

CHALLENGES TO MEDIATION AND DIALOGUE IN UKRAINE: DISTRUST IN PROCEDURES AND A DYSFUNCTIONAL MARKET

DISCUSSION PAPER



IMPRESSUM

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EXECUTIVE SUMMARY

THIS DISCUSSION PAPER PRESENTS SELECTED RESULTS OF AN EXPERT ROUND TABLE HELD AT THE EUROPEAN UNIVERSITY VIADRINA ON 10 MARCH 2016. THE ROUND TABLE WAS PART OF THE GERMAN-UKRAINIAN PROJECT, "IMPLEMENTING MEDIATION AND DIALOGUE IN UKRAINE: CULTURAL AND INSTITUTIONAL IMPEDIMENTS AND POSSIBLE IMPROVEMENTS."

THE PAPER IS AIMED AT PROVIDING INSIGHTS FOR PEACE MEDIATORS AND DIALOGUE PRACTITIONERS, UKRAINE EXPERTS AND POLICY ACTORS INTO CHALLENGES REGARDING RECENT DIALOGUE AND MEDIATION EFFORTS IN UKRAINE.

THE AUTHORS PICKED THOSE ISSUES OUT OF THE DISCUSSIONS THAT SEEM MOST RELEVANT TO INTERNATIONAL MEDIATION AND DIALOGUE EXPERTS DEALING WITH THE CURRENT SITUATION IN UKRAINE: DISTRUST IN PROCEDURES AND A DYSFUNCTIONAL MARKET OF MEDIATION AND DIALOGUE.

IN THE FIRST PART, THE PAPER OFFERS AN OVERVIEW OF THE CONTRIBUTORS, MAIN IDEAS, COMPONENTS AND AIMS OF THE PROJECT IN THE BACKGROUND OF THE EXPERT ROUND TABLE HELD IN MARCH 2016. IN THE SECOND, IT SUMMARIZES SELECTED CONTRIBUTIONS OF THE DISCUSSION AT THE ROUND TABLE. IN THE THIRD PART, THE AUTHORS DRAW FIRST CONCLUSIONS FROM THE DISCUSSION AND ADD SOME FURTHER FOOD FOR THOUGHT REGARDING THE CHALLENGES FOR MEDIATION AND DIALOGUE IN UKRAINE AND BEYOND.



I. THE PROJECT:

ITS CONTRIBUTORS, MAIN IDEAS, METHOD, COMPONENTS AND AIMS

“Implementing Mediation and Dialogue in Ukraine: Impediments and Possible Improvements” is a collaborative project of the Center for Peace Mediation (CPM) at European University Viadrina Frankfurt (Oder) and Dr. Tatiana Kyselova, National University of Kyiv-Mohyla Academy.

The project was born when an exchange of insights into the current developments in Ukraine¹ in 2015 revealed an interesting parallel: Both efforts to establish domestic mediation in civil or commercial matters within Ukraine and recent dialogue and peace mediation processes addressing the current societal and political crisis on the national and international level encountered considerable and apparently similar challenges, with many such endeavors simply failing. Putting together internal/Ukrainian and external/international attempts to explain these difficulties proved to be illuminating and thought provoking for both sides. A first product of this exchange was a series of hypotheses about the factors that might impede mediation and dialogue in Ukraine, as bluntly and provocatively as they came to mind (see list of hypotheses in the annex).² In a nutshell, the hypotheses suppose that certain cultural conditions and institutional frameworks in Ukrainian society on one hand and procedural flaws on the other inhibit recent mediation and dialogue efforts.

Ukraine’s situation is only one of many countries where spelling out a “context-” or “culture-sensitive” process design that fits the actual-societal and political realities poses considerable challenges. But the fact that the current crisis brought so many international dialogue and mediation actors at once into the country (which is mostly criticized for its negative side-effects) makes it a particularly rich exemplary scenario that might provide valuable answers to the general challenges and dilemmas of context-sensitive design of dialogue and mediation processes. The project’s overall goal is thus to collect recommendations for dealing with these challenges and dilemmas and to identify questions for further research.

The methodical approach of the project is to actively engage Ukrainian and international mediation and dialogue practitioners in the analysis of challenges and strategies for tackling them. The starting point was an Expert Round Table (ERT I) in March 2016 hosted by the Center for Peace Mediation at European-University Viadrina in Frankfurt (Oder). It brought together international experts who are or have been conducting mediation or dialogue activities in Ukraine.³ In the summer of 2016, Tatiana Kyselova conducted comprehensive qualitative field research in various locations in Ukraine, including focus groups and semi-structured interviews with Ukrainian mediation and dialogue actors. Through the end of 2016, the Center for Peace Mediation (CPM) continued exchanging with international experts and policy actors, including a focus group in November 2016 facilitated by Tatiana Kyselova. For 2017, a second Expert Round Table (ERT II) is planned in Ukraine to discuss the findings and consider options for applying them to the everyday work of national and international practitioners.

The project is supported by the Robert Bosch Foundation. Tatiana Kyselova’s research is funded by the European Union’s Seventh Framework program for research and innovation under the Marie Skłodowska-Curie grant agreement.⁴

1 Tatiana Kyselova has followed the development of mediation in Ukraine since 2010 and has done extensive research on the topic (Tatiana Kyselova, *Pretenziia Dispute Resolution in Ukraine: Formal and Informal Transformation*, 40 *Review of Central and East European Law* (2015); Tatiana Kyselova, *Legal transformations of business disputes in post-Soviet Ukraine*, 1 *Oñati Socio-Legal Series* (2011); Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6 *Hague Journal on the Rule of Law* (2014). The CPM team has been following the efforts in mediation and dialogue in Ukraine since 2014 and provided support to local dialogue facilitators in Odessa/Ukraine in 2014 and 2015. One of the support activities was an interview series to analyze the background of dialogue activities in Odessa including the understanding of and experiences with dialogue, political affiliations and motivations of facilitators, participants and key potential issues. Members of the CPM have also done research on culture-sensitive process design (Kraus (2011): *Culture-sensitive Process Design: Overcoming Ethical and Methodological Dilemmas*. In: Mason/Sguaitamatti (eds.), *Religion in Conflict Transformation*. Politorbis, Vol. 52(2), 35ff).

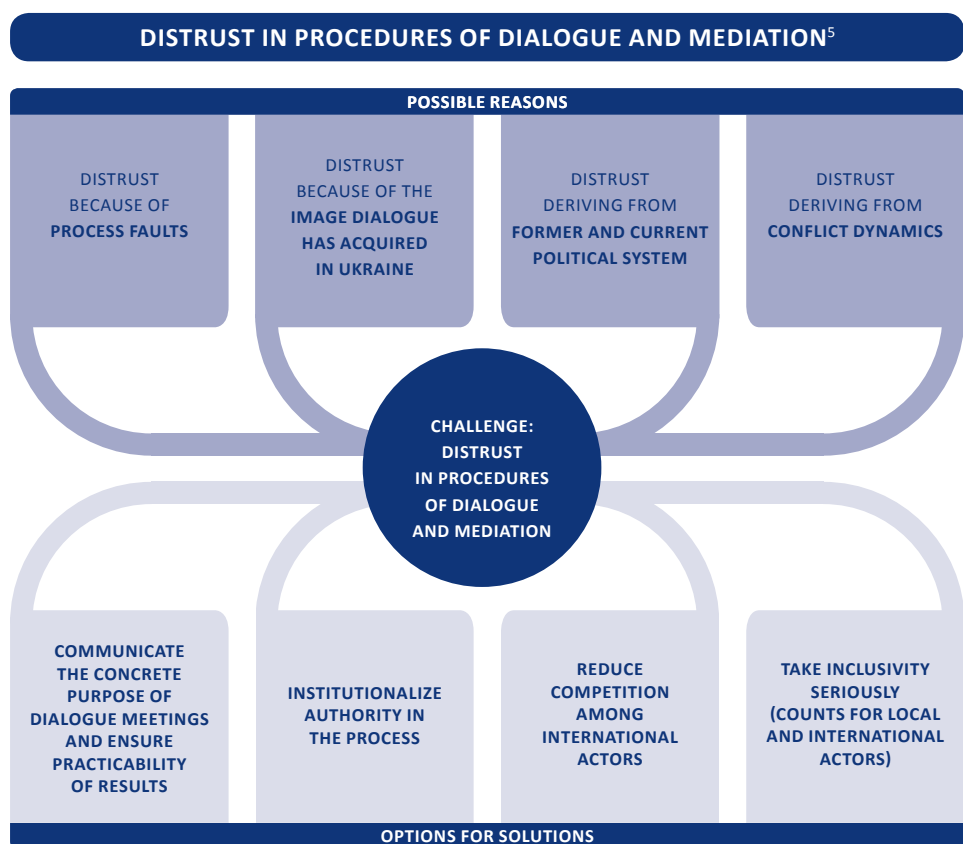
2 The development of the research design was supported by David Lanz, OSCE CPC and Alex Azarov, mediatEUR and by the reports of the Dialogue Support Platform Ukraine provided by mediatEUR.

3 See list of participants in the annex.

4 Marie Skłodowska-Curie grant agreement No 609402 - 2020 researchers: Train to Move (T2M)

II. CHALLENGES, POSSIBLE REASONS FOR THEM AND OPTIONS FOR SOLUTIONS: EXTRACT OF THE DISCUSSIONS AT THE EXPERT ROUND TABLE I (ERT I), MARCH 2016

The ERT I was dedicated to discussing various challenges to mediation and dialogue (collected in a background Research Design paper by the project's contributors and containing 24 hypotheses; see annex), possible underlying reasons for these challenges, and options for solutions. Participants shared their observations, experiences and assumptions from their own mediation or dialogue activities and made suggestions on how to tackle the respective challenges. In the following, you will find a selected extract of the working group discussions on two topics that seem to be the most relevant in terms of touching on serious dilemmas or severe process design questions: distrust in procedures of dialogue and mediation and a dysfunctional market of dialogue and mediation. The statements do not necessarily reflect the opinion of the majority of the participants or of the authors.



POSSIBLE REASONS FOR AN OBSERVED RELUCTANCE TOWARDS THE USE OF MEDIATION AND DIALOGUE IN UKRAINE

1) Distrust because of process faults: a) Lack of concrete outcomes of recent dialogues (all tracks); b) Unfamiliarity with the facilitative, participatory style of dialogue approach; c) Distrust between international actors and their local counterparts; d) Lack of public awareness for and understanding of the method of dialogue; e) Lack of cooperation and linkages between tracks and spheres (e.g. local authorities and civil society).

2) Distrust because of the image dialogue has acquired in Ukraine: a) Dialogue is seen as part of the political sphere that is generally distrusted because of widespread corruption in the political system; b) Dialogue is perceived as a satisfaction of an international demand, but not of a national or local need; c) Dialogue is seen as an activity for women conducted by women.

⁵ For the various types of impediments discussed in view of the distrust and procedures issue, see list of hypotheses in the background Research Design Paper attached.

3) Distrust deriving from former and current political system: a) The idea that the state and not the individual has the responsibility for any societal matters, one of the Soviet system's legacies, hampers self-determination of individuals and groups in political questions; b) Perception that authoritative procedures for conflict resolution are the only effective way of decision making in the given environment; c) Feeling of incapability to achieve any societal change and d) Fear of negative consequences of taking part in dialogue, both due to a perception of the current political system as corrupt or totalitarian.

4) Distrust deriving from conflict dynamics: Perceived need of society for defense, not dialogue, because the dominant feeling is of being under attack (from the inside and outside).

OPTIONS FOR DEALING WITH THIS CHALLENGE

1) Communicate the concrete purpose of dialogue meetings and ensure practicability of results: a) Increase information on dialogue and mediation processes in public; b) Make the purpose of a process transparent and display the kinds of change that can be expected, c) Make topics of dialogue as concrete as possible – practical, not abstract, discussions needed; d) Search for concrete practical solutions, make the outcome more likely to be implemented and think about concrete ways to integrate results into political processes.

2) Institutionalize authority in the process: a) Involve authorities in the process to give it political weight and support; b) Use settings that are more formal and thereby increase the authority of hosts and facilitators; c) Institutionalize dialogue and mediation by integrating it into government structures and the administrative system to improve its image.

3) Reduce competition among international actors: Overcome competition among international actors to protect processes from being spoiled and to regain trust in third party actors and the methods they are using.

4) Take inclusivity seriously (counts for local and international actors): a) Think of creative ways to integrate those not sitting at the table that are also acceptable to those sitting at the table; b) Strengthen information sharing/links between Tracks 1, 2 and 3; c) Introduce the concept of power sharing among Ukrainian authorities and civil society.

DYSFUNCTIONAL MARKET OF DIALOGUE AND MEDIATION

POSSIBLE REASONS FOR CHALLENGES WITH REGARD TO A PARTIALLY DYSFUNCTIONAL MARKET OF MEDIATION AND DIALOGUE

The observation that some actors serve as gatekeepers to the Ukrainian conflict management market, combined with the existence of “grant-eating”⁶ behavior on that market, paved the way for defining the anatomy of this specific set of challenges:

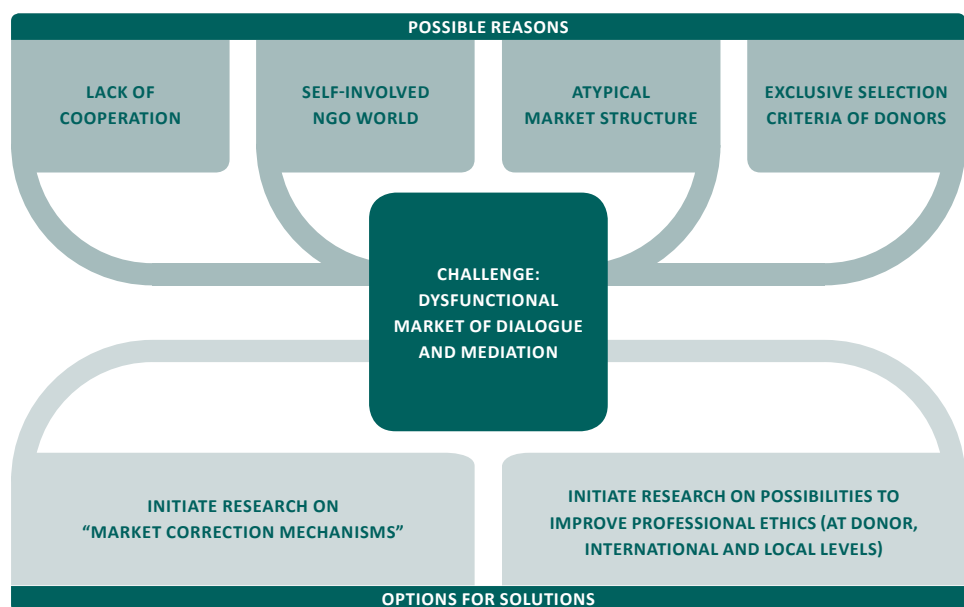
1) Lack of cooperation: a) Competition among (international and local) dialogue/mediation actors for possibly available funds impedes honest cooperation among them; b) In seeking financial security for their own organization, dialogue/mediation actors might try to respond to or even modify donors' funding schemes according to their very own goals, thereby neglecting the bigger picture and diminishing other actors' chances to get funds.

2) Self-involved NGO world: The NGO world has turned into an attractive field of professional activity and employment, with a whole number of resulting logics and dynamic being detached from – or even detrimental to – the conflict system that needs support.

⁶ See hypothesis No 23: “Very limited number of actors serving as gatekeepers for access to international community have become grant-eaters leading to exploitation of donor resources to personal advantage and distrust from other national actors.” See list of hypotheses in the Research Paper.

3) Atypical market structure: By selecting – occasionally in a not transparent fashion – actors and activities to be funded, donors strongly influence the market structure. As a set of consequences, a) “Users”/beneficiaries have no free choice among “service providers” and “products” of dialogue and mediation; b) Market and “supply” dynamics are different from self-regulatory markets, as the selection of actors and activities primarily may follow the political interests and agendas of donors rather than the articulated “demand” on the ground; c) Due to artificial monopoly positions, competition among “suppliers” about best approaches to meet the conflict system’s necessities is reduced, minimizing the potential for a learning, dynamic market.

4) Exclusive selection criteria of donors: With these consequences of donor influences in mind, a number of exclusive selection criteria on their side become even more relevant: a) Perception of donors – based on incomplete and arbitrary information – that there exists only a small number of actors with “professional” dialogue or mediation expertise in the field; b) Preference of donors to work with established partners even if only minimum standards of quality are fulfilled (in order to avoid both the conflict of separating from one and the costs of finding a new cooperation partner).



