

FREQUENTLY ASKED QUESTIONS

ON THE LAW “ON THE BUSINESS OMBUDSMAN INSTITUTION IN UKRAINE”

1. Does the Verkhovna Rada have a constitutional power to adopt the Law on the Business Ombudsman Institution?

In accordance with the Constitution of Ukraine law adoption is one the powers of the Verkhovna Rada of Ukraine. The Constitution in no way restricts the range of issues on which the Verkhovna Rada adopts and does not adopt laws.

Taking into account that the establishment of the Business Ombudsman Institution aims at practical implementation of constitutional guarantees given to business entities in Ukraine, Koretsky Institute of State and Law specifies that the Law of Ukraine “On the Business Ombudsman Institution in Ukraine” (including the case of the law adoption with a registration number No.3607 dated June 5, 2020) shall be, firstly, considered as an additional guarantee of the constitutional law for conducting business activity; secondly, as an innovative and additional mechanism being alternative to existing forms of law-enforcement for protection of property and business rights, efficiency of which was proved by law-enforcement expertise of many countries; and thirdly, as extra means recognized by the state at the highest level for protecting rights and freedoms from violations and illegal malpractice by state bodies.

Koretsky Institute of State and Law summarizes that the Verkhovna Rada is undoubtedly empowered with relevant constitutional rights to adopt the Draft Law “On the Business Ombudsman Council in Ukraine.”

2. Does the Business Ombudsman duplicate the supervisory functions of other bodies?

Supervisory bodies take decisions and issue decrees, they can impose sanctions in case of non-enforcement of such decisions. At the same time, the Institution operates on advisory basis and aims at ceasing malpractice of state bodies.

Koretsky Institute of State and Law explains: “The Draft Law on the Business Ombudsman Institution in Ukraine” does not provide for the Business Ombudsman Institution with supervisory functions of public authorities that pertain to traditional state bodies in Ukraine. Apart from that, the concept of the Draft Law “On the Business Ombudsman Institution in Ukraine” does not contradict the rules of law-making practice.

3. Is it true that the Business Ombudsman whose office is funded by foreign donors is lobbying interests of foreign business in Ukraine?

The Business Ombudsman Council is funded through a multi-donor account set up at the European Bank for Reconstruction and Development in 2014. The donor countries include the European Union, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Sweden, Switzerland Great Britain, the USA. In addition to the Ukrainian government and business associations, the BOC's Supervisory Board includes EBRD and OECD international financial institutions but the BOC does not aim to lobby interests of foreign investors.

The mission of the institution is to help businesses operating in Ukraine, protect their rights against government agencies' malpractice. It will be more correct to say that **the Business Ombudsman is a lobbyist for the rule of law and the Verkhovna Rada adopting laws in Ukraine.**

Over the years, BOC has received over 8,000 appeals, 72% of which came from small and medium-sized businesses. The majority of complainants (84%) are Ukrainian companies, only 16% – companies with foreign investment.

The BOC's team consists of 20 qualified Ukrainian lawyers who review business appeals and monitor proper implementation of Ukrainian legislation by government agencies.

4. Why do we need a law on the Business Ombudsman Institution in Ukraine?

At the end of 2014, it was decided to establish the BOC – an institution aimed at combating illegal actions of government agencies and improving business climate in Ukraine. For 5 years the BOC worked as a consultative and advisory body to the Cabinet of Ministers of Ukraine. There was also cooperation with bodies not subordinated to the Cabinet of Ministers (Prosecutor General's Office, SSS, local authorities), however, exclusively on a voluntary basis of government agencies themselves. The law will make such cooperation mandatory.

The law will guarantee the stability of the Business Ombudsman's Office in contrast to the Resolution of the Cabinet of Ministers, which, by and large, can be canceled any time. The adoption of the law on the Business Ombudsman Institution in Ukraine is a positive signal for Ukrainian and foreign investors, which proves that Ukraine uses all available mechanisms to protect interests of business against illegal actions of state bodies.

To conduct investigations effectively investigators often need access to official and confidential information. Currently, in order to obtain the necessary information, investigators refer to the law on access to public information. But public information is statistics, examination results, letters and orders - all that already exists, while investigators need answers to inquiries, explanations and motivation of government agencies regarding decisions made described in business complaints. The law will oblige civil servants to provide such information and establish liability for its late and incomplete provision. On the other hand, the law provides for the obligation of investigators to protect official and confidential information, as well as civil servants.

The BOC prepares system reports – analysis of systemic business problems with recommendations to government agencies on how to solve them. However, currently the Business Ombudsman is significantly limited in their presentation. The law provides an opportunity to bring systemic recommendations to the level of the Verkhovna Rada Committees and the Cabinet of Ministers meetings in accordance with regulations of these institutions. This improves the review quality and the possibility of implementing the BOC's systemic recommendations.

5. How does ombudsman access restricted information in other states?

The experience of ombudsman institution legal regulation in foreign countries confirms that the ombudsman is guaranteed access to any documents and information (including with restricted access) to ensure the possibility for the complaint to be properly considered. At the same time, when obtaining such information, the legislation of a number of European states binds the ombudsman institution to ensure its protection and non-disclosure. In particular, such an obligation is contained in the national legislation of Sweden, Portugal, Romania, Croatia, Armenia, Georgia, Poland, Norway, Serbia, Malta, Bosnia and Herzegovina, etc.

Taking best international practices into account, the current Draft Law also contains the right of the Business Ombudsman Institution and its employees to access data containing confidential and official information. The respective right corresponds to the institution's obligation enshrined by the Draft Law to ensure compliance with such information protection.

Thus, the Business Ombudsman's Office employees, as well as civil servants, in case of violation of legislation on information, may be subject to disciplinary, civil, administrative or criminal liability in accordance with current legislation of Ukraine.

[The Venice Principles](#) on Protection for the Promotion of Ombudsman Institutions, approved by the Council of Europe, