two channels, via 1200 specific contracts and by investing in international funds. Major parts of this sum were allocated in Ukraine and Russia.

The Chernobyl Shelter Fund and Nuclear Safety Account are managed by the EBRD. Up till 2006 the two instruments received altogether €205 million. Due to different difficulties, the NSP was reorganised in 2000-2001. The EU is by far the main donor to the Chernobyl Shelter Fund, the main aim of which is to make the site environmentally safe. The European Union

⁵ Interconnection of Power Systems/Unified Power System: it comprises the Power Systems of the Baltic States (Latvia, Lithuania, and Estonia), Armenia, Azerbaijan, Belarus, Georgia, Moldova, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan.

has so far provided € 190.4 million to the Fund, representing roughly 35% of the original estimated cost of the project. As far as Nuclear Safety Operations are concerned, Ukraine received about 47 per cent of TACIS funding.

Ukrainian, EU and external experts have conducted a safety evaluation of Ukrainian NPPs. At present, one major focus is the provision of support to the implementation of the national NPP upgrading programme via on-site-assistance at the currently operating NPPs. This activity is divided into four regionally separated blocks: 1. The Rovno NPP project; 2. South Ukrainian NPP project; 3. Khmelnytsky NPP project; 4. Zaporozhye NPP project.

Cooperation with Ukraine in relation to the Joint Research Centre (JRC) is one of the concrete and still effectively working results of EU TACIS-funding. The JRC's mission is to provide scientific and technical support for the implementation and monitoring of EU policies. Its work under the EURATOM programme is split across three priority areas: nuclear safety, nuclear waste management and nuclear security. The programme will also support the application of efficient safeguards of nuclear materials. EURATOM has signed two agreements with Ukraine. 1. on co-operation in the field of nuclear safety (1999); 2. on the peaceful uses of nuclear energy. Based on the agreement with EURATOM and loan contracts of EBRD the so-called K2R4 modernisation programme has been also going under EU support.

Nuclear safety is still one of the key priorities among EU assistance activities to Ukraine. This is reflected also in the characteristic "threat-approach" on the EU side. However, it is naturally also in Ukraine's own interests to take care of the sector. The relevance for the EU of this priority is evident. From January 2007, as part of the reform of EU assistance instruments, the TACIS NSP was replaced by a new instrument called the Nuclear Safety Instrument (NSI). The joint European Commission – International Atomic Energy Agency – Ukraine nuclear safety program covering the four issues of "design safety", operational safety, radioactive waste management and decommissioning, and regulatory framework will be supported mainly by the EU NSI tool. According to the Nuclear Safety Strategy for Community Cooperation Programmes 2007-2013 the NSI is focusing on the CIS-space during 2007-2009. Several TACIS projects are further implemented. The new instrument is steadily phasing out the "technical assistance"- orientation and moving towards a more collaborating programming and implementation process. A specific effort is given to the linkage with the EURATOM Research and Training Framework Programme.

The new nuclear safety programme will have an indicative budget of €217 million for the period 2007-2009, of which approximately one third will be provided for Ukraine, including a potential new contribution to the Chernobyl Shelter Fund and other NSA projects in Chernobyl. According to an EBRD report published in 2003 the updated cost estimate of projects under Shelter Implementation Plan was increased to €1 091 million from the original €768 million. Supporting regulators will gain a bigger emphasis. The TACIS Joint Support Office in Kyiv will also continue to be supported under the new tool.

In the field of nuclear safety, the EU is in active co-operation with other international organisations like the International Atomic Energy Agency (IAEA). Most international initiatives are linked to the 1992 G7 meeting that set up a programme of action to address the problem of Chernobyl NPP.

3. Relevance, effectiveness, efficiency and sustainability of EU action

According to expert opinions, the ENP itself is a weak tool for promoting democracy, and the last two years even saw setbacks in democratic consolidation. The 2006 parliamentary elections can be considered a landmark in Ukraine's political development, but also the start of obstructive behaviour on part of major Ukrainian political forces blocking further democratic development.

Since the EU's enlargement policy is evidently the most successful tool for promoting democratisation processes, the EU has limited chances in promoting democracy in Ukraine under current circumstances. However, institution building may be one of the concrete ways to get results since the EU may put pressure on Ukraine, using e.g. a well established system of conditionality (e.g. no support without concrete steps in this field). This also means that supporting the rule of law should be made a central activity of the EU: better functioning of the rule of law is a pre-condition of progress in most other fields of life in Ukraine.

