

How has the Business Ombudsman Council Helped Real Estate and Construction Companies?



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The construction and real estate sector is consistently among the TOP-5 industries, which most often turn to the Business Ombudsman Council (BOC) for support. During the five years of its operation, the BOC has received 654 complaints of malpractice by state bodies from real estate and construction companies and closed 426 cases. Of these, more than half (59%) were closed successfully in favor of businesses.

The BOC helped the industry to return and save almost UAH 475 million. In particular, this amount consists of unjustified tax charges that were cancelled, refunded VAT and registered tax invoices. At the same time, the institution did not receive a penny from business, as its services are free of charge for entrepreneurs.

Despite the fact that a lot has been done, we feel that we can help even more. Therefore, in this post we would like to focus on the most common subjects of complaints, provide examples of resolved cases and encourage entrepreneurs to address the BOC in similar situations.

WHAT ISSUES WERE ADDRESSED TO THE BOC BY REAL ESTATE AND CONSTRUCTION COMPANIES?

More than half (53%) of complaints were tax-related – companies disagreed

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with the results of tax inspections, were unable to receive a VAT refund or encountered suspension of tax invoices. Almost one in every five (19%) appeals concerned actions and/or inaction of law enforcement bodies (procedural abuses, inactivity and ungrounded criminal proceedings). Actions of local government authorities (allocation of land plots, issuance of permits and licenses) and actions of state regulators (in particular, the State Architectural and Construction Inspectorate (SACI), State Service for Geodesy, Cartography and Cadastre) created problems for busi-

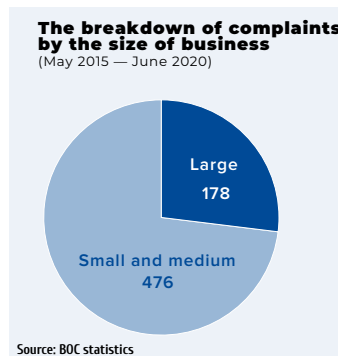
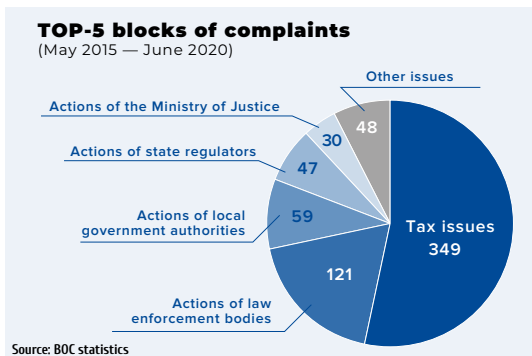
ness in 9% and 7% of cases, respectively. Complaints regarding the actions of the Ministry of Justice, including cases of raiding, accounted for 5% of appeals.

EXAMPLES OF SOLVED CASES

BIIR Property finally becomes the legal owner of purchased real estate

A subsidiary of a Danish engineering company faced difficulties in becoming the legal owner of a recently acquired office with an area of almost 2,000 m² and worth more than UAH 9 million due to an active criminal proceeding.

It appeared that soon after its acquisition through the ProZorro bidding system, 1/10 of the building was arrested by a court on the basis of an individual citizen's appeal and the respective criminal proceeding opened under the article of "fraud". The arrest was lifted a month later, but the criminal proceeding was not closed. The BOC requested in writing that the Prosecutor's Office of Odesa Region and the Main Directorate of the National Police in Odesa Region verify the legal grounds of the pre-trial investigation. In particular, the investigator emphasized that it was important to meet time-limits for examining the lawyer's request regarding the investigation. The Council introduced the company's case to a meeting of an expert



The geography of appeals (May 2015 — June 2020)



group formed on the basis of the Memorandum of Cooperation between the BOC and the Prosecutor General's Office.

In February 2020, the Odessa Region Prosecutor's Office instructed the state law enforcement officer to intensify the pre-trial investigation. This secured the expected desired result, and at the end of March 2020 the criminal proceeding was closed.

Unsuccessful raiding attempt by minority shareholders

The state registrar of a utility company, at the initiative of minority investors of a development company, changed the Head of the company and certified a new charter of the enterprise. The authorized capital of the company was increased in such a way that the shareholding held by minority shareholders increased from 8% to 84%. The fact that several criminal cases were at that time opened against new owners did not particularly bother the state registrar. Moreover, the Complainant stated that soon after respective changes were introduced to the Register about 100 people of burly sporting physique surrounded the perimeter of the residential complex where the developer's office was located. They took control of the checkpoints of the complex and blocked entrances to construction sites.

The next day, the BOC investigator was already studying the case documents. In the opinion of the Council, the changes made regarding the Head of the company,

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its authorized capital and constituent documents could be illegal. The Council stated this in its letter to the Deputy Minister of Justice of Ukraine for State Registration. The Complainant's questions were submitted to the meeting of the expert group established on the basis of the Memorandum of Partnership and Cooperation between the BOC and the Ministry of Justice.

The Ministry of Justice considered the complaint, taking into account all the circumstances and ordered the cancellation of the illegal registration actions mentioned above. Access to the State Register of Real Property Rights was blocked for the "black registrar".

With Council's help SACI approves commissioning of supermarket

The Business Ombudsman Council received a complaint from a developer, a

contractor and a customer of a supermarket construction in Kyiv Region. The SACI did not allow developers to commission an already made object and declared all already approved documents invalid. The Architectural Service became interested in the facility after an NGO complained about the developers. In the view of activists, the developer violated the urban planning legislation during construction, in particular, may not have had the due permits (as it turned out later, this was not true). Therefore, during the year SACI tried several times to conduct an unscheduled inspection of the facility, issued a series of orders to companies, fined them and eventually canceled registration of the notice of construction commencement. The Complainant insisted that he SACI's orders and decisions were illegal and the actions of civil servants were unlawful.

The Council's investigators started working on such a controversial case. Having examined the circumstances of the case and the positions of the parties, the Council upheld the company. In particular, investigators found that the activists' appeal had no nitty-gritty, except for suspicion that the developer might not have permits. The law provides for such situations and prohibits initiation of unscheduled inspections based on anonymous or other clearly unreasonable inquiries. However, the supervisory authorities are usually afraid of being accused of lack of attention to activists' complaints and proceed from the logic: "it's better to double check" without taking into account how much inconvenience an inspection will cause to a business.

The Deputy Business Ombudsman and the Council's investigator met with the SACI top management and held comprehensive discussions as to complaints from the developer, the contractor and the construction customer. The SACI decided to assist the company and, despite certain disputed issues on the object, which would be resolved in court, promised not to interfere with its commissioning. Developers re-submitted the notice of commencement of construction works, and a declaration of commissioning of the completed facility afterwards. The documents were successfully approved and the supermarket was commissioned into operation. The complainants thanked the Council for its assistance in resolving the case.

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