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The trial and arrest of Yulia Tymoshenko

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On 5 August, the former Ukrainian Prime Minister Yulia Tymoshenko was detained in the courtroom during her trial on exceeding her powers while negotiating a gas contract with Russia in 2009. The formal reason for her detention was her ostentatious disregard for the court's procedures. It seems that her arrest was not planned in advance. Public protests against her arrest has been limited in size; they may gain wider coverage in September, after the start of the new political season.

The former prime minister's arrest is a sign of the intensifying political dispute in Ukraine between the ruling camp and Tymoshenko's supporters before next year's parliamentary elections. The trial is political in nature; its aim is to deprive Yulia Tymoshenko, President Viktor Yanukovych's only major rival, of her right to participate in elections, which would remove her from the country's active political life. The charge laid against her, as the trial has shown, is poorly documented. So the proceedings have focused on the gas contract itself, a move which is politically convenient, but of less importance with regard to the case itself.

The trial

In the trial, which has been proceeding since 24 June, Yulia Tymoshenko is accused of the following: in January 2009, by issuing directives to the people negotiating a gas contract with the Russian Federation, she exceeded her authority, which led to "serious consequences". Ukraine's Criminal Code punishes such an act with imprisonment ranging from seven to ten years, and an additional penalty in the form of prohibiting the guilty party from "occupying specific positions and carrying out specific activity for up to three years" (the nature of these positions and activities are to be determined by the court in its sentence). Conditional suspension of the sentence for this offence is impossible; however, it would become possible if the act under discussion is recognised as not having led to "serious consequences".

The allegation in the indictment does not concern the content of the directives Tymoshenko issued, but rather how they were issued and approved; in fact, it concerns procedural and secretarial issues. So, disputing how the directives were approved does not challenge the legality of their content, and thus cannot give grounds for challenging the legitimacy of the agreement. This does not change the fact that the gas contract with Russia which Tymoshenko signed at the end of her period in office has significantly increased the price of gas for Ukraine. Ukraine has no legal concept of constitutional responsibility, and so the

highest state officials, including the Prime Minister and President, must bear responsibility before the courts for crimes related to the performance of their duties. However, the current trial is the first such case brought against a politician of this rank.

The evidence presented to date does not indicate that Tymoshenko is guilty to any degree. From the witnesses' testimony, it appears that she did not exceed her powers; also, in the course of the investigation, the prosecutors apparently gave up their attempts to determine what the specific procedures applicable to the Ukrainian government actually were. Therefore, the submission focuses not on proving the fact of the offence, but rather its particularly severe consequences. Witnesses have been asked about the details of the negotiations; how the prices for the natural gas were established; Tymoshenko's links with Russia, going back to the 1990s, etc. Many of these facts are irrelevant to the merits of the case, and are intended to discredit Tymoshenko's activities as prime minister.

The case is being heard by a young and inexperienced judge, who was unprepared to deal with an issue so closely associated with current politics. During the trial, Tymoshenko has openly scorned the proceedings and ostentatiously demonstrated her disrespect for the court, for example by refusing to stand up when addressing the court. Her activities are designed to cause the maximum delay in dealing with the case, so that it cannot be completed before the beginning of the autumn session of the Ukrainian parliament (on 5 September). Also people in the public gallery, led by MPs from Tymoshenko's *Batkivshchyna* (Fatherland) party, have been trying to disrupt the proceedings. The judge has already ordered the court to be cleared on several occasions, and has had people behaving inappropriately removed from the room. However, the trial remains open to the public; diplomats and journalists are present in the courtroom (although there are no television cameras), and the media have published detailed reports of the hearings in the court.

The trial is proceeding quickly, and it is possible that a sentence will be passed before the end of August. This will not mean the end of the matter; the judgement will almost certainly be challenged by one of the parties (depending on its content), and the previous procedural irregularities mean that the court of appeal will most likely order a retrial (unless it decides on a dramatic violation of the law). The retrial would take place no earlier than late autumn; after that – if they find against Tymoshenko – there will be further proceedings in the court of appeal, and then the Supreme Court. A final decision cannot be expected before spring 2012.

