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# Legal Monitoring in Ukraine III

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**Preliminary Report on the  
investigations against Yulia  
Tymoshenko in November  
2011.**

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for Human Rights**

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## Introduction with summary of conclusions

This report is a follow up to two previous preliminary reports from The Danish Helsinki Committee for Human Rights<sup>1</sup> on the pending investigations and trials in Ukraine against members of the former government. Those reports were based on the monitoring of the cases against former Prime Minister Yulia Tymoshenko, former Minister of Interior Yuriy Lutsenko, former acting Minister of Defence Valeriy Ivashchenko and former First Deputy Minister of Justice Yevhen Korniychuk.

This report has the purpose of describing and analyzing the actual legal situation of Mrs. Tymoshenko as of the beginning of November 2011 and to compare it with the obligations of Ukraine as a party to the European Convention on Human Rights. It has not been the purpose of the monitoring to take side in the question of guilt or innocence; Human Rights are for the guilty as well as for the innocent.

On 11.10.2011 Mrs. Tymoshenko was found guilty by the Pecherskiy District Court of Kyiv in having violated Article 365 of the Ukrainian Criminal Code. The next day another investigation was opened against her for violation of Article 191 §5 of the Criminal Code in what is in this report called the Debt Case going back to the 1990es. Few days later a number of old and already closed investigation were reopened. This first of all raises the question of why this is being done now. Considering that the present administration has been under considerable pressure to decriminalize the articles on economic crime which are the basis for most of the pending cases against politicians from the former government, including the sentence of 11.10.2011 against Mrs. Tymoshenko, opening a new investigation and reopening old ones for violation of other articles against an inconvenient opposition politician is remarkable. The timing of events, the considerable age of the cases and the previous history justifies strong suspicion as to political motives behind the investigations.

The report is preliminary, as it is based on the public information available at the time of publication.

The report concludes

- **that the Debt Case is obsolete due to 10 years statute of limitation.**
- **that the statute of limitation is not prevented by describing the constituting criminal act as the time when UESU stopped paying its debt in 2000 and not as would be usual legal**

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<sup>1</sup> <http://www.helsinki-komiteen.dk/>

**argumentation the issuing of the guarantee in 1996; An extension of the statute of limitations can subsequently not be based on the Gas Case of 2009.**

- that the statute of limitations also prevents the reopening of most if not all of the eight investigations against Mrs. Tymoshenko which were closed in 2004 and 2005.**
- that reopening investigation in cases which have been legitimately closed violates Article 6 and Article 18 of the European Convention on Human Rights when the decisions are not justified by legitimate purposes and grounds**
- that the President in his public allegations on the crimes of Mrs. Tymoshenko confuses suspicion with convictions,**
- that the statements by the Prosecutor General's Office on the cases against Mrs. Tymoshenko justifies doubt as to the objectivity, independence and impartiality of the Criminal Justice Sector**
- that the complicated terminology and mixture of factual descriptions and allegations in the resolution to open investigation in the Debt Case makes it very difficult or even impossible to identify the acts which are incriminated to Mrs. Tymoshenko and therefore violates her right to defence and to a fair trial.**

The report is produced for the Danish Helsinki Committee on Human Rights as part of its Legal Monitoring program by Mikael Lyngbo, who has many years of experience as a public prosecutor, chief of police and deputy chief of the Danish Security Service. He has also worked for the EU and other international organizations as Chief Advisor in Albania, Political Advisor in the Sudan, Rule of Law Expert in Iraq and Head of Evaluation Team in South Africa.