Democracy building and the rule of law

The EU is a major supporter of reforms aimed at establishing the rule of law in Ukraine. As indicated in the 2007-2013 Country Strategy Paper, "Support for Democratic Development and Good Governance" is priority area 1. Under this priority, the following four sub-priorities are established:

- Sub-priority 1: Public administration reform and public finance management;
- Sub-priority 2: Rule of law and judicial reform;
- Sub-priority 3: Human rights, civil society development and local government;
- Sub-priority 4: Education, science and people-to-people contacts/exchanges.

The set of sub-priorities appears very appropriate: as we already mentioned, not just the classical "rule of law" problems, but also practical, institutional issues should be addressed. These issues are of utmost importance for the proper functioning of the democratic system. This consideration seems to be taken into account in the sub-priorities, especially in sub-priority 2.

Public administration reform is of key importance in fighting corruption. As corruption is considered to be at a high level in Ukraine, this sub-priority is more than welcome. It is especially positive that reform is handled together with public finance management – a crucial issue from the point of view of making the system work in practice. Also the inclusion of local government issues into sub-priority 3 as well as the whole sub-priority 4 reinforces this impression⁶.

The success and direct impact of an EU-supported training project for judges and human rights experts during 2007 conducted in co-operation with the Council of Europe proved that the EU can make a considerable contribution to the Ukrainian judicial reform. This is a good sign of the relevance of the above-mentioned sub-priority 2. The EU had another effective joint project with the Council of Europe named "Project Against Corruption in Ukraine". A

⁶ Human rights and civil society are discussed in other sub-sections of this briefing.

major event, broadcasted on the Parliament TV channel, assisted a Ukrainian parliamentary committee in the preparation of the “anti-corruption package” draft laws for the second reading.

Much depends, of course, on the sustainability of the effects of EU action. From the point of views of financing, the length of the 2007–2013 financial framework offers considerable space for mid-term planning and continuity. Regular, thorough evaluation of EU action can also help improve its effectiveness and efficiency. Still, much depends on the readiness for change of the Ukrainian political elite. As already mentioned, conditionality – built up systematically and used consistently – can have a major role in achieving the positive attitude in this respect.

Freedom of expression and media

Regarding the recent state in the field of freedom of expression, but more essentially in the field of freedom of media, the EU should assume a more active role. Free media are *the* cornerstone of democracy and Ukrainian media still face many difficulties (as indicated above). First, it is of utmost importance that whatever the new legal basis for EU-Ukraine relations will be, it has to be highly specific in outlining the expectations of the EU. It should clearly state the goal of more transparent ownership of the media through governmental regulatory bodies and the creation of public service media.

Especially, and in accordance with the recommendations issued by the EP, these expectations should be mentioned in the negotiation mandate for the New Enhanced Agreement (NEA) Further, the ENPI and EIDHR assistance should focus on programmes aimed at educating journalists, media lawyers and judges as well as at enhancing the ethics of journalism. Under the EIDHR there was only one 18 months project launched, local in its nature, totalling €98 394, focusing on creating a virtual regional network to voice the problems of marginalized groups in Ukraine. Since the freedom of expression is one of the fundamental human rights, the EIDHR should consider taking a more active role in this field.

Civil Society

There are two main areas of necessary improvement in the sphere of Civil Society: 1) to broaden public support for NGOs and CSOs; 2) to secure more favourable conditions for the functioning of the NGOs and CSOs, in institutional, educational as well as financial dimensions.

In both of these areas, the EU’s assistance should be able to help. But first of all it has to close an obvious gap between the EU’s rhetoric and practice in supporting civil society in Ukraine

These obstacles are the following:

- *Lack of an overall strategy and scattered ad hoc based approach.* Such strategic objectives should entail: 1) lowering the distrust of society at large towards the CSO’s (via ENPI funded projects) and 2) enhancing the position of the NGO’s in the eyes of the Ukrainian government (via political actions). This strategy should also include

specifically stated goals especially on the political level. This means that the EU should not be afraid to explicitly identify problems in the sector of civil society and draw attention to this in further negotiations with Ukraine. Moreover, this strategy should focus on improving organizational structure of both programmes and EU actors involved. There are too many departments, units and officials involved, yet, no general guidelines. The earlier recommendations to establish a coordinating unit to deal with the assistance to NGO's should be reconsidered. This could also add to lowering the apparent inter-institutional tensions and power struggles inside the EU institutions