Arrests and protests

The prosecution first requested Tymoshenko's arrest on 27 July; this proposal was rejected. The next request, on 5 August, was granted. It seems that the immediate cause was the clash between the accused and Prime Minister Mykola Azarov, who was being questioned that day as a witness. This dispute included Tymoshenko's demand for a Ukrainian interpreter; Azarov was testifying in Russian, although witnesses on previous days, including the former Deputy Prime Minister Oleh Dubyna, had done the same, and Tymoshenko had addressed them in Russian.

The decision to arrest her was either a spontaneous reaction to her behaviour (as some observers in Kiev believed), or part of a plan designed to remove the former prime minister from the political arena (as Tymoshenko herself argues). The former is more likely; otherwise, she would have already have been arrested. According to Ukraine's Code of Criminal Procedure, her detention may last up to two months, and may also be extended. Tymoshenko immediately challenged the decision to arrest her; it is not known when the court of appeal will consider her motion.

Since the beginning of the trial, Tymoshenko's supporters have been picketing the courthouse (just as they picketed the Attorney General's building during the hearings). These actions have included a few dozen up to several hundred people. After the arrest, politicians from *Batkivshchyna* called for mass protests, which did not happen. The number of protesters in Kiev temporarily increased to around a thousand. In view of the ban placed on unlawful assembly before the court, the protesters put up several tents there, acting as the 'field quarters' for the deputies, a move which gives them immunity according to Ukrainian law. It cannot be ruled out that in September (if the process is still going on) the number of demonstrators at the sit-in will increase, but large-scale demonstrations (numbering five figures or more) seem unlikely.

The aims of the parties

There is no doubt that the case against Yulia Tymoshenko is political in nature. The government's aim is, before next year's parliamentary elections, to deprive her of the right to stand for election, as a person with a criminal conviction; and to reduce her opportunities for political activity in the process. Tymoshenko and her party are in fact the only real competitors to Viktor Yanukovych and the Party of Regions, although their popularity and effectiveness are much less today than they were several years ago.

Since the dismissal of Tymoshenko's government in spring 2010, the Presidential Administration, the prosecutors' office and the government have worked to prove that the previous government permitted abuses of power and worked to the detriment of the country. Among other things, Tymoshenko was accused of inappropriately spending money received from Japan to set CO2 emission limits, and the purchase of inappropriate vehicles for the health service. None of these cases have been officially concluded, but the government has decided to put them aside and focus on the charge relating to the gas contract – the most risky from a legal point of view, but the one with the most political potential.

On the other hand, Tymoshenko has a clearly defined political objective: maintaining and building up her popularity with the public, as well as uniting her party so that they can consider winning the next parliamentary elections. Her behaviour in the courtroom, together with her constant public statements that she will certainly be arrested and imprisoned, testify to the fact that not only had she already considered the possibility of arrest, but she may also have seen it as an appropriate move for her political strategy. When in 2001 she

was arrested after her dismissal from the post of deputy prime minister, she emerged from jail as the unquestioned leader of the opposition movement against the government of Leonid Kuchma. Today, she probably hopes that her arrest will bring her a significant increase in the popularity which she lost while she was actually in power. It also seems that Tymoshenko hopes that the international community will not allow her to be imprisoned.

International implications

The arrest of the former Prime Minister has weakened Ukraine's international position, including its negotiating position with both Russia and the West. The further charges against Tymoshenko, the long-delayed start of her trial, and her subsequent arrest have provoked critical reactions from the EU's institutions and member states (especially from representatives of the European People's Party), the more so as Tymoshenko has deftly exploited the Western media for her own political purposes. It seems that the Ukrainian government is currently considering how to get out of the Tymoshenko case in such a way so as not to delay the pace of negotiations on the EU association agreement, and secondly, to prevent a political and moral victory for Tymoshenko. The authorities must also take two further factors into account: the prospect of parliamentary elections in autumn 2012, and the final stage of negotiations with the EU on the association agreement, which Kiev really needs to reach a successful conclusion.

The trial and arrest of the former prime minister has not strengthened Ukraine's bargaining position towards Russia, especially regarding the unfavourable renegotiation of the gas contracts. Russia has expressed concern at the possible re-examination of the details of the gas contract negotiations in 2009, stressing that the contract was concluded in a legal manner. But Tymoshenko's arrest suits Russia, as it could threaten a chill in Ukraine's relations with the EU and the US, and thus undermine Kiev's reluctance to join the Customs Union of Russia, Belarus and Kazakhstan, which corresponds to Moscow's long-term plans for Ukraine.