*Copenhagen, the 8<sup>th</sup> November 2011.*

## 1. The background to the situation in November 2011

- On 11.10.2011 Yulia Tymoshenko was sentenced to 7 years of imprisonment and further 3 years of prohibition to hold a public office as well as ordered to compensate damages to Naftogaz of around 200 million USD.
- During an international meeting in Yalta in September 2011 President Yanukovich was heavily criticised for the trials against politicians and the possible implications for the future cooperation between Ukraine and Europe was mentioned, also related to the association agreement being negotiated. The statements of President Yanukovich were interpreted by high ranking EU representatives as a promise to initiate an amendment to the Criminal Code which would decriminalize the relevant articles 364 and 365 under which Yulia Tymoshenko and most of the other former government members were prosecuted. There were also suggestions that the President should exercise pressure on the judiciary to set Yulia Tymoshenko free; this however would have been unacceptable and a violation of European standards. A proposal to amend the Criminal Code has actually been presented to the Parliament.
- The day after the conviction of Yulia Tymoshenko in the Gas Case a completely different response was however given by the Ukrainian authorities: Mrs. Tymoshenko was charged in another case (here called the "The Debt Case") for having in 1995-2000 violated Article 191 of the Criminal Code. Since then initiative has also been taken to reopen a number of investigations against her which had been closed in 2004 and 2005. These cases all have their background in the Ukrainian-Russian gas trade and her role in that.
- Mrs. Tymoshenko was the president of the energy trading company United Energy Systems of Ukraine (UESU) from 24.11.1995 to 1.1.1997, when she was elected to the Verkhovna Rada and therefore was obliged to resign, after which her husband took over the management. UESU was a private company which in 1995 under an intergovernmental agreement between Russia and Ukraine bought natural gas from Russia and paid for it in cash and by delivery of material and technical resources from Ukraine.
- In an interview 18.10.2011 in Frankfurter Allgemeine Zeitung President Yanukovich gave the following information on the background for the new investigations: "...There are two court decisions, an American and a Russian, which in detail describe what she is guilty of. If there has been a process in America in which Lasarenko has been convicted and is jailed (FAZ: *You are thinking of the former Ukrainian Prime Minister Lasarenko, with whom Mrs. Tymoshenko in the nineties worked together and alleged corruption in the Russian Ministry of Defence...*) "... if there has been a process in Russia in which General Colonel Olejnik were sentenced to six years of prison and is also jailed: In these crimes Tymoshenko were directly involved - especially in the cases which concerned employees of the Russian Ministry of Defence. In Ukraine taxes were not being paid, although gas was sold on Ukrainian territory..."

- The allegations of the President however are built entirely on suspicion and not supported by any independent court ruling as the sentence against Pavlo Lazarenko in the US has nothing to do with the UESU case, the former head of the Russian Ministry of Defence Military Budget Department general Olejnik was acquitted on 26.11.2003 by the Presidium of the Russian Supreme Court and Mrs. Tymoshenko herself has never been sentenced in either of these countries. The alleged tax evasion is one of the cases being reopened and she has not been convicted for that either. The statement of the President therefore does not respect the presumption of innocence.
- Following a tradition which fortunately is unknown in most European countries, First Deputy Prosecutor General Kuzmin in a TV show on 28.10.2011 publicized a number of allegations and suspicions against Yulia Tymoshenko and others which had not led even to formal charges being raised, not to mention indictments. Such behavior from a very senior prosecutor is in violation of the basic rule of law principle of presumption of innocence<sup>2</sup> and leads to serious doubt as to the objectivity and apolitical nature of the PGO when it at some later time has to decide whether to prosecute. A prosecutor is supposed to assess the outcome of the investigation objectively and based on that decide whether there is sufficient proof for an indictment and for the case to be sent to court for trial. Compared to the almost non-existing rate of acquittals (99.8 % of those indicted are found guilty by the Ukrainian courts) such premature statements compromise the entire Criminal Justice System and justifies doubt as to whether to expect a fair trial.

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<sup>2</sup> European Convention on Human Rights Article 6 §2: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

## 2. The new cases

### Charges and suspicions:

1. A new investigation was opened on 12.10.2011 by the Security Service of Ukraine (SBU) for violation of Articles 191 §5 and Article 15 §2<sup>3</sup> of the Criminal Code against Yulia Tymoshenko for conspiracy to attempt to embezzle state property by unlawful reimbursement from the state budget of UESU debt.

The following is a summary of the description and charges in the resolution of the SBU:

- On 18.2.1994 Russia and Ukraine signed an agreement on the conditions for sale of Russian gas to Ukraine and transit of gas through Ukraine to Europe. Part of the Ukrainian payment could be made through supplies of material and technical resources.
- Pavlo Lazarenko had as First Deputy Prime Minister the responsibility for the interstate relations with Russia, including the gas payments. Mrs. Tymoshenko allegedly suggested to him to allow her company UESU to get involved in the gas trade; he would then get a share of the profit transferred to a foreign bank. Mr. Lazarenko accepted and made a proposal accordingly to the Russian Ministry of Defence and in 1996 about 50% of the Russian gas from Gazprom to Ukraine was channeled through this contact, the gas delivery being paid by delivery of material and technical resources from UESU to subsidiaries of the Russian Ministry of Defence, as Gazprom was indebted to the Russian state.

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<sup>3</sup> Article 191. Misappropriation, embezzlement or conversion of property by abuse of official post

Misappropriation or embezzlement of somebody else's property by a person to whom it was entrusted shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labor for a term up to two years, or restraint of liberty for a term up to four years, or imprisonment for a term up to four years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Misappropriation, embezzlement or conversion of property by abuse of official post - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Any such actions as provided for by paragraph 1 or 2 of this Article, if repeated or committed by a group of person upon their prior conspiracy, - shall be punishable by restraint of liberty for a term of three to five years, or imprisonment for a term of three to eight years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Any such actions as provided for by paragraphs 1, 2 or 3 of this Article, if committed in respect of a gross amount, - shall be punishable by imprisonment for a term of five to eight years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Any such actions as provided for by paragraphs 1, 2, 3 or 4 of this Article, if committed in respect of an especially gross amount, or by an organized group, - shall be punishable by imprisonment for a term of seven to twelve years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and forfeiture of property.

### Article 15 Criminal attempt

A criminal attempt shall mean a directly intended act (action or omission) made by a person and aimed directly at the commission of a criminal offense prescribed by the relevant article of the Special Part of this Code, where this criminal offense has not been consummated for reasons beyond that person's control.

A criminal attempt shall be consummated where a person has completed all such actions as he/she deemed necessary for the consummation of an offense, however, the offense was not completed for the reasons beyond that person's control.

A criminal attempt shall be unconsummated where a person has not completed all such actions as he/she deemed necessary for the consummation of an offense for the reasons beyond that person's control.

- In the period between April and August 1996 64.480.000 US\$ were allegedly illegally transferred to Pavlo Lazarenko to a Swiss bank account as payment for his assistance to UESU.
  - Mr. Lazarenko, who had by then become Prime Minister, also on 26.8.1996 sent to the Russian Prime Minister Chernomyrdin a letter confirming that UESU had been authorized by the Ukrainian Cabinet of Ministers to play its role in the gas trade, which was not true, and guaranteed for its fulfillment of the obligations
  - Russia demanded a Ukrainian government guarantee in order to allow the 1997 gas delivery to go through UESU. Mr. Lazarenko ordered State Minister Minchenko to sign a guarantee (dated 31.12.1996) to Gazprom that the Government of Ukraine would repay the debt of UESU within 200 million US\$.
  - In order to allow for tax exemption Mrs. Tymoshenko falsely mentioned in the contract another firm controlled by her, United Energy International Limited, as a corporate member of UESU and a partner in the gas trade and the profit thereof was allegedly channeled through that company.
  - UESU only partially fulfilled its obligations and eventually in 2000 discontinued the contract. This was according to the SBU not due to financial shortcomings as UESU in 1997 transferred 944.683.245 US\$, 30.833.509 £ and 269.304 DM to foreign banks which could have been used for purchase of material and technical resources.
  - The Russian Ministry of Defence brought the case before the Moscow Court of Arbitration and was supported by the Court in a claim against UESU for 197.983.803, 90 US\$. This has never been paid.
  - On 10.6.2011 The Russian Ministry of Defence addressed the Cabinet of Ministers of Ukraine in respect of repayment of the debt of UESU of now 405, 5 mill. US\$. During the examination by the Ukrainian Cabinet of Ministers of the information provided by the Russian Ministry of Defence the criminally punishable acts were revealed and the SBU was informed. This prevented the attempt to embezzle from realization.
2. Deputy Prosecutor General Kuzmin mentioned on TV on 28.10.2011 that prosecutors are to investigate whether Yulia Tymoshenko was involved in the 1996 murder of Donetsk Governor and Deputy Yevhen Shcherban, who was involved in the gas trade and shot in Donetsk airport in what seemed to be a contract killing. According to Mr. Kuzmin a witness questioned in the United States has stated that the murder was paid for from the accounts of Mrs. Tymoshenko and the then Prime Minister Pavlo Lazarenko, who is now serving a prison sentence in the US for an unrelated fraud and money laundering. Eight persons were in 2002 found guilty and sentenced for the murder on Mr. Shcherban.

3. Mr. Kuzmin during the TV show also accused Mrs. Tymoshenko of an attack in 2003 on a pre-trial detention center in Chernihiv where her father-in-law was being held. It is not clear whether this is being formally investigated.
4. Finally Mr. Kuzmin mentioned on TV an attempt to bribe Supreme Court Justices by Mrs. Tymoshenko in 2004. It is not clear either whether this is being formally investigated.

**Observations:**

On state guarantee for the debt of UESU

- The Government guarantee dated 31.12.1996 was issued to Gazprom, was limited in time from 1.1.1997 to 31.1.1998, it only covered the gas trade in 1997 and not any other debt from gas contracts of other years and it had a maximum amount of 200 mill. \$.
- The letter dated 26.8.1996 from the Prime Minister of Ukraine to his Russian counterpart does not specify time, amounts, contracts or objects. It can not be considered a financial state guarantee.
- Neither Gazprom nor the Russian Federation as a state or Gazprom have apparently ever considered the Ukrainian government guarantees as documents based on which they could make demands against Ukraine and they have never tried to make Ukraine responsible for the debt of UESU. The letter from the Russian Ministry of Defence from June 2011 does not mention a guarantee at all, it just asks for assistance in collecting the debt of 405, 5 mill. \$ from the UESU.

On the statute of limitations of the new investigations:

- Considering that the events mentioned under paragraphs 1 and 2 above go back more than 10 years it seems natural to consider whether it is still legally possible to prosecute. Article 49 of the Ukrainian Criminal Code of 2001 today regulates the statute of limitation<sup>4</sup> and holds a 15 years statute of limitation for the crimes for which Mrs. Tymoshenko is now charged.

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<sup>4</sup> Article 49 (2001) on Discharge from criminal liability due to limitation period

A person shall be discharged from criminal liability if the following periods have elapsed from the date of the criminal offense to the effective date of the judgment:

two years where a minor offense has been committed and the prescribed punishment is less severe than the restraint of liberty;

three years where a minor offense has been committed and the prescribed punishment is the restraint of liberty or imprisonment;

seven years where an offense of medium gravity has been committed;

fifteen years where a grave offense has been committed;

twenty years where a special grave offense has been committed.

(2). ...

(3) The statute of limitation shall be forfeited where a person, before the terms specified in paragraphs (1) and (2) of this Article have expired, commits another medium grave, grave or special grave offense. In this case a limitation period starts on the date on which such new crime is committed. Each offense gives rise to its own period of limitation.

(4) and (5)....



- However, at the time when the alleged crime was committed a different statute of limitation was in force (Article 48 of the Criminal Code of 1960<sup>5</sup>), and the time limit and other conditions of that law are still to be used on crime committed then. Using a newer statute of limitation allowing prosecution in cases which would not have been possible according to the former law would be in violation of Article 7 of the European Convention on Human Rights on “No punishment without Law”<sup>6</sup>. SBU seems to have acknowledged that there is a 10 years statute of limitation.
- A conviction (not just a charge or an indictment) for a new grave crime committed within the previous 10 years period could however start another 10 years period. According to a statement from the PGO the statute of limitations for some of the crimes of Mrs. Tymoshenko (probably the new Debt case) was extended due to her committing in January 2009 a new crime (the Gas case) for which she was sentenced on 11.10.2011. For that crime to renew any statute of limitation requires for the conviction to become final which may happen once the appeal filed by Mrs. Tymoshenko is considered.
- The statute of limitations of 10 years can however only be renewed by an act in 2009 if the constituting criminal act in the Debt Case is not in 1996 but in 1999 or later. This is probably the background to the claim in the “opening letter” that the attempted embezzlement was fulfilled through the lack of payment of an old debt (in 2000) and not through the issuing of the warranty (in 1996). This line of arguments can not be considered normal legal argumentation.
- The conclusion is therefore that the statute of limitations to be used in this case prohibits prosecution of the Debt Case, and a possible extension of the statute of limitation cannot be based on the Gas Case.

