

PUBLIC PROCUREMENT REFORM IN UKRAINE: THE IMPLICATIONS OF NEOPATRIMONIALISM FOR EXTERNAL ACTORS

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Abstract: The neopatrimonial framework helps to explain the difficulty making progress on procurement reform in Ukraine. Even when reform laws are adopted, entrenched private interests succeed in watering down these laws, moving significant parts of the procurement process from the formal to the informal sector. Because of the prevalence of domestic interests in the process, outside actors, such as the EU, World Bank, and USAID have little influence in pushing for a more transparent procurement process in Ukraine.

The trajectory of public procurement reform in Ukraine reveals much about the character of the political regime, as well as about the degree of its susceptibility to external pressure.¹ Public procurement is a sensitive area in many countries, and problems with transparency and fair competition are widespread.² Furthermore, since significant financing is made available by the state, it is an area in which political and economic actors and their respective interests interact. The nature of this interaction

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¹ I would like to thank Iryna Solonenko and the two anonymous reviewers for their comments on an earlier draft of this article.

² See e.g. Robert R. Hunja. 2001. *Obstacles to Public Procurement Reform in Developing Countries*. http://www.wto.int/english/tratop_e/gproc_e/wkshop_tanz_jan03/hunja2a2_e.doc, accessed February 15, 2013; Tina Søreide. 2002. *Corruption in Public Procurement: Causes, Consequences and cures*. <http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf>, accessed February 15, 2013.

can be indicative of defining regime features which have an impact on political decision-making processes. Finally, public procurement is a realm which is of major interest to external partners in both the political and economic spheres. For one thing, the procedures governing decisions about the distribution of funds for state-financed projects constitute a litmus test for aspects of democratization and good governance, such as fairness, transparency, and efficiency of public spending. For another, public procurement rules also have a direct effect on the opportunities for foreign firms to participate on an equal basis with domestic companies in tenders for attractive projects. Thus the way public procurement issues are handled plays a role in determining how the business climate is perceived by external economic actors.

In this article, we first give a short presentation of the relevant literature on neopatrimonialism, both as a general concept and as it relates to analysis of the post-Soviet space. Neopatrimonialism provides a useful framework for understanding the specific procurement processes the article analyzes. We then briefly review the evolution of public procurement reform during the presidencies of Leonid Kuchma and Viktor Yushchenko, in order to set the stage for our analysis of the current period under Viktor Yanukovich. This analysis is divided into two parts. In the first, we explore developments in public procurement with regard to the light they shed upon the nature of the Yanukovich regime. In the second, we examine these developments from the perspective of key external actors, outlining their goals and activities and assessing the degree of impact they have achieved in the public procurement sphere. We then conclude by reflecting on the implications of our findings for external actors' ability to influence elements of democratic and economic reform relevant to Ukrainian foreign policy both in the public procurement realm and more broadly.

Neopatrimonialism and Its Applicability to Post-Soviet Contexts

Shmuel Eisenstadt originally developed the concept of neopatrimonialism in response to the three types of authority conceived by Max Weber - patrimonial, charismatic, and legal-rational bureaucratic - with the intention of updating and extending the patrimonial category.³ In earlier decades, researchers primarily employed it in regard to African regimes. However, more recently neopatrimonialism has been used to explore political (and economic) developments in a wider geographical framework, to some

³ For more on the background of the concept, see Gero Erdmann and Ulf Engel. 2007. "Neopatrimonialism Reconsidered: Critical Review and Elaboration of an Elusive Concept." *Commonwealth & Comparative Politics* 45:1, 95-119; Marlene Laruelle. 2012. "Discussing Neopatrimonialism and Patronal Presidentialism in the Central Asian Context." *Demokratizatsiya* 20: 4 (Fall): 301-324.

extent even across regions.⁴ After the collapse of the USSR and the emergence of fifteen states on its territory, political scientists began to explore and compare the development of post-Soviet regimes. Although this at first took place mainly in the context of transition research, which developed new concepts such as hybrid regimes, competitive authoritarianism and defective democracy (just to name a few), with time there was an increasing attempt to make previously existing concepts fruitful for the analysis of the post-Soviet space. One of these has been the concept of neopatrimonialism, which initially made its way into research on Central Asia, but meanwhile has been applied to Russia, Ukraine and other post-Soviet countries as well. Most recently there have been efforts to compare the utility of neopatrimonialism to other, more specifically post-Soviet concepts and to explore possibilities for eventually combining them in a broader approach to political dynamics in the region.⁵

The key feature of neopatrimonialism as it is currently used in the literature is that it describes a form of rule which combines formal (in the sense of legal-rational) with informal elements. As Gero Erdmann has written: "...neopatrimonialism is an attempt to tackle the challenge provided by the coexistence and interaction of formal and informal institutions or widespread informal behaviour within one polity."⁶ This combination of formal rules and informal interactions furthermore creates uncertainty on which a system of rule can be based and through which it can reproduce itself.⁷ The rulers have the choice of applying formal or informal rules in any given instance. This choice can be used to reward or punish various groups or networks which attempt to wield influence within the system. Thus, in most cases where neopatrimonialism is at work, a system of patronage develops, which "defines a mode of governance and function of intra-elite relations, and concerns mostly the transfer of public goods to private persons."⁸ The close interlinkage between neopatrimonialism, patronage, and clientelism is illustrated by the "three main dimensions of neopatrimonial rule" specified by Christian von Soest: "(1) power concentration in the hands of patrons, 2) systematic clientelism, and

⁴ Christian von Soest. 2010. "Persistence and Change of Neopatrimonialism in Africa, Latin America, Southeast Asia." Paper presented at the workshop "Neopatrimonialism in Various World Regions," August 23, 2010, GIGA German Institute of Global and Area Studies, Hamburg.

⁵ See Marlene Laruelle. 2012. "Discussing Neopatrimonialism and Patronal Presidentialism..."; Susan Stewart et al. 2012. *Presidents, Oligarchs and Bureaucrats: Forms of Rule in the Post-Soviet Space*. Farnham: Ashgate.

⁶ Gero Erdmann. 2012. "Neopatrimonialism: Problems of a Catch-all Concept?" In Susan Stewart et al., eds., *Presidents, Oligarchs and Bureaucrats: Forms of Rule in the Post-Soviet Space*. Farnham: Ashgate.

⁷ Gero Erdmann and Ulf Engel. "Neopatrimonialism Reconsidered..." 105.

⁸ Marlene Laruelle. 2012. "Discussing Neopatrimonialism and Patronal Presidentialism..." 305.

3) particularistic use of state resources.”⁹

These three dimensions indicate the clear relevance of neopatrimonialism for the post-Soviet space. The concept of the “power vertical,” which has been applied to Russia in particular, but also to other post-Soviet political systems, points to a certain concentration of power in the hands of a few (patrons, in Soest’s terminology). As for systematic clientelism, Henry Hale has pointed out that post-Soviet politics takes place in “*highly clientelistic* societies, where the same formal institutions that might promote stability and openness in the West can often have very different effects in the former USSR” (italics in original).¹⁰ He views politics in this context as “primarily a battle of extended personalized networks rather than of formal institutions or even individuals.” Although he sees his definition of clientelism as quite close to the concept of neopatrimonialism, in fact Hale focuses more exclusively on informal, personalized interactions rather than on their interplay with more formal institutions. Returning to Soest, his third dimension, the “particularistic use of state resources” applies especially well to post-Soviet environments in which the production, transit or sale of products in the energy sector is relevant. However, rent-seeking behavior can be found in other sectors as well. In these contexts, “formal state institutions cannot fulfill their universalistic purpose of public welfare. Instead, politics and policies are determined by particularistic interests and orientations.”¹¹

Other scholars have already opted to apply the term “neopatrimonial” to the Ukrainian context. For example, Oleksandr Fisun has argued that in the Ukrainian case “...neopatrimonial democracy is a standard modification of the premier-presidential regime in a clientelistic setting, in which rent seeking is the key motive of politics. Political actors compete through formal electoral mechanisms (for the presidential office and seats in parliament), but their goals still focus on state capture as the primary gain.”¹² As in the case of public procurement to be discussed below, formal institutions exist but are intertwined with and undermined by informal elements and narrow material interests. The importance of this mixture of formal and informal mechanisms, as well as a certain insecurity which goes along with these arrangements and can benefit the elite in its struggle

⁹ Christian von Soest, “Persistence and Change of Neopatrimonialism...” quoted from the abstract of the paper.

¹⁰ Henry E. Hale. 2012. “Two Decades of Post-Soviet Regime Dynamics.” *Demokratizatsiya* 20:2 (Spring): 71-8.

¹¹ Gero Erdmann and Ulf Engel. “Neopatrimonialism Reconsidered...” 105.

¹² Oleksandr Fisun. 2010. *Ukrainian Teeter-Totter: Vices and Virtues of a Neopatrimonial Democracy*. PONARS Memo No. 120. http://www.gwu.edu/~ieresgwu/assets/docs/pepm_120.pdf, accessed February 16, 2013. For a geographically broader argument, see Oleksandr Fisun. 2012. “Rethinking Post-Soviet Politics from a Neopatrimonial Perspective.” *Demokratizatsiya* 20:2 (Spring): 87-96.

for power, has been emphasized with regard to the Ukrainian case by other authors as well.¹³ Thus the legitimacy of discussing Ukrainian political developments by referring to a neopatrimonial framework is relatively well established.

This article will argue that neopatrimonialist rule has consequences for external actors who attempt to influence policy decisions within a given state. While this topic (to the author's knowledge) has not yet been addressed in the theoretical literature, it seems plausible that several aspects of neopatrimonialism would hinder or even prevent external actors from having a significant impact on policymaking. For one thing, the importance of informal interactions means that many developments are not transparent, making it difficult for external actors to comprehend and do justice to the complexity of the relationships involved when devising their approach to a given situation. For another, the mixture of formal and informal institutions implies that domestic actors can always refer to a formal logic and deny the influence of particularistic interests in any given case, thereby depriving external actors of certain arguments in favor of reform.

Background: Public Procurement under Kuchma and Yushchenko

Our analysis begins with the year 2000, because it was then that a comprehensive public procurement law was passed. According to a World Bank assessment, this law complied reasonably well with accepted international standards.¹⁴ Furthermore, the overall situation in the public procurement field seemed to improve in the early 2000s, with the percentage of competitive tenders exceeding 90 percent by 2005.¹⁵ However, starting in late 2004 amendments began to be introduced which significantly undermined these standards in some areas. These amendments spanned both the late Kuchma and the early Yushchenko phases, indicating that both presidents were willing to tolerate the introduction of problematic and non-transparent procedures in the public procurement realm. Of particular concern was the

¹³ See e.g. Katerina Malygina. "Ukraine as a Neopatrimonial State: Understanding Political Change in Ukraine in 2005-2010." *SEER Journal for Labour and Social Affairs in Eastern Europe* 1: 2010, 7-27; Kerstin Zimmer. 2008. "Formal institutions and informal politics in Ukraine." In Gerd Meyer, ed. *Formal Institutions and Informal Politics in Central and Eastern Europe: Hungary, Poland, Russia and Ukraine*. 2nd revised edition. Opladen: Barbara Budrich Publishers.

¹⁴ World Bank, Operational Policy and Services, Europe and Asia Region. 2006/2007. *Ukraine Country Procurement Assessment Report 2006*, Report No. 39948-UA, November 12, 2006 (updated March 30, 2007). http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/07/19/000310607_20070719112646/Rendered/PDF/399480Uaoptimized.pdf (accessed February 14, 2013).

¹⁵ World Bank. 2011. *Trends in Corruption and Regulatory Burden: East Europe and Central Asia*. Washington, DC: World Bank, 17.

creation of a “Tender Chamber,” which had the status of a non-governmental organization. While its official role was to promote transparency and efficiency in the procurement area, its members (Ukrainian businesses) saw it as a means to advance their interests in the tender process. Members of both “Blue” and “Orange” political forces - the Party of Regions, the Bloc Yulia Tymoshenko, and Our Ukraine - were involved in the work of the Tender Chamber. The World Bank concluded that the chamber was given undue influence on the question of allocating bids without being subject to the control and supervision that official public administration bodies would have had to undergo. In fact, between 2005 and 2008 Ukraine was one of the countries with the greatest increase in bribes in the areas of public procurement.¹⁶

The amendments passed in 2004 and 2005 made the public procurement law increasingly dysfunctional, which led to its repeal by the Rada in 2008. Also in 2008 the Tender Chamber was abolished and key elements of the pre-2004 situation were restored, leading to an improved basis for implementing procurement procedures.¹⁷ However, between 2008 and 2010, public procurement was governed by resolutions issued by the Cabinet of Ministers.¹⁸ This situation was increasingly problematic because the resolutions did not have the authority and general character of legislative acts. They could thus easily be tailored to specific situations and frequently privileged particular actors over others. In fact, the practice introduced under Yanukovich through legislation allowing competitive tenders to be avoided for projects related to Euro 2012 (see below) apparently began in the form of a Cabinet of Ministers’ resolution under the Tymoshenko government.¹⁹

Publicly available information on procurement issues during 2008-2010 is limited, but there is a fairly high degree of consensus among Ukrainian experts that there is not a significant difference between the Yushchenko years (including the period when Yulia Tymoshenko was prime minister) and the current Yanukovich phase with regard to the treatment of public procurement funds. Dmytro Ponamarchuk, president of the Viacheslav Chornovil Foundation of Free Journalists, claimed in 2011 that when Tymoshenko was prime minister the country lost USD 6

¹⁶ Ibid.

¹⁷ Business Anti-Corruption Portal. *Ukraine Country Profile: Public Procurement and Contracting*. <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/ukraine/corruption-levels/public-procurement-and-contracting/>, accessed February 14, 2013.

¹⁸ Embassy Kyiv. 2010. *Ukraine: New Laws on Public Procurement, Business Regulation and Real Estate*. February 19. <http://www.cablegatesearch.net/cable.php?id=10KYIV262>, accessed February 16, 2013.

¹⁹ Dmytro Shurkhalo. 2012. “Tsifra 30% stala mahichnoiu dlia temy Evro-2012 – ekspert iz koruptsii.” Radio Svoboda, June 16. <http://www.radiosvoboda.org/content/article/24615886.html>, accessed March 7, 2013.

billion per year to public procurement-related corruption. He declared that ten percent of procurement funds were dispensed as bribes to officials.²⁰ Yanukovich stated publicly in December 2011 that the current figure (under his own administration) was ten to fifteen percent, totaling USD 7.4 billion, using this as an argument for aggressively pursuing the fight against corruption.²¹ These figures would seem to confirm expert opinion that public procurement dealings have not become radically worse under Yanukovich, although corruption overall has increased. At any rate, patterns such as passing a law which is then undermined by a series of amendments, or manipulating procurement regulations to give preference to one's political supporters, appear to have been in place long before the Yanukovich presidency began.

Public Procurement Reform under Viktor Yanukovich

Viktor Yanukovich was elected president of Ukraine in February 2010. In June of that year, a special Committee on Economic Reforms subordinated directly to the president published an extensive program of planned reforms in many different sectors entitled "Prosperous Society, Competitive Economy, Effective State."²² The implementation of this program has been partial and sporadic, and most of the intended reforms have not yet been tackled.²³ In the case of public procurement, important steps were initially taken. However, some of these steps called the motivation of the political leaders involved into question, and further developments have confirmed that special interests have consistently trumped any other considerations behind the reform.

The Ukrainian parliament passed a law on public procurement in

²⁰ Reader's commentary on Sasha Seryi. "Goodbye, Papa. Pochemu rasprava s Tymoshenko tak ili inache privedet Yanukovicha k poteri vlasti." <http://ord-ua.com/2011/08/11/goodbye-papa-pochemu-rasprava-s-tymoshenko-tak-ili-inache-privedet-yanukovicha-k-poteri-vlasti/>, accessed March 7, 2013. Considering that Ponamarchuk headed Yanukovich's press center when Yanukovich was running for president in 2010, this information requires independent confirmation.

²¹ Mark Rachkevych. "Under Yanukovich, Ukraine slides deeper in ranks of corrupt nations." *Kyiv Post*. December 1, 2011. At <http://www.kyivpost.com/content/ukraine/under-yanukovich-ukraine-slides-deeper-in-ranks-of-118032.html>, accessed March 7, 2013.

²² For the text of the program in Ukrainian: http://www.president.gov.ua/docs/Programa_reform_FINAL_1.pdf. For an unofficial English translation: http://www.usubc.org/site/files/Ukraine_Program_of_Economic_Reforms_2010-2014.pdf, both accessed February 15, 2013.