OPTIONS FOR DEALING WITH THIS CHALLENGE:

1) Initiate research on “market correction mechanisms”: a) Research on possibilities to impede monopoly positions and foster fruitful competition – less for funds, more about best approaches to meet the needs of the conflict system; b) Research on how a “functional market” would look in this field; c) Research on options to foster cooperation among international third party actors.

2) Initiate research on possibilities to improve professional ethics (at donor, international and local levels): Research on the motivational profiles of third party actors and strategies to satisfy them without losing sight of the needs of the conflict context.

III. FIRST CONCLUSIONS FROM THE DISCUSSION AND FURTHER FOOD FOR THOUGHT

The following conclusions and further thoughts that evolved after the ERT I in the project team shall stimulate the next discussion rounds with mediation and dialogue experts in focus groups and at ERT II.

Shift away from “culture” to “institution” or “system.” Throughout the discussions, the term “cultural” (one third of the hypotheses discussed used this category) has been deconstructed and was replaced by “institutional” and “related to the political system” or “systemic.”

Ethical and methodical questions on dialogue as means of societal transformation.

To what extent are (Ukrainian as well as international) mediators and dialogue actors expected and mandated to change the structures of the Ukrainian societal and political system? Is a change of the societal and political system a precondition for effective mediation and dialogue in Ukraine and, if so, in which regard and to what extent? To what extent is the existing system already participating in activities that might trigger societal and political changes?

Challenges have different relevance in different types of processes. Challenges such as the reluctance to take responsibility in politics⁷ are particularly relevant if taking responsibility is an indispensable requirement of the respective process type - as it is in some classical mediation processes. In dialogue processes aiming at trust building between divided communities, the relevance of responsibility taking of the participants might be smaller. It could therefore be worthwhile to examine each process type in view of its relevant preconditions and corresponding challenges in a given context.

“Diluting the method.” Apparently, the discussed hypotheses touch upon some core questions in the field of international peace mediation: Is there a single “right” or “standard” model of mediation and dialogue and, if so, what does it look like, which contextual circumstances does it require and to what extent can we dilute it without losing its constitutional elements and destroying its ethical and functional logics? Four responses emerged from the discussions:

- 1) Even if nobody believes in a single correct model, there seems to be a “nucleus” (inherent in the multiple mediation and dialogue approaches) that is, however, very difficult to define.
- 2) Political agendas and the necessity of achieving results often make pragmatic compromises on methodical and ethical principles unavoidable. However, a stronger awareness and consensus are needed to assess how far these compromises can go.
- 3) It is self-evident that a context- or system-sensitive approach is essential, as every context and system in which a conflict is taking place is different (so Ukraine is not unique in this sense); but it is still far from trivial to clarify which approach is actually required. This obviously has not been done sufficiently in Ukraine (and here, too, Ukraine is not alone).
- 4) The Ukraine crisis still calls for better process ideas, so any approaches to resolving the conflict are welcome, regardless of which methodical approach is chosen.

⁷ Hypothesis No 2: “Cultural resistance/ barrier to taking responsibility negatively influences self-determination of parties in mediation/dialogue”; See list of hypotheses in the background Research Design Paper, see attachment.

ANNEX



Implementing Mediation and Dialogue Initiatives in Ukraine:

Impediments and Possible Improvements

Research Design

March 2016

(Draft Research Design: Tatiana Kyselova/Lars Kirchhoff/Anne Isabel Kraus)

SUMMARY

This research project starts from the **observation** that consensual conflict resolution facilitated by a third-party seems to be in need in Ukraine – in view of the current conflict polarizing Ukrainian society and international politics but also in all spheres of Ukrainian society in general. However, a significant number of recent dialogue processes as well as various efforts to establish mediation within Ukraine encounter considerable challenges and difficulties. Many simply fail.

Our **assumption** is that *cultural conditions* and *institutional frameworks* in Ukrainian society on the one hand and *procedural flaws* in recent mediation and dialogue efforts on the other hand prevent these mechanisms from working properly (see the List of Hypotheses below). According to systems, legal transplant and ownership theories, it is likely that the models of mediation and dialogue used are not well accepted because they are rather incompatible with the cultural and institutional setting of the environment and the process of their implementation and establishment is not transparent and democratic enough.