#### On the resolution to open an investigation:

- The letter on opening the investigation in the Debt Case is an eight page document with a very complicated terminology, long sentences and a mixture of factual descriptions and

<sup>5</sup> Article 48 (1960) Period of limitation for bringing to criminal liability

A person cannot be brought to criminal liability if from the day when he committed a crime the following terms had lapsed:

- 1) one year from commission of any crime provided for in Articles 106 and 125.1 or a crime for which the law provides a possible punishment not more severe than correctional works or referral to the disciplinary battalion;
- 2) three years from the day of commission of a crime for which the law provides a possible punishment of not more than 2 years of imprisonment (except for crimes mentioned in paragraph 1) above);
- 3) five years from the day of commission of a crime for which the law provides a possible punishment of not more than 5 years of imprisonment;
- 4) ten years from the day of commission of a crime for which the law provides a possible punishment that is more severe than 5 years of imprisonment.

Duration of the above limitation periods shall be interrupted if before they lapsed a person commits a new crime for which the law provides a punishment of more than 2 years of imprisonment. Calculation of the limitation period in this case starts from the *(continued on next page)*

commission of a new crime.

Duration of the limitation periods is suspended when a person who committed a crime is hiding from investigation or court. ... Question of limitation period for person, who committed a crime for which the law provides as possible sanction death penalty, shall be decided by the court. ...

<sup>6</sup> *(Kononov vs. Latvia 17.5.2010 §§ 228-233, Coëme vs. Belgium 22.6.2000 §§ 142-151 and Achour vs. France 29.3.2006).*

allegations which makes it impossible even for the trained eye to identify the charges against which Mrs. Tymoshenko should be defended. The European Convention on Human Rights Article 5 §2<sup>7</sup> requires the charges to be made in a way to be understood as does Article 6 on right to defence and to a fair trial.<sup>8</sup>

- The charges in the Debt Case opened by the Security Service are constructed in a most unusual way. Normally the criminal act of an attempted embezzlement based on a government guarantee for repayment of a private company's debt would be the issuing of the document servicing as a guarantee which in this case took place in 1996, but in the Debt Case the constituting criminal act, which allegedly completed the attempt, was referred to year 2000 when UESU company stopped paying its debts to the Russian side. This was probably construed this way only in an attempt to avoid the 10-year statute of limitation prohibiting investigation in 2011 of the actions that took place in 1995-1996 which is legally unacceptable.
- In 2000, the alleged time of the criminal act, the time limit of the guarantee had expired and it was no longer valid. Mrs. Tymoshenko could therefore not have attempted to embezzle state budget by transferring her company's debt to the government in 2000.

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<sup>7</sup> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him".

<sup>8</sup> See also Preliminary Report II

### 3. Closed investigations now being reopened

#### The charges:

- In the period between January 2001 and January 2003 the PGO opened 14 investigations against persons related to UESU, including Yulia Tymoshenko, her husband Oleksandr Tymoshenko, her father-in-law Hennadiy Tymoshenko, former UESU accountant Lidiya Sokolchenko, former manager of United Energy International Limited Yevhen Shago and Antonina Bolyura.

Eight of the investigations included Yulia Tymoshenko:

- 1) Case of 05.01.2001: Article 148-2 §3 of the Criminal Code 1960 - Intentional tax evasion in especially gross amount;
  - 2) Case of 21.02.2001: Article 80-1, Articles 19 and 80-1, Article 86-1 of the Criminal Code 1960 - Concealment of foreign currency revenues, Embezzlement of state property in especially gross amount;
  - 3) Case of 02.11.2001 (against Yulia Tymoshenko and Oleksandr Tymoshenko): Article 369 §2 of the Criminal Code 2001 - Bribe-giving committed repeatedly;
  - 4) Case of 02.11.2001: Article 70 of the Criminal Code 1960, Article 15, Article 191 §5, Article 366 §2, Article 27 and Article 366 §2 of the Criminal Code 2001 - Smuggling (Criminal Code 1960), Misappropriation, embezzlement or acquisition of property by abuse of office, Forgery in office that caused grave consequences;
  - 5) Case of 02.08.2002: Article 364 §2 of the Criminal Code 2001 - Abuse of authority or office that caused grave consequences;
  - 6) Case of 02.08.2002: Article 191 §5, Articles 27-30 and Article 191 §5, Article 366 §2, Article 27 and Article 366 §2 of the Criminal Code 2001- Misappropriation, embezzlement or acquisition of property by abuse of office, Forgery in office that caused grave consequences;
  - 7) Case of 08.01.2003: Article 27 and Article 212 §3 of the Criminal Code 2001 - Tax evasion in especially gross amount;
  - 8) Case of 17.01.2003 (against Yulia Tymoshenko, Lidiya Sokolchenko, Antonina Bolyura and Yevhen Shago): Article 191 §5 of the Criminal Code 2001 - Misappropriation, embezzlement or acquisition of property by abuse of office.
- 21.3.2003 The Vyshgorod District Court refused to close the above mentioned investigations as requested by the defendants
  - 13.5.2003 The Appeal Court of Kyiv overruled the Vyshgorod court decision and closed all the criminal cases.
  - 7.10.2003 The Supreme Court's Criminal Cases Chamber overruled the Appeal Court of Kyiv and remitted the case to a new consideration by another appeal court, the Appeal Court of the Zhytomyr Region.

- 22.4.2004 The Appeal Court of the Zhytomyr Region confirmed the decision of the Vyshgorod District Court which had refused to close the investigations.
- 11.11.2005 a joint session of the Supreme Court's Criminal Cases Chamber and the Military Court Panel refused the request to close the investigations as those investigations had already with legally binding effect been closed due to the lack of elements of crime by a number of decisions by the PGO (dated 21., 22. and 28.1.2005 and 5.7.2005) and by the Shevchenkivskiy District Court (dated 21.1.2004, 30. and 31.12.2004). The Supreme Court ruled that *"...these decisions were made in accordance with requirements of the criminal procedure law by authorized bodies and officials, they came into force and have binding force. These decisions de facto recognized that mentioned criminal cases against Yulia Tymoshenko and others were opened without grounds for that..."*
- The Shevchenkivskiy District Court in Kyiv has now on 28.10.2011 decided to extend the term for filing cassation appeal against its own decisions of 21.1.2004, 30. and 31.12.2004 to close the investigations, which allows the PGO to file cassation appeal against those decisions to the new Higher Specialized Court on Criminal and Civil Cases.
- PGO has also applied to the court for extension of the statute of limitations in order to reopen other cases against relatives of Mrs. Tymoshenko.
- On 20.10.2011 the PGO reversed its own decisions dated 21., 22. and 28.1.2005 and 5.7.2005 to close other investigations and on 27.10.2011 conducted a search of the home of the former UESU accountant Lidiya Sokolchenko in Dnipropetrovsk.

## Observations

### On reopening of proceedings

- The reason given in the PGO resolution dated 20.10.2011 and signed by Prosecutor General Pshonka for reopening the old cases is that *"...During the studies of the cases it was established that the decision to close the cases ... were taken illegally and that the mentioned motivations is not in correspondence with the materials of the criminal case and contradicts the gathered evidence in the cases"*. PGO spokesman Yuri Boichenko has said that the PGO had reversed a 2005 decision to drop the case against Tymoshenko; *"This decision was taken hurriedly, without reason and must be cancelled."*
- The Ukrainian Criminal Procedure Code allows reopening a closed pre-trial investigation within the statute of limitation<sup>9</sup> and has no other criteria for such reopening. This leaves

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#### Article 216. Reopening investigation in a dismissed case

Pre-trial investigation in a dismissed case may be reopened within periods of limitation for prosecution, by the decision of the prosecutor, Chief of Investigation, and, in instances referred to in Article 236-6, third paragraph, of the present Code - by judge's decision.