²³ Nazar Kholod. 2012. *Reforming the Ukrainian Economy under Yanukovich: The First Two Years*. <http://carnegieendowment.org/2012/04/02/reforming-ukrainian-economy-under-yanukovich-first-two-years>, accessed February 15, 2013. See also International Renaissance Foundation/Institute of Economic Research and Policy Consultations, *Vykonannia Poriadku dennoho asotsiatsii Ukraina-ES: Chi e prohres u sektoral'nykh reformakh?* http://www.ier.com.ua/files/Public_events/2012/AA_Economy_Nov2011_May2012_Report_IER_ukr.pdf, accessed February 15, 2013.

February 2010, the same month in which Yanukovych was elected to the presidency. Although this law received some support from international organizations, it had serious defects and opened up new opportunities for corrupt practices, in particular regarding the impartiality and independence of the appeal mechanisms built into the law. The EU and the World Bank went so far as to send a letter to Yanukovych requesting him to veto the law.²⁴ He did indeed opt to do so, expressing a series of concerns with various clauses. These issues were rapidly addressed by the Ukrainian parliament, which adopted a new version of the law in June 2010. Yanukovych signed this version, which won praise from a variety of international actors, including the EU and the World Bank, and duly came into force in July of the same year. Numerous clauses in the law were based on the EU *acquis*, and EU structures provided assistance when the law was being drafted.

The new law addressed a number of problems which had been present in the public procurement sphere until its passage. The Tender Chamber was not reinstated, the Ministry of the Economy was given primary responsibility for supervising implementation, and a complaints mechanism was established within the Anti-Monopoly Committee. Furthermore, the requirement to publish information about tenders both online and in paper form increased transparency. Despite these advances, however, several concerns remained. Most importantly, critics found fault with the criteria for excluding applicants from future participation in tender processes. It is not clear, for example, that firms found to have bribed officials to give them undue advantage when bidding on a tender will be denied the opportunity to participate in further procurement procedures. Additionally the legislation did not address the issue of potential conflicts of interest satisfactorily.²⁵

Although Yanukovych and his team quickly addressed the issue of public procurement, they failed to allow the law to be implemented as originally drafted. Many amendments were added which watered down the original legislation (the June 2010 law), providing for one exception after another. The first and best known example of this amendment process was the decision taken in August 2010 to eliminate the requirement for competitive tenders for all projects related to the European Soccer Championship (Euro 2012), which was organized by Poland and Ukraine in June-July 2012. The Ukrainian government argued that due to the failure of the

²⁴ [No author]. 3/14/2010. *EU Calls on Ukrainian President to Veto Public Procurement Law*. <http://www.publictendering.com/eu-calls-on-ukrainian-president-to-veto-public-procurement-law/>, accessed February 16, 2013.

²⁵ For an excellent summary of the advantages and disadvantages of the law, see OECD Anti-Corruption Network for Eastern Europe and Central Asia. 2010. *Istanbul Anti-Corruption Action Plan: Second Round of Monitoring. Ukraine. Monitoring Report*. <http://www.oecd.org/corruption/acn/istanbulactionplan/46832397.pdf>, accessed February 15, 2013.

previous government under Yulia Tymoshenko to undertake the necessary preparations for Euro 2012, the Azarov government had come under extreme time pressure, which did not allow for observing the bureaucratic demands of the tender process if Ukraine was to fulfill its obligations to the UEFA and complete all requirements prior to the start of the championship. Indeed, UEFA head Michel Platini warned Ukraine that it could lose the right to hold the championship if it did not manage to achieve a great deal in a short time.²⁶

However, both the contracts awarded in the context of Euro 2012 and further developments surrounding public procurement legislation demonstrated that the soccer championship was not an exception, nor was its preparation conducted in the national interest. Rather, it seems to have benefited primarily a small circle of influential Ukrainian businessmen, especially those close to Borys Kolesnikov, then Deputy Prime Minister and responsible for infrastructure in general and preparations for Euro 2012 in particular. For example, the general contractor of the Olympic stadium in Kyiv, which was rebuilt for the soccer championship, Volodymyr Artiukh, was apparently chosen by Kolesnikov to reconstruct the stadium even though he had been charged with embezzling USD 3 million, a crime which he later admitted in court. According to research done by investigative journalists from the online opposition publication *Ukrains'ka Pravda*, Artiukh has close connections to Kolesnikov.²⁷ On the level of enterprises, a company called Altcom was one of the principal contractors in the Euro 2012 framework. Although it is difficult to say who owns Altcom, as its structure is not transparent, it is clear that it has offshore components in Cyprus and Belize, and links to Kolesnikov are widely assumed in the Ukrainian media, if not conclusively proven.²⁸ Offshore businesses are frequently used in the Ukrainian context for siphoning off illegal profits and kickbacks and transferring them to a safe tax haven.²⁹

Observers concluded that the projects carried out in Ukraine for the championship were significantly more expensive than similar ones in other country contexts, even those with less favorable economic conditions (e.g. higher labor costs). The higher prices especially affected expenses

²⁶ Interfax Ukraine. "Platini: Ukraine May Lose Euro 2012 if Kyiv Stadium Is Not Ready." *Kyiv Post*. March 29, 2010. <http://www.kyivpost.com/content/kyiv/platini-ukraine-may-lose-euro-2012-if-kyiv-stadium-62751.html>, accessed February 14, 2013.

²⁷ Luke Harding and David Leigh. "Euro 2012: Uefa Urged to Investigate \$4bn Corruption Allegations in Ukraine." *The Guardian*. June 20, 2012. <http://www.guardian.co.uk/football/2012/jun/20/euro-2012-corruption-allegations-ukraine>, accessed February 15, 2013.