This calls for a context-specific participative **approach** that fits mediation and dialogue to the given systemic environment in Ukraine, builds on its own third-party models where existent and invites Ukrainian professionals to design their own mediation and dialogue mechanisms. This approach has to acknowledge that there are limits in how far such a flexibility in designing mediation and dialogue can go: it has to draw a line where third party engagement becomes impotent or harmful when tailored to a specific environment – e.g. where must mediators get dirty hands to have impact, where do they have to be incorruptible to protect the process and maintain the trust of parties?

The **aim** of this research is to 1) map up and understand the cultural, institutional and procedural impediments and possible directions for improvements in consensual conflict resolution in Ukraine; 2) suggest measures to tackle these challenges, in the short-run; 3) design further research projects to deepen understanding of certain challenges and expand the scope of the research to other post-Soviet countries (for ex. Russia), in the long-run.

Although we do not tackle the peace negotiations of the armed conflict in Eastern Ukraine directly, the **2013 Ukraine-Russia Crisis** is seen as the overall justification for this research and the turning point in studying implementation and impediments of conflict resolution processes. At the moment, research is focused on Ukraine. Is it methodologically doubtful that the findings can be automatically **expandable to Russia or other post-Soviet countries**; generalization beyond Ukraine will most likely require a separate research.

HYPOTHESES - TO BE TESTED!

The following hypotheses on factors that might impede mediation and dialogue from working properly in Ukraine are the result of a couple of discussions (between Tatiana Kyselova, the CPM team (Julia v. Dobeneck, Imke Kerber, Lars Kirchhoff, Anne Isabel Kraus), David Lanz and Alex Azarov) and the evaluation of reports of the Dialogue Support Platform¹ Ukraine provided by mediatEUr.² Naturally, before having been tested by research, each hypothesis mirrors a selective perspective and is inevitably biased. The planned research aims at testing these hypotheses in order to affirm, reframe or correct them and at widening the view to add completely new ones. In a first attempt to cluster the hypotheses we identified four types of Impediments (related to Procedures, Communication, Dis/Trust, Market Mechanisms), being aware of the overlaps and blurred distinctions between these categories. Each group then breaks into 1) cultural conditions (basic cultural patterns that exist in the society for a long time), 2) institutional frameworks (including professional, legal and societal norms), and 3) procedural flaws (the way mediation/dialogue is being introduced in Ukraine).

Type of Impediment	Dimension	Mediation	Dialogues
I. Procedures	Cultural conditions	1. Cultural barrier to semi-formality of mediation procedures negatively influences the structure of mediation process (T, C)	
		2. Cultural resistance/barrier to responsibility taking negatively influences self-determination of parties in mediation/dialogue (T)	
		3. Societal and individual patterns of exclusion collide with principle of inclusiveness (R2, C)	
		4. Protracted dispute avoidance until the point of extreme escalation (because of historical lack of CR mechanisms in between informal negotiations and court litigation) makes initiation of mediation/dialogue difficult (T)	
		5. Privilege-focused society only accepts „hard“ procedural power as conveyor of change (C)	
		6. Cultural barrier to question social status/hierarchy/function based authorities restricts the choice of suitable facilitator and hampers outspokenness and self-determination of parties in mediation/dialogue (C)	
	Procedural flaws		7. Lack of quality assurance mechanisms, disagreements among facilitators regarding methodology, terminology, principles and absence of any ethical standards/guidelines diminish effectiveness and quality of dialogues (R1, R3)
II. Communication	Cultural conditions	8. Cultural inability/barriers to articulate emotions and needs increases the level of aggression in negotiation and complicates mediation/dialogue (T, A, C)	

¹ <http://dialoguesupport.org/>

² T – Tatiana Kyselova, C – CPM team, R – Reports (1,2,3) of the Dialogue Support Platform, A – Alex Azarov

² T – Tatiana Kyselova, C – CPM team, R – Reports (1,2,3) of the Dialogue Support Platform, A – Alex Azarov

			9. Dominance of debate culture in politics complicates popular understanding of dialogue (R1, R2)
			10. Polarization and radicalization of the society in post-2013 period, wide-spread phenomenon of trauma and PTSD complicates initiation and conduct of dialogues (R2, R3)