- *Overly strict Financial Regulation of the EU.* The system is criticised for raising costs, increasing uncertainty and reducing the effectiveness of NGO's that seek funding from the Commission. Regulations impose tight financial control with auditing rules that are far stricter than the usual standards in both public and private sectors. The extensive and complicated reporting requirements pose a further extra burden on recipients of aid. The rules are so complex that few Commission officials properly understand them, and different units and departments interpret them differently. Responsibility for any possible shortcomings or misuse of funds is carried by individual officials who therefore try to follow the rules painstakingly. Furthermore, the procedure takes such a long time – several years from programming until actual payments – that local conditions and needs may change radically in the interim period, and few NGOs in transition countries are able to plan their work so far in advance. Since the procedures are extremely slow, laborious and costly, it is particularly difficult for small NGOs to apply for EU funding. It is indeed common knowledge among activists in the neighbouring countries that the procedures of EU aid programmes are very unfavourable for NGOs. Most organisations prefer to work with other donors that are more flexible and less bureaucratic.
- *Lack of human and organisational resources of the EC for allocating assistance to the Civil Society;*
- *Lack of cooperation with the European NGOs.* This cooperation should be included in the overall strategy, perhaps by creating already mentioned coordinating foundation or mechanism
- *Lack of cooperation with NGOs and CSOs in Ukraine in the preparatory phases of relevant documents.*

The reason for a rather reluctant and non-strategic approach on the part of the EU might lie in a fear that a more comprehensive and assertive strategy for the support of the civil society might complicate negotiations with the Ukrainian government. Grand and assertive strategy might also involve a danger of EU losing its current image of being neutral and benign.

Human rights

As mentioned, there is a serious lack of concreteness of the ENPI Indicative Programme, which does not even mention the most pressing problems of human rights violations. The reason probably lies in the fact that the EU does not want to harm its relations with the Ukrainian government and in that every Indicative Programme is agreed with the respective government which naturally objects to any negative remarks. However, what is rather perplexing is the fact that concrete (or realistic) remarks are missing also in the Country Strategy Paper. Despite many problems in the field of human rights in Ukraine, this document basically only refers to Human Rights as a priority but does not state anything specific. The

entire EU's "strategy" can be read so that the major responsibility of the Human Rights related issues will be dealt on the EIDHR basis.

The overview of EIDHR co-funded programmes (2004 – 2007) reveals that not all pressing issues were really covered by this instrument. While there were many projects dealing with people with disabilities and even more projects focused on children, women and gender equality, there was only one project focused on refugees and asylum seekers which is an ever more important issue. There was also a project on torture prevention, education in the sphere of human rights, interconnection of NGO's to the human rights agenda, but only one project on protecting minorities (relating exclusively to the Roma minority). From this overview it is obvious that the currently most pressing problems (asylum seekers, minorities) are not fully dealt with on the EIDHR basis.

Furthermore, there is a widespread belief that in July 2007 finalised agreements on visa facilitation for Ukrainian nationals and on readmission of irregular migrants who transit through Ukraine fail to provide sufficient human rights safeguards. Because of its readmission agreement with Ukraine and the fact that the EU will soon start to return asylum seekers from different countries to Ukraine, the EU has a moral responsibility to seek relevant improvements in Ukraine (detention conditions, processing of asylum applications, guarantees against refoulement etc) and, of course, to provide for the best assistance possible since in the absence of this, the already bad situation could further deteriorate. To depend only on EIDHR cannot be expected to be effective, therefore, clear goals should be present in the negotiation mandate for the enhanced EU-Ukraine agreement.

The EP recommendation concerning the negotiation mandate is insufficient. It only involves a call on the Ukrainian authorities to fulfil their obligations under international human rights law and to exercise due diligence in securing women's rights to equality, life, liberty and security, while stressing the need for zero tolerance in relation to discrimination, torture and cruel, inhuman and degrading treatment.

Energy

Altogether the EU initiatives in supporting Ukrainian energy sector have been focusing on really important issues and the aid provided has produced concrete and significant results. Therefore these initiatives should be continued and strengthened. However, in the future, stronger emphasis needs to be given to the role of institutions in this sector, an issue that has already been addressed by EU initiatives like the aid provided to the National Energy Regulatory Committee (NERC) and electricity and gas transmission system operators.