²⁸ Serhij Shcherbyna. "Khto zarobliae na Evro 2012? L'vivs'ki mil'iardy". *Ekonomichna Pravda*. May 14, 2012. <http://www.epravda.com.ua/publications/2012/05/14/323440/>, accessed February 15, 2013.

²⁹ Vlad Lavrov. "Ukraine Goes Offshore." *Kyiv Post*. November 12, 2010. <http://www.kyivpost.com/content/ukraine/ukraine-goes-offshore.html>, accessed February 15, 2013.

incurred for road construction and repair. The Polish example, a good basis for comparison since Poland co-hosted Euro 2012, demonstrated a more transparent and efficient process, with large projects being carried out by foreign firms from both within and outside the EU.³⁰ The Ukrainians, on the other hand, had to finance most of the necessary projects from the state budget, since they failed to attract major investment from foreign companies. These unplanned expenditures came at a time when Ukraine's economy was performing poorly and social benefits were being trimmed. While the Ukrainian government claims that it spent around USD 5 billion on the championship, other estimates range as high as about USD 13 billion.³¹ Taken as a whole, the evidence points overwhelmingly to serious abuse and mismanagement of public funds during the preparations for Euro 2012. This behavior was made possible in large part due to the exemption from the tender procedures granted for related projects and the resulting lack of transparency in the key transactions.

Beyond the situation surrounding Euro 2012, exceptions to the public procurement rules have become increasingly numerous, making it clear that circumventing public procurement procedures has taken on a systematic character. In January 2011, tenders were essentially abolished in the realm of supplying households and public utilities with electricity and natural gas.³² In 2012 a veritable flood of amendments to the law began.³³ In April of that year the parliament passed an amendment to the public procurement law which exempted further major segments of the energy sector (gas in particular) from abiding by standard procurement procedures. This was done in spite of the fact that parliamentary expertise found that the changes would not contribute to increasing competition in the gas sector or to a more efficient use of state resources.³⁴ One month later, a law was voted in which removed further spheres from the remit of the public procurement law and altered the financial threshold for projects required to comply with tender regulations.³⁵ In June 2012, the

³⁰ Mark Rachkevych. "Runaway Costs." *Kyiv Post*. March 11, 2011. <http://www.kyivpost.com/content/ukraine/runaway-costs-99518.html>, accessed February 14, 2013.

³¹ Slawomir Matuszak and Tadeusz A. Olszański. 2012. *Euro 2012 – Ukraine's Wasted Opportunity?* June 8, http://www.osw.waw.pl/en/publikacje/osw-commentary/2012-06-08/euro-2012-ukraine-s-wasted-opportunity#_ftnref3, accessed February 15, 2013.

³² Iryna Solonenko. 2011. *When the EU Makes a Difference in Ukraine's Reform Process: The Cases of Public Procurement and the Judiciary*. http://www.ukrainianstudies.uottawa.ca/pdf/P_Danyliw2011_Solonenko.pdf, accessed February 15, 2013.

³³ See the text of the law (in Ukrainian) at <http://zakon2.rada.gov.ua/laws/show/2289-17>, accessed February 16, 2013. It indicates that there were 3 amendments in 2010, 7 in 2011 and 18 in 2012.

³⁴ DiXiGroup. 2012. *Analitichna zapyska shchodo priyniatykh zmin do Zakonu "Pro zdijsnennia derzhavnykh zakupiveli"*. At http://ua-energy.org/upload/files/Analitichna_zapyska_Derzhavni_zakupivli.pdf, accessed February 15, 2013.

³⁵ DiXiGroup. 2012. *Analitichna zapyska shchodo Zakonu "Pro osoblyvosti zdijsnennia*

Rada eliminated the requirement for companies belonging to the defense industrial complex to comply with public procurement procedures. This was justified by the claim that the defense industry would not otherwise be competitive in supplying its products to international customers because delivery dates would of necessity be delayed.³⁶ In July 2012, the parliament passed a law exempting state-controlled companies from the tender procedure if they use their own funds to finance the project under consideration. Sales of land or real estate are also no longer subject to the law on public procurement. Firms in the food sector are allowed to use a simplified tender procedure.³⁷

The trend of creating exemptions to the public procurement law has not ceased. In October 2012, the Ukrainian analytical weekly *Komentari* reported that the head of the National Bank of Ukraine (NBU), Serhiy Arbuzov, had authored a draft law in which he proposed exempting the NBU from its obligation to follow public procurement procedures when managing foreign exchange reserves or printing money.³⁸ On December 25, 2012 Yanukovich appointed Arbuzov First Deputy Prime Minister in the new government, and many observers expect him to succeed Prime Minister Azarov eventually. At any rate, an extremely high-ranking government official has clearly indicated his willingness to meddle with the public procurement rules and to do so to benefit the agency he himself was running.

Thus the 2010 public procurement law is valid for ever fewer segments of the Ukrainian market. Even when competitive tenders are foreseen, a number of problems tend to arise which are particularly troubling for foreign bidders, but can also affect domestic companies that are not among the privileged few with access to and influence on key political decision-makers. Among these problems are the following: “(1) the lack of public notice of tender rules and requirements; (2) covert preferences in tender awards; (3) the imposition of conditions that were not part of the original tender requirements; and (4) ineffective grievance and dispute resolution mechanisms, which often allow a losing bidder to block the tender after the contract has been awarded.”³⁹ Therefore, even within the

zakupivel' v okremykh sferakh hospodars'koi diial'nosti.” At http://ua-energy.org/upload/files/AnalysisLaw_30052012.pdf, accessed February 15, 2013.