III. Dis/trust	Cultural conditions	11. Cultural lack of societal trust negatively influence perception of neutrality of mediator/facilitator and mediation/dialogue institution in general (T)	
		12. Cultural acceptance of lie negatively influences perception of enforceability of the mediated outcome (T)	12. Cultural acceptance of lie negatively influences perception of authenticity and honesty of statements in dialogue (C)
		13. Cultural acceptance of corruption negatively influences expectations towards integrity of mediator/facilitator (T, C)	
	Institutional frameworks	14. Lack of information/knowledge/understanding in general public and state authorities about mediation/dialogue impedes its use (T, R1, R3)	
		15. Mediation/dialogue threaten frameworks of corruption and therefore meet resistance from the “old” system and complicate establishment of transparent rule of law and therefore meet resistance from the “new” system (C)	
		16. Deficiencies of societal and legal normative frameworks negatively influence effectiveness of mediation/dialogue institution in general (C)	
	Procedural flaws	17. Multiplicity and blurred mandates of international dialogue and mediation actors creates situation of unaccountability (post-2013) (C)	
			18. Dialogue fatigue – unsuccessful attempts at dialogues increased popular perception of ineffectiveness of dialogues leading to distrust to the method as such (R1)
		19. Absence of charismatic leader representing mediation/dialogue in professional mediation community and within court system offers no identification figure (T)	
		20. Risks of systematic abuse of mediation/dialogue by the government to their advantage (T)	

IV. Market mechanisms	Procedural flaws	21. Dominance of self-interests of and competition between mediation actors impedes joint investments into and collaborations within mediation services market (T, C)	
		22. Limited resources for organizational capacity building undermine efforts at institutionalization and conducting mediation/dialogue (R2)	
		23. Very limited number of actors serving as gate keepers for access to international community have become grant-eaters leading to exploitation of donor resources to personal advantage and distrust from other national actors (C)	
		24. Similar grant-eating attitude of some local actors increased distrust to the method from other local actors and general public (T)	

SCOPE OF THE RESEARCH

- Main unit of analysis: people and their perceptions
- Target group: Ukrainian conflict resolution professionals (mediators and dialogue facilitators); representatives of Ukrainian judiciary and government; representatives of foreign donors and international mediation/peace-building organizations; consumers of conflict resolution services (businesses and civil society).
- Working definition mediation and dialogue processes: third-party consensual conflict resolution (CR) processes characterized by (a) third-party involvement; (b) consensual decision making by the parties.
- Processes to be studied: (a) CR processes at national and regional level in Ukraine, excluding international state-to-state conflicts, but with a specific reference to the current armed conflict; (b) CR processes involving individuals who act on their own or represent organizations; (c) CR processes in all possible spheres, including civil, commercial, family, restorative justice, administrative/public, labour, employment, community, etc.; (d) Cultural and institutional frameworks that support CR processes.

EMPIRICAL APPROACH

Semi-structured qualitative interviews with target group (see above): We will let the interviewees themselves define their own “ideal” CR process (broadly within the frame of third-party consensual processes) and then let them speculate about the ways/difficulties/adjustments/etc. this “ideal” process may have or already has in Ukraine. We will ask what things have to be done that “their” CR process works in Ukraine as legitimate, recognized and self-sustainable practice and what impediments may be faced in this implementation. In this approach, we are untied from a specific model of mediation or dialogue and follow what people think rather than impose our thinking on them.

RESEARCH QUESTIONS

- 1) What are the features of the most efficient and culturally suitable consensual CR processes in Ukraine?
- 2) How can these processes be implemented?
- 3) What are the difficulties/mistakes of the current implementation?
- 4) What are the measures to be taken to adjust/improve current processes?

RESEARCH TIMELINE

1. **Expert Round Table I**, March 2016
2. **Sampling Design**, March 2016
3. **Field work (Pre-testing questions, interviews) in Kiev, Odesa, Lviv, Kharkiv**, April-June 2016
4. **Analysis of the findings**, July-November 2016
5. **Development of policy briefing and research article**, December 2016-February 2017
6. **Expert Round Table II**, March 2017

**IMPLEMENTING MEDIATION AND DIALOGUE INITIATIVES IN UKRAINE:
IMPEDIMENTS AND POSSIBLE IMPROVEMENTS
PARTICIPANTS EXPERT ROUND TABLE (ERT I) DISCUSSION
10 MARCH 2016 AT EUROPEAN UNIVERSITY VIADRINA, FRANKFURT (ODER)**

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