



Fact Findings: Kyoto/Opel

Background: Former Prime Minister Yulia Tymoshenko has been charged in the Ukraine with abuse of power and improper use of budgetary funds related to the handling of revenues received in 2009 from the exchange of carbon emission credits under the Kyoto Protocol. *These charges are referred to below as the “Kyoto charges.”*

Tymoshenko has also been charged with abuse of power related to Ukraine’s purchase of 1000 Opel Combo vehicles and other medical equipment under a contract with Austrian company Vamed Engineering GmbH & Co KG. *These charges are referred to below as the “Opel Combo charges.”*

Covington & Burling LLP and BDO USA have been asked by Yulia Tymoshenko and the Batkivschina Party to examine the validity of the charges brought against her as well as the validity of a report, funded by the Government of Ukraine, conducted by the American law firms Trout Cacheris and Akin Gump. Their report was presented on October 14, 2010 and served as the basis for the subsequent charges against Tymoshenko on February 21, 2011.

Overview of Facts:

- The Government of Ukraine’s American lawyers claim to have facts to support the allegations they made in their October 14, 2010, report. But, we have yet to be given access to supporting evidence. Aside from a handful of inconclusive documents, the government’s American lawyers have refused to provide materials that they used to write their report about Tymoshenko. This directly contradicts their

public offer “to study the documentary evidence to test the validity of [their] conclusions, professional opinions and the investigation as a whole.” *It raises the question of the validity of their report if there is no supporting documentation to substantiate the charges.*

- In addition, the Ukrainian government has not responded to our request for these materials.

Impact of Lack of Transparency: This lack of transparency does not allow us to reach the principal conclusions set forth by the Government of Ukraine and its American lawyers with respect to the Kyoto and Opel Combo sections of the October 14, 2010 report and the corresponding charges that Covington & Burling and BDO USA are examining.

The publicly available documents do not allow us or anyone else to ferret out the truth or gain a full understanding of the investigation by the Government of Ukraine and its American lawyers. They do not allow anyone to understand the facts involved or test the validity of their conclusions, professional opinions, or investigation as a whole.

Finding: *Unless this supporting evidence is provided, the Kyoto and Opel Combo Sections of the October 14, 2010 report are not worth the paper they are printed on.*

Main Findings of Interim Report--Kyoto Charges:

What we have been able to independently uncover is striking enough to justify this interim report and to demand that the Government of Ukraine make available the documentation to support its prosecution of Tymoshenko. *At present, the allegations against the former prime minister appear to be political in nature because there does not appear to be facts to substantiate the charges.*

With respect to the Kyoto charges, we are able to state the following:

- First, in 2009, the National Environmental Investment Agency (NEIA) of Ukraine entered into four (4) agreements with various Japanese companies and one (1) agreement with Spain's Ministry of Environment for the exchange of carbon emission credits under Article 17 of the Kyoto Protocol. Under the Agreements, Ukraine received approximately €320 million in 2009 and €150 million in 2010 for a total of €470 million in exchange for 47 million carbon emission credits. *The proceeds Ukraine received under these Agreements are referred to below as "Kyoto Revenues."*
- The €320 million of Kyoto Revenues received in 2009 was the equivalent of UAH 3,300,528,843.52 in Ukraine's local currency, the Hryvnia. This amount was recorded as the 2009 balance of Ukraine's special fund account designated for use by the NEIA (under the Ministry of Environmental Protection) for implementing the environmental projects required by the Kyoto Agreements. *This special fund account is referred to below as the "Kyoto Special Purpose Account."*
- The documentation we have been able to review makes clear that the Kyoto Special Purpose Account balance of approximately UAH 3.3 billion as of the date of receipt remained constant throughout the period at issue, with none of the Kyoto Revenues expended in 2009. *Because this account balance remained the same as on the date of receipt, any allegation that Prime Minister Tymoshenko "used" these funds contrary to their target purpose is patently untrue.*
- Of course, like cash that Ukraine receives from any revenue source, whether taxes or other levies, the State Treasury managed the cash received from the Kyoto Revenues within its vested powers and according to the needs of the moment. Just as it usually would be, some of the money was first converted into Ukraine's local currency. Although this resulted in a small commission fee, Ukraine did not

suffer any state loss as a result given that the fee was simply paid from one state agency to another and the National Bank returned more than this amount in profits to the state budget in 2009.

- Ukraine's State Treasury operates in a manner similar to the way banks operate. As depositors make deposits into their savings and checking accounts, the bank records an obligation to each depositor. The cash itself may be commingled with the cash of other depositors but the bank's obligation to each depositor remains intact until the depositor decides to use the funds available to it. The bank on the other hand takes the cash and uses the cash to make loans or investments with the understanding that the depositor could require the funds at any time. Through the use of asset and liability management techniques, a bank, like a state treasury, retains sufficient cash on hand or borrowing facilities available to meet its commitments to depositors. This is not only the way banks work, it is also the way countries' manage their finances, including Ukraine.
- In this context, cash is fungible and controlled by the Treasury. Thus, the movement of cash is not informative. Rather, what is significant are the books and records of the Treasury, which establish that from the date of receipt, the Kyoto Revenues were required to be used to fund greening measures. *Because this restricted use was properly accounted for, the movement of cash did not affect the Kyoto Special Purpose Account balance.*
- The first expenditure of Kyoto Revenues did not occur until December 2010 (**after former Prime Minister Tymoshenko left office**) in the amount of UAH 117,382,696.50. According to government documentation, it is clear that this amount was spent and that no other prior withdrawals to pay any state expenses were made. *Thus, as of December 29, 2010, the balance of the Kyoto Special Purpose Account essentially consisted of the original amount less this expenditure in 2010.*