³⁶ Interfax Ukraine. “Ukrainian defence firm head hails annulment of state procurement law.” *BBC Monitoring Global Newsline - Former Soviet Union Political*, June 9, 2012.

³⁷ [No author]. “Koruptsiyneri Protianuly cherez Radu Zakonoproekt 9634, iakij znyschue kontrol' nad derzhzakupivlyami.” *Nashi Hroshi*. July 4, 2012. At <http://nashigroshi.org/2012/07/04/koruptsiyneri-protiyahnuly-cherez-radu-zakonoproekt-9634-yakyj-znyschue-kontrol-nad-derzhzakupivlyami/>, accessed February 16, 2013.

³⁸ *Gorshenin Weekly* No. 43, November 5, 2012, 10.

³⁹ U.S. Department of State. March 2011. *2011 Investment Climate Statement – Ukraine*. <http://www.state.gov/e/eb/rls/othr/ics/2011/157378.htm>, accessed February 14, 2013.

formal regulatory framework, informal networks appear to be functioning which have a major impact on the outcome of tender procedures.

For actors interested in civic monitoring of public expenditures and the activities of firms controlled by the state, the developments described above are extremely disturbing. Each time an exemption from the public procurement law is made, it implies a loss of transparency, since the exempted spheres of activity are no longer obliged to abide by the law's requirements to make information on tenders public. Furthermore, if no tender has to be held, then there is not even any information to publish. Thus there is no record of processes and expenditures and it becomes extremely difficult to determine whether certain firms are receiving informal privileges and whether funding spent on particular projects is within reasonable limits. It is therefore no wonder that the *Kyiv Post* titled an article on changes in public legislation "State spending moves further into shadows with new law."⁴⁰

According to this article, almost 75 percent of Ukraine's budget spending is used for public procurement purposes. This spending totaled USD 40.6 billion for 2011, with over USD 31 billion of that going to state-owned entities, according to the *Kyiv Post* citing Ukrainian civil society organization and procurement watchdog Nashi Hroshi. These high figures serve as a reminder that it is not simply a lack of transparency that is the problem, but also the fact that the absence of competitive tenders drives prices for goods and services up, so that taxpayers are overpaying for many state-funded projects. Civic monitoring is particularly important in countries like Ukraine, where governmental supervisory bodies are often deprived of necessary control functions or co-opted into patronage structures which prevent them from exercising adequate supervision. Ukraine has a well-developed (if small) segment of civil society which is experienced in monitoring the state, as well as a few media willing to publicize official abuses of power and money, although the number of such media is shrinking.

Based on the above analysis of the advances and reversals of public procurement law in Ukraine, we have convincing support for the argument that a neopatrimonial system of clientelism and patronage has been established, in which the players are somewhat fluid but the patterns remain the same. The privileging of established networks largely independent of criteria such as quality, efficiency and integrity during the preparations for Euro 2012 indicated that patron-client networks were at work, in which loyalty counts for more than merit and both sides stand to benefit personally from any given transaction.

⁴⁰ Mark Rachkevych, Yuriy Onyshkiv. August 2, 2012. "State Spending Moves Further into Shadows with New Law." At <http://www.kyivpost.com/content/ukraine/state-spending-moves-further-into-shadows-with-new-law-310969.html>, accessed February 15, 2013.

It is not merely these relationships, however, that make up the neopatrimonial character of the regime. Rather, the combination of formal and informal components is also a key element, as elaborated in the theoretical section above. The constant removal of certain sectors or parts thereof from their legal obligation to conform to public procurement rules can be viewed as the transfer of these sectors from the formal to the informal realm. This is especially true because creating exemptions not only implies that (competitive) tenders do not need to be held, but also that the amounts and flows of funds generated by projects in these sectors become non-transparent and inaccessible to the public as well as to the relevant monitoring agencies. Thus the formal institutions remain in place and continue to function (more or less) with regard to some sectors, while those actors who have sufficient political or economic influence to sway decision-makers obtain exemptions for their sectors or enterprises and thereby gain a place for themselves in the informal sphere.

Public procurement is only one building block in the Ukrainian system of patronage and clientelism but provides evidence of some of the primary components of a neopatrimonial regime, including a shifting mixture of formal and informal elements which creates a degree of uncertainty for the players involved. It is the combination of the use of networks willing to engage in corrupt practices and the opportunities to avoid transparency and engage in rent-seeking which makes the public procurement realm eminently suitable for illustrating the neopatrimonial character of Ukraine's current system of rule. Since this type of regime fosters corruption and discourages making public crucial information about how taxpayers' money is spent, it has a clearly negative impact on democratization processes in Ukraine.

External Actors' Influence on Public Procurement Reform

Public procurement reform is of particular interest to external actors. For one thing, since procurement is an area which is so apt to be problematic and susceptible to corruption, it is a good test of the political leadership's willingness to adhere to principles of democracy and good governance. Of more immediate importance, the rules governing public procurement have a direct impact on the opportunities external economic actors have to participate in potentially lucrative tenders and thereby to increase their penetration of the Ukrainian market. However, foreign companies believe they are informally discriminated against and business executives "report that government officials often favor well-connected companies and

individuals when awarding contracts.”⁴¹ Bribes are commonly required to maneuver one’s way successfully through the bidding process. Despite the high visibility of agreements with western firms such as Shell, Chevron or ExxonMobil, foreign bidders have for years received only a tiny fraction of tenders awarded.⁴²

Thus it is not surprising that those actors interested in Ukraine’s economic development have paid significant attention to the arena of public procurement and have attempted to influence certain aspects of it. In particular, the EU and the World Bank have been active and visible players, but USAID has also followed developments closely, although from a slightly different perspective. In general, the goals of all three actors have been similar, since all are interested in achieving greater transparency in the public procurement realm as well as a higher degree of fair competition. In this section, we review the activities of these three entities and attempt to assess their impact on the public procurement sphere in Ukraine. Then, in the conclusion, we link our findings to the results of the previous section on the implications of patron-client relationships and inadequate transparency resulting from the interplay of formal and informal mechanisms.