#### Article 236-6. Judge's considering the challenge against decision to dismiss a case

Challenge against decision of the inquiry agency, investigator, prosecutor to dismiss the case shall be considered by a single judge, who shall be determined in accordance with the procedure established by paragraph three of Article 16-2 of this Code, within five days and, if the case is complicated, – within ten days from the date on which the dismissed case has been received by court.

persons against whom an investigation has once been opened vulnerable for many years, for even if the investigation at some time was closed it can at any time be reopened at the discretion of the authority which closed it. Many cases have been sleeping for years only to be reopened many years later in another political climate.

- There is no regulation in the European Convention on Human Rights directly applicable to this situation. Article 4 of Protocol 7 to the European Convention on Human Rights expresses the fundamental rule of law principle “Ne bis in idem” for the reopening of a case, but is only directly applicable in situations where there has been a final sentence or a final acquittal in a court following a trial. According to the Protocol that may be done on the condition that there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. The Protocol of the Convention expresses a general principle in the rule of law but does not apply directly to the situation when a decision to close an investigation was taken by the Prosecution during the investigation<sup>10</sup> or by a court before the start of the trial.
- It must however follow from the general principles of the rule of law, including also Article 5 on the “Right to Security” of the European Convention on Human Rights<sup>11</sup>, that the reopening of a case, like any other prosecution, must be driven by a legitimate purpose and not be part of a political, selective procedure. If that is not the case it is a violation of Article 18 of the Convention<sup>12</sup>. It also raises fair trial issues under Article 6 of the Convention for denial of legal certainty to a person if a criminal case, which has earlier been closed by a competent authority, at any time can be reinstated without sufficient reasons.

The statement of the Supreme Court of 11.11.2005 that “*These decisions de facto recognized that mentioned criminal cases against Yulia Tymoshenko and others were opened without grounds for that*” calls for a very convincing explanation on the legal

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The judge directs to submit him/her records of the case and, if appropriate, hears complainant’s explanations.

The judge informs prosecutor and the complainant on the time when the challenge will be considered, prosecutor and the complainant being allowed to participate in the consideration of the challenge and present their arguments. Record of court session is kept during consideration of the challenge.

Having considered the challenge, the judge, depending on whether the case was dismissed in compliance with provisions of Articles 213 and 214 of the present Code or not, makes one of the following decisions:

- 1) dismisses the challenge;
- 2) reverses decision to dismiss the case and returns the case to prosecutor for renewing investigation or inquiry.

When reversing decision to dismiss the case and referring the case to prosecutor for renewing investigation or inquiry, the judge points out what circumstances should be ascertained in the course of pre-trial investigation.

Prosecutor, complainant may challenge judge’s decision before Court of Appeals within seven days from the date of judge’s decision.

A copy of judge’s decision is forwarded to the person who took decision to dismiss the case, complainant, and prosecutor who denied renewing pre-trial investigation or inquiry.

<sup>10</sup> (*Smirnova and Smirnova vs. Russia, decision of 3.10.2001*)

<sup>11</sup> “Everyone has the right to liberty and security of person.”

<sup>12</sup> “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

grounds to reopen old cases against an inconvenient political opponent. The explanation that *“decision to close the cases ... were taken illegally and that the mentioned motivations is not in correspondence with the materials of the criminal case and contradicts the gathered evidence in the cases”* as stated by the PGO is not sufficient.

- The argumentation on the statute of limitations mentioned above also apply to the reopened cases, which as far as is known were committed in the period 1995-97 and therefore must be time-barred in 2005-07 and can not be renewed by acts committed in 2009. They must therefore be considered obsolete.

#### 4. Other pending investigations

- The Kyoto case and The Ambulance case described in “Legal Monitoring in Ukraine, Preliminary Report II”<sup>13</sup> are still under investigation. The files in these cases are being studied by the defence lawyers, which have been criticised by the PGO for working too slowly. Although no decision to prosecute has been taken and no indictment made Mr. Kuzmin in the above mentioned TV show of 4.11.2011 explained that the cases after the examination by the defence counsels would be submitted to court for consideration, and he expressed the hope that they would get a verdict on these cases too. This statement again justifies the doubt on the objectivity of the Prosecution.

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<sup>13</sup> <http://www.helsinki-komiteen.dk/>