There is one energy-related project (related to the Boyarka Metrology Centre) among EUROAID forecasted programmes (beside the other one on combating the HIV/AIDS epidemic), one on Integration of Transport Networks and Border Crossing Points, one on Sustainable Local Development Works and several on nuclear issues. However, co-operation in applying clean coal technologies is still lagging behind for example in comparison with that kind of co-operation with Russia.

Taking into account the real "common interest" of the EU and Ukraine, EU aid in energy should concentrate more on energy efficiency (parallel with a decreasing weight of the traditional threat-motivated objectives). Since energy efficiency is one of the main operational

priorities of the EBRD according to its country strategy it would be advisable to co-operate with EBRD in projects targeted at improving Ukrainian energy efficiency.

Nuclear safety

EU support within the framework of the NSP, the following NSI and new EUROAID projects constitutes a considerable contribution to Ukrainian nuclear safety which is obviously an all-European interest. Moreover, EU action in comparison with other donors is becoming more diversified with the new list of actions supported by the NSI. Beyond the “traditional” targets (design safety, operational safety), the appearance of radioactive waste management and decommissioning shows a more forward-looking approach than the program until 2006. The presence of regulatory framework on the list of priority issues reflects that the EU (together with the Ukrainian authorities) is aware of the fact that a clear regulatory framework is a pre-condition for the sound development of this sector. The broadening scope of EU assistance in the field of nuclear safety is welcome; adjustments can be made on the basis of regular evaluation of progress.

4. Specific issues

4.1. The New Enhanced Agreement and EU support

EU-integration is widely supported among Ukrainian leading parties. This was well reflected by the 399 positive votes in Verkhovna Rada on the resolution on the start of negotiations between Ukraine and the EU on a new basic agreement. This positive approach includes a commitment to approximation with EU legislation. Most people and experts see Ukraine’s future in the EU as a guarantee of further democratic development in Ukraine and the building up of a market economy. For this purpose they call for an association status-offer, in line with relevant European Parliament resolutions. However, the scope of the special relationship planned under the NEA is limited. Among the direct impacts on public governance offered by NEA and especially by the FTA+, one can see is for example a comprehensive customs reform aiming at simplification of customs procedures and elimination of related corruption. Planned approximation of Ukrainian legislation in competition policy, corporate governance, taxation or public procedure will also help establishing a more transparent administrative environment. EU support, including advice and funding, is given to all of this and is planned to continue.

4.2. Ukraine and Moldova

Since November 2005 the EUBAM assists with modernisation of management of their common border in accordance with European standards, and to help in the search for a resolution of the “frozen conflict” over the separatist Transnistrian region of the Republic of Moldova. The mission staff is 200 and with its help Ukraine has developed co-operation with Moldova on border questions, including information exchange on the flow of goods and

people. Also due to the enhanced cooperation, Ukraine has reached arrangements to finalise the demarcation of the Ukraine–Moldova border.⁷

The major recent achievement of the EU Border Assistance Mission (EUBAM) is increased transparency about import/export flows from the Transnistrian region of Moldova. This success is a consequence of a new customs regime which requires companies based in the Transnistrian region in Moldova to export to and via Ukraine with official Moldovan stamps. EUBAM has been able to play a useful role as a neutral observer of the situation at the border.

The Mission has been working to increase cooperation between national and local law-enforcement agencies involved in border issues (like prosecutor office, traffic police, tax police etc.) This enhanced cooperation also takes place between the border services of Moldova and Ukraine. It has encouraged, assisted and monitored 4 cross-border operations in 2006-7. As a result of the operation in April 2006, more smuggled goods were seized in 10 days than in the whole of first three months of that year.

However, several interviewees suggested that in many cases, the reports on the successes in fight against trafficking and smuggling “improved” so that they do not reflect the actual state of affairs and picture the situation better than it actually is. Therefore, the EUBAM should take extra care in evaluating these reports.

An important issue is a rising level of information exchange. On the very practical level, Ukrainian border guards admit that the EUBAM team is very useful when it comes to controlling technical documents of foreign cars, checking foreign passports and identifying foreign number plates.

5. Conclusions and recommendations

Conclusions

Ukraine has been seen for a long time as a *threat-source* for Europe for different reasons. In earlier phase initiatives of the European Union targeted the elimination or at least the reduction of these “threats” including nuclear threats (consequences of the Chernobyl accident, radiation in connection with new major accidents or the possibility of nuclear material ending up in wrong hands etc.) or potential interruptions of gas supplies to the EU, the issue of illegal migrants, organised crime etc. Although this approach has been somewhat re-valued after the intensification of the relations between Ukraine and the European Union in the post-Orange Revolution period, EU activities in the country still bears the marks of this previous attitude.