We begin with the EU, which has recently emphasized the importance of public procurement regulation in its relationship with Ukraine. The European Commissioner for Enlargement and Neighborhood Policy, Štefan Füle, clearly expressed his concern about Ukraine failing to align its legislation both on paper and in practice with that of the EU. In a speech to the Verkhovna Rada in February 2013 he stated: “Let me give you a concrete example: Procurement Law. The result of any legislative process should not just result in a law called ‘procurement.’ It should result in procurement rules that are also compatible with European Union requirements. That is what matters. If the legislation only does half the job then it is not half a success, it is a failure and a step backwards. None of us wants to see hard work wasted in this way.”⁴³ This statement indicates both the EU’s frustration with the developments in the public procurement area in Ukraine to date and the significance the EU attaches to successful public procurement reform.

The EU has been following the development of public procurement legislation and practice for a number of years now. The procurement sphere was included in the Action Plan agreed upon by Ukraine and the EU in

⁴¹ Business Anti-Corruption Portal. *Ukraine Country Profile: Public Procurement and Contracting*. <http://www.business-anti-corruption.de/country-profiles/europe-central-asia/ukraine/corruption-levels/public-procurement-and-contracting/>, accessed February 15, 2013.

⁴² *Ibid.*

⁴³ Štefan Füle. 2013. *Speech: Address to the Members of the Ukrainian Parliament*, February 7. http://europa.eu/rapid/press-release_SPEECH-13-107_en.pdf, accessed February 15, 2013.

2005, with a reference to the Partnership and Cooperation Agreement of 1994, which briefly touches upon the question of public procurement. The Association Agenda, intended as a replacement for the Action Plan and a road map leading to the signing and ratification of the Association Agreement, included the area of public procurement among its priorities in the section on trade.⁴⁴ Trade concerns are of major importance to the EU as a primarily economic actor, and the Deep and Comprehensive Free Trade Agreement (DCFTA) accounts for most of the text of the Association Agreement, which has been negotiated and initialed by Ukraine and the EU.⁴⁵ Chapter 8 of this agreement deals specifically with public procurement and lays out a process according to which Ukraine will align its laws and practices with the basic tenets of the EU *acquis* in this area in the course of six months after the agreement enters into force. Thus public procurement, as a relevant area for trade and investment, has consistently been important to the EU in its relations with Ukraine. Numerous companies in the EU member states would no doubt be interested in competing for government-funded projects if provided a level playing field in Ukraine.

With regard to the question of the EU's impact we can draw on the work of Iryna Solonenko, who has explored the ability of the EU to have an effect on developments in Ukraine's public procurement sphere.⁴⁶ She comes to the conclusion that EU efforts had a certain amount of success. She points out that the EU made precise and specific demands and implemented conditionality mechanisms (withholding funds) while simultaneously informing the Ukrainian media about its criticism and actions. She further attributes the success to a favorable coalition of forces including not only external actors but also Ukrainian civil society organizations, which mounted a visible campaign for greater transparency in public procurement procedures.

However, Solonenko acknowledges that the timeframe of her research is limited. Writing in the second half of 2011, she had the opportunity to review developments during the first year and a half of Yanukovich's presidential term, and she admits that if one looks at the reform process from a longer-term perspective, then "no quality change has taken place."⁴⁷ Observing developments after three years of Yanukovich's tenure the situation appears less optimistic than Solonenko's analysis would indicate.

⁴⁴ European Commission – External Relations. *EU-Ukraine Association Agenda to Prepare and Facilitate the Implementation of the Association Agreement*. http://www.eeas.europa.eu/ukraine/docs/2010_eu_ukraine_association_agenda_en.pdf, accessed February 14, 2013.

⁴⁵ Signing of this agreement has been delayed by the EU because of serious concerns about regression in the fields of democracy and the rule of law in Ukraine.

⁴⁶ Iryna Solonenko. 2011. *When the EU Makes a Difference in Ukraine's Reform Process: The Cases of Public Procurement and the Judiciary*. http://www.ukrainianstudies.uottawa.ca/pdf/P_Danyliw2011_Solonenko.pdf, accessed February 15, 2013.

⁴⁷ *Ibid.*, 2.

While external actors (and the EU in particular) have been able to influence certain documents in the process of public procurement reform, the improvements achieved in this manner have not proven sustainable. Rather, they have been undermined or even reversed by later actions of the Ukrainian parliament and political leadership, as we have seen above. In the area of public procurement, domestic vested interests tend to trump not only national interests, but also the concerns of external actors, even when there are clear negative foreign policy implications.

The World Bank has also been involved in the development of the public procurement law in Ukraine. As a basis for this involvement it has conducted important research on the evolution of the sphere, following it since at least 2001 with a series of reports and surveys which have both focused on Ukraine as a case study and embedded the Ukrainian case in a larger regional context.⁴⁸ The World Bank has consistently provided advice to Ukrainian actors in the field of public procurement. It sometimes joins forces with the EU to press the Ukrainian president or parliament to pursue a certain course of action regarding public procurement rules. Despite this high degree of activity, the conclusion about its impact must be similar to that above for the EU, as their approaches have been similar and at times overlapping. While small successes are indeed possible, they are often overruled by later developments, and the overall trajectory of the field is much more dependent on the narrow special interests of domestic actors than on advice and arguments provided by the World Bank or any other external entity.

The example of the World Bank also demonstrates that it is difficult to participate in these processes without getting drawn into domestic political struggles between Ukrainian actors and institutions. Research carried out by investigative journalist Tetiana Chornovil showed that Martin Raiser, the World Bank's director for Ukraine, Belarus and Moldova, adopted positions taken by Anton Yatsenko - formerly the first vice president of the Tender Chamber and currently a member of the Ukrainian parliament representing the Party of Regions - thereby inadvertently supporting him in his political battles with other Ukrainian actors.⁴⁹ Yatsenko is known in Ukrainian circles as an allegedly unscrupulous politician and bureaucrat who pursues his own personal agenda rather than supporting the introduction of fair and transparent rules. This instance indicates how closely intertwined domestic politics and interactions with external actors are, showing how challenging it is for institutions such as the World Bank to

⁴⁸ See e.g. World Bank. *Ukraine: Country Procurement Assessment Report 2006*. <https://openknowledge.worldbank.org/bitstream/handle/10986/7759/399480UAoptimized.pdf?sequence=1>, accessed February 15, 2013; World Bank. 2006. *Trends in Corruption...*

⁴⁹ Tat'iana Chornovol. 11/10/2010. *Derzhzakupivli miniaut' dakh*. http://lb.ua/news/2010/11/10/73602_derzhzakupivli_minyayut_dah.html, accessed February 15, 2013.

find Ukrainian partners who both share their goals and can contribute to their achievement.

As for USAID, it has also observed the evolution of the public procurement realm, but has emphasized slightly different aspects of it than the World Bank and the EU. For example, USAID has focused on the potential role of civil society in public procurement development, offering events and information on this topic and involving civil society organizations in a dialogue. Also, USAID has embedded concerns about procurement strongly within the context of corruption issues, for instance in the public health sector.⁵⁰ On the whole, the agency has not engaged quite as intensely with procurement issues as the EU or the World Bank, which may be due to the fact that the US is significantly less involved in trading with Ukraine or investing in the country than some key World Bank or EU member states. However, the rules regulating procurement and their consequences for governance continue to interest USAID, and some cooperation with European entities has recently been undertaken.⁵¹ With regard to impact, the accent on civil society participation and corruption aspects of procurement implies that any effects of USAID endeavors are likely to be long-term, since increasing the role of civil society in policy processes and reducing corruption levels are not goals which can realistically be attained in a short time frame.

Thus each of the three entities examined here has undertaken serious efforts to influence developments in the field of public procurement in Ukraine. However, while there have been some small, temporary successes, none of them has managed to have a serious and lasting impact on the direction the field has taken. Rather, the trajectory of public procurement reform has often run counter to the goals and interests of the three external actors.

Conclusion

The vested interests and patronage structures described in this article provide evidence of entrenched patterns of governance in Ukraine, which have been further developed under Yanukovich. They define in large part the boundaries within which domestic and foreign policies can be made. This holds particularly true for foreign economic relations, since this field impinges directly upon the interests of influential Ukrainian businesspeople and the politicians associated with them. Thus the question of the degree to which external actors can influence the formulation of foreign

⁵⁰ USAID. 2006. *Corruption Assessment: Ukraine. Final Report*. February 10. At http://pdf.usaid.gov/pdf_docs/PNADK247.pdf, accessed February 15, 2013.

⁵¹ [No author.] 10/19/2012. *Ukraine Will Get Help on Changing the Public Procurement System*. <http://acf.ua/eng/news/ukraine-will-get-help-on-changing-the-public-procurement-system>, accessed February 15, 2013.

economic policy within such a system arises. Due to Ukraine's increasingly dire economic situation, it appears plausible that major international financial institutions such as the IMF can still exercise a certain amount of leverage over the country's elite. This is true to a lesser extent for the EU, since it supplies some limited funding and, more importantly, can provide a sort of seal of approval for Ukraine's reform efforts, which would be helpful in convincing other regional or international actors to invest in the country.

However, the development of Ukraine's public procurement process and the related activities of external actors demonstrate that the main drivers of this process are internal. These domestic drivers emerge from a system which can be termed neopatrimonial, as it is based on both patron-client relationships and a fluctuating combination of formal and informal arrangements. The interests pursued by domestic actors within this system are narrow and personalized, and correspond neither to broader Ukrainian national interests nor to those of external actors, such as the EU and the World Bank. Within this context it is extraordinarily difficult for such actors to have a sustainable impact on the evolution of public procurement, despite the fact that 1) the Ukrainian elite is ostensibly interested in cooperation with the foreign entities involved and 2) changes in public procurement policy in the direction of greater transparency and less informal discrimination against foreign firms would presumably have a positive effect on Ukraine's integration into the larger European economy, as well as on its reputation among financially-powerful external actors. An approach toward public procurement focused on fair procedures and greater openness would also improve Ukraine's standing in terms of its perceived degree of democratization. However, such an approach would also endanger the position of Ukrainian power brokers, who rely on non-transparent patronage networks and on possibilities to reward and punish supporters by granting or withholding formal and informal preferences to ensure their continued dominance.

Until the neopatrimonialist patterns of interaction described above can be altered, it is unlikely that outside attempts at influence will have a significant impact. Public procurement is a field in which these patterns can be particularly well illustrated, since the large sums available encourage neopatrimonialist behavior. At the same time, developments in this sphere have important implications for foreign economic policy. Overall, it is extremely plausible that the difficulties external actors face in their efforts to promote greater transparency in the area of public procurement are equally applicable to other areas of reform in Ukraine.