- Consistent with our findings, the Government of Ukraine has been assuring Japan since May 2010 that all Kyoto Revenues were fully accounted for. *A June 2010 Government commissioned report by a large Ukrainian accounting firm also did not find any concerns with how the Kyoto Revenues had been handled.*
- Japanese officials are apparently content with how the Kyoto Revenues were used and transferred and have confirmed that the country has no objection to purchasing carbon emission credits from Ukraine in the future as a result of the handling of these revenues under the Tymoshenko Government. Had any of the Japanese companies or Spain's Ministry of Environment considered Ukraine in breach of any obligation under the Kyoto Agreements, the Parties could have sent a notice of default to Ukraine and terminated the Agreement pursuant to the enforcement provisions therein.
- Instead, the New Energy and Industrial Technology Development Organization (NEDO) of Japan paid an additional €150 million to Ukraine for the exchange of carbon emission credits in 2010, with Spain's Ministry of Environment paying an additional €108. *These amounts were transferred to Ukraine following a reported investigation by the Japanese into the allegations of misuse by the Yanukovych Government, which is strong evidence that the Kyoto Revenues were handled in a manner consistent with the Parties understanding of the terms of the Kyoto Agreements and the Kyoto Protocol itself.*

Conclusion: The charges by Ukraine's Prosecutor General and the claims made in the report either ignore or do not adequately address the facts outlined above. They follow the cash. They do not look at or address the accounting records. They make conclusions that are not supported by the facts.

Main Findings of Interim Report--Opel Combo Charges:

- With respect to the Opel Combo charges, there is no dispute that in early 2009, Ukraine’s Ministry of Health determined that the country’s regional health departments were in “urgent need” of specialized vehicles. The Ministry of Health found that the health of Ukraine’s rural population at that time was “significantly worse than that of urban people,” with rural health care service providers lacking “instruments required for performing the simplest diagnostic and treatment procedures,” such as ultrasound machines and infant incubators.
- To address this urgent need, state-owned enterprise Ukrmedpostach entered into a contract with Vamed for the provision of medical equipment, including 1,000 Opel Combo vehicles. The hope was that “[f]itting out primary medical and sanitary care institutions with modern medical equipment and means of transport [would] make it possible to render expert medical care and qualified emergency care to patients residing in [Ukraine’s] distant and hard-to-reach areas.”
- **The limited set of documents we have reviewed make clear that the Vamed contract was a direct commercial contract between Vamed and Ukrmedpostach, in which no other intermediaries were involved.**
- The financing arrangements for the first phase of the Vamed contract, including its reliance on guarantees and servicing from Ukrainian and Austrian governmental entities, follow well-established international practices for supporting a major export transaction.
- To finance the bulk of the Vamed contract, an Austrian private bank, Unicredit, furnished a €85 million loan to a Ukraine governmental entity, Ukrmedpostach, at an annual interest rate of 5.5%.
- This loan was guaranteed by the Ukraine Government acting through its Cabinet of Ministers and Ministry of Finance. This guarantee is expressly referenced in the financing agreement.

- In addition, the Austrian government operates through its official Export Credit Agency, OeKB, a program for financing Austrian value added exports, such as the Opel Combo vehicles sold to Ukraine. As mentioned in the Financing Agreement, OeKB furnished two types of coverage to Unicredit on behalf of Austria.
- Again, as typical in emerging markets, the Ukrainian Export-Import Bank, Ukreximbank, provided banking, foreign exchange, and other related services for the loan. Since Ukreximbank is a Ukrainian state entity, Ukraine is essentially paying itself the commission fees associated with the loan servicing.
- As noted by the Government of Ukraine’s American lawyers, Vamed initially offered to sell Opel Combos at €16,039 per vehicle. After further negotiation, Ukraine ultimately purchased a different model of Opel Combo vehicles at €12,500 per vehicle.
- Based on government documentation that we have reviewed, the price paid for the Opel Combo vehicles was at or below market price, with a Ukrainian Ministry of Economics Review specifically opining that the per vehicle manufacturer’s price for the Opel Combo vehicles ranged between €16,000 - €18,000. Our own research confirms that the price Ukraine paid for the Opel Combo vehicles appears to be no worse than market price.
- Even the Government of Ukraine’s American lawyers could not find that the Vamed contract involved any *quid pro quo* or other personal benefits to those negotiating it, including former Prime Minister Yulia Tymoshenko.
- On June 9, 2011, the European Parliament expressed concern regarding the “increase in selective prosecution of figures from the political opposition in Ukraine, . . . particularly in the case of Ms. Tymoshenko,” and stressed “the importance of ensuring the utmost transparency in investigations, prosecutions and trials,” warning “against any use of criminal law as a tool to achieve political ends.”

Our review of the facts thus far fully justifies the European Parliament's concerns.

Conclusion: The facts we have found appear to be a complete defense of the charges in the Ukraine or in another international forum if a fair trial cannot be had there.

Once our investigation is complete, we understand that our findings will be published on the official website of Yulia Tymoshenko and circulated by her and/or her party to governmental entities in the European Union and other countries, and international organizations.