



The Tymoshenko case

by Ondrej Ditrych

On 30 April 2013, the European Court of Human Rights (ECHR) in Strasbourg delivered a ruling on the *Tymoshenko v. Ukraine* case. It confirmed that Yulia Tymoshenko - one of the leaders of the Orange Revolution (2004) and former prime minister of Ukraine - had been subjected to arbitrary and unlawful detention before her trial in 2011. An unsuccessful contender in the 2010 presidential election, which she lost to the current president Viktor Yanukovich by a 3.5% margin, Tymoshenko is currently serving a seven-year prison term for abuse of office, linked to the signing a gas contract between Naftohaz and Gazprom in 2009 that her opponents claim had a disastrous effect on Ukraine's economy.

The ECHR ruled unanimously that her pre-trial detention was not to make sure that she would face justice but was imposed for 'other reasons'. Effectively, the court determined that the rationale for the detention of Tymoshenko, a leader of the opposition *Batkivshchyna* (Fatherland) party, was motivated by political considerations. However, the complaint by Tymoshenko concerning alleged physical mistreatment while in detention was not upheld. The court also did not rule on the prison sentence as such, as this will be examined in a separate case. It is important to note that the ECHR's decision is not final and the respective parties now have three months to appeal to the court's Grand Chamber. While Tymoshenko is unlikely to do so, according to her lawyer's statement, Ukraine can be expected to exhaust all legal possibilities to reverse the ruling.

In a joint statement following the ruling, HR/VP Catherine Ashton and the Commissioner for Enlargement and

European Neighbourhood Policy (ENP), Štefan Füle, urged Ukraine to 'reconsider thoroughly [Tymoshenko's] situation.' At the same time, the decision on whether to sign a new Association Agreement and a Deep and Comprehensive Free Trade Agreement (DCFTA) with Ukraine at the Eastern Partnership (EaP) summit in Vilnius this November has been postponed. The two documents were both initialled last year but, in light of the deteriorating political situation in Ukraine, the Council decided in December 2012 to make the signature conditional on a clear demonstration of progress by Kiev in the areas of: judicial reform (ending selective justice, read 'politically motivated prosecutions'); electoral reform (including election law, but also the administrative code and other areas of legislation which are prone to government abuse by virtue of their mutual incoherence); and the association agenda. The conditions were then further specified at the EU-Ukraine summit in February 2013.

It was initially expected that an evaluation of Kiev's progress would be conducted by early May. But EU member states later decided to give Ukraine more time, and the final decision is now most likely to be taken as late as October. This month will see only a college decision by the Commission on whether to conclude formally the negotiations. Yet this will be an administrative rather than political decision, and will almost certainly be favourable. Technical preparations for the agreements to be signed in the autumn will begin thereafter.

A cold political climate

Ukraine has recently been a source of major



disappointment in the EU. 'Lilies that fester smell far worse than weeds', and Ukraine, having once been called a laboratory for the neighbourhood policies, seems a case in point.

Ukraine's politics are currently being shaped by two key features. First, a *balance of power among oligarchs*. As with any functioning balance of power, it prevents the rise of a potential hegemon. But a concentration of power in the hands of the few does not encourage genuine political pluralism. It also prevents any change in the economic status quo which is currently defined by limited competition and a bad investment climate. Second, a *concentration of policy-making powers in the hands of Yanukovich's inner circle* (the 'Family'), bolstered by personal appointments and, more recently, also by a new law on referenda: this is the quintessential instrument of 'illiberal democrats' from Minsk to Dushanbe.

Yet such a political constellation is not necessarily stable. Yanukovich feels insecure because, despite electoral irregularities, his Party of Regions only received 30% of vote in the last October's parliamentary elections and, together with his allies, can only boast a fragile majority in parliament. Moreover, he cannot take the support of the oligarchs for granted: rumour has it that some - including some of those closest to the administration, Dmitry Firtash and Sergei Levochkin (business associates in RusUkrEnergo) - have started secretly supporting the opposition in order to curtail the president's political influence. Yanukovich's response seems to be to expand the economic assets of the 'Family', a move that is likely to irritate the oligarchs further.

It is difficult to predict how this power game may end, but it is unlikely to pave the way to real political competition in the near future. Yanukovich seems genuinely keen on seeing the agreements with EU signed, and this would also suit the parochial economic interests of the oligarchs. He may not, however, be able (or willing) to modify the fabric of Ukraine's politics within which he has a strong personal interest in securing his position.

This may go some way in explaining why the government has so far attempted to appease the EU by doing as little as possible, while toying, typically, with the idea of joining the Customs Union with Russia to soften the stance of Brussels. On 7 April 2013, Yanukovich pardoned Yury Lutsenko, a former interior minister who served a four-year sentence for embezzlement and abuse of office, together with five other officials, with the government clearly indicating that this was a good will gesture to the EU (a European Parliament's monitoring mission headed by Pat Cox and Aleksander Kwaśniewski took interest in his case, as it did on Tymoshenko's). Yanukovich, made it nevertheless clear that he was not prepared to release Yulia Tymoshenko, allegedly because she faces other charges (tax evasion

and embezzlement) and, since January, is under investigation for the contract killing of businessman Yevhen Shcherban back in the 1990s. Given his shaky position and dwindling public support, it is also safe to say that Yanukovich is unlikely to support genuine electoral reform ahead of the next presidential election in 2015.

What next then?

The immediate effect of the ECHR ruling will be limited. Even if upheld by the Grand Chamber, it will not force Ukraine to release Tymoshenko since it relates to the period prior to her sentencing. Lutsenko, whose similar complaint was validated by the ECHR last summer, only received €15,000 compensation from the government and in any case, his eventual release had little to do with the ECHR ruling. From the EU's perspective, the ECHR's decision means that even more attention is now likely to be paid to Tymoshenko's case. If Kiev ultimately decides to release her (if only *pro tempore*) ahead of the October deadline, this increases the possibility that the Council may be more willing to give the green light to the signing regardless of Ukraine's (lack of) progress in meeting other criteria.

To be sure, there are clear benefits for the EU in signing the agreements. Leaving aside the geopolitical argument (almost impossible to evaluate) that turning Ukraine down would inevitably push Kiev into Moscow's arms, the binding legal basis for the bilateral relationship and the detailed *quid pro quo* roadmap included in the DCFTA can have a (long-term) gravitational effect and lead to structural change.

But there are also risks in signing the agreements so long as political and economic reforms are still off-track. If Tymoshenko's case epitomises much of what is currently wrong with Ukraine's politics, the problems are complex and cannot be reduced to the (mis)treatment of one politician. By postponing the deadline for its evaluation, the EU may have given the impression (at least to Kiev) of softening its resolve. Proceeding with the signature under the current circumstances risks reinforcing this perception of weakness and undermining the Union's leverage in the many technical but difficult decisions on implementation that are bound to follow.

It is not *now* (read 'Vilnius') or *never*. Indeed, if the agreements are not signed at the EaP summit, the EU may be reluctant to do anything before the 2015 presidential election. But much will ultimately depend on how responsive the government is in meeting the criteria, and also on good public diplomacy, i.e. on explaining to the citizens of Ukraine that, by being patient, the EU is not betraying their European aspirations, but serving them.

Ondrej Ditrych is an Associate Fellow at the EUISS and a Research Fellow at the Institute of International Relations in Prague.