A major evidence of this phenomenon is the outstanding share of the energy sector in total EU aid directed to Ukraine. Still, it is evident that also for domestic reasons, the Ukrainian energy sector needs foreign support, both advice and funding. By providing this the European Union may reduce the feeling of being threatened both regarding the security of energy supplies arriving through Ukraine at the EU-borders and direct or indirect nuclear threats. The EU is a

⁷ Due to the fact that the issue is much more closely related to Moldova, it is tackled in detail in the briefing on Moldova in the same series.

major donor to the Chernobyl Shelter Fund and assists Ukrainian nuclear sector in several ways. Also the EU's commitment to reforming the Ukrainian energy system - including the gas, oil, electricity and coal sectors - is outstanding both regarding its broad scope (including responsibility and motivation) and the amount of money directed to the sector.

However, the Ukrainian society and state face enormous challenges that have been further increased by the almost permanent domestic political crisis of the past two years. These challenges should be addressed in a more active way by the EU. Support for the consolidation of the rule of law is particularly urgent. Progress in this area is necessary in order to make it possible to overcome the permanent political instability and constitutional crisis.

Recommendations

- Since political stability under the current circumstances of continuous struggle between the three major political forces and their leaders is rather far from being achieved, the EU should focus more on the issue of rule of law, including necessary institution building.
- Conditionality on essential progress regarding the rule of law should be in some way put into the New Enhanced Agreement which will have a binding character. Ukraine could be put under more pressure to follow recommendations of the Venice Commission on this issue. This could help overcome the difficulties related to the political culture and the nature of the political class in Ukraine.
- Completion of the launched process of a transition from presidential power towards a European-type parliamentary “rule of law” (with a normally functioning parliament) seems unavoidable in order to achieve political stability in the country. According to Ukrainian expert Natalia Shapovalova, “there is a need for a more potent tool to measure progress made in the course of the NEA implementation” (Shapovalova, 2008).
- Regarding the EU assistance aimed at increasing the rule of law in Ukraine, the focus should be not only on law-making but even more on the implementation phase. This is a sphere where Ukraine still has lots to do and where there is scope for activities. Previous and actual international examples of similar processes in the international arena (in many cases assisted by the EU) can be useful for orientation, evaluation, as well as for rewarding progress or, if that is the case, punishing the lack of it.
- The EU should continue to be active in the field of freedom of expression and media. The main issues to be addressed in this field can be grasped as two-dimensional. On the political level, the EU should focus on government in asserting the need to strengthen governmental regulatory bodies; to create independent public service together with denationalisation of mass media (in the sense of transforming national media to public service media as there are still no public mass media in Ukraine); to promote transparency of ownership of the media; to improve public access to information. On the level of people-to-people contacts, the EU should promote and support an improvement of legal education of journalists, media lawyers and capacity building of judges; improving the quality of journalism and journalists’ ethics.
- EU action in the field of human rights should be more concrete. The ENPI Indicative Programme does not even mention the most pressing problems of human rights violations. The Commission regards HR as an issue which should be addressed primarily through the EIDHR. However, since human rights are one of the priorities in

EU-Ukraine relations, the ENPI should involve this dimension too. Without explicitly setting an agenda and goals for the Ukrainian government in these areas, no real progress (using the ENPI assistance) can be expected. Currently, the most important issue is the treatment of asylum seekers and immigrants, because their conditions might even deteriorate after the readmission agreement with the EU is fully applied.

- The EU should be more active in the sphere of promoting civil society. It should develop a clear strategy, supported by an overall coordination mechanism for dealing with this issue on the EU level. This mechanism should provide for closer cooperation with NGO's both within the EU and in Ukraine; procedures for decisions on financing and disbursement should be simplified.
- The EU should continue to play an active role in the Ukrainian energy sector reform, but paying more attention to the issue of increasing energy efficiency. This is a real "common interest", since it frees up resources (for example gas) for rapidly growing EU demand and helps to reduce Ukrainian dependence on Russian supplies.
- The EU should introduce concrete *pilot projects* aimed at increasing energy efficiency, similar to EU projects running in Russia since years. Taking into consideration the fact that Ukraine is among the biggest energy-wasting countries in the world, the emphasis most probably should be put on energy savings and energy efficiency rather than on renewables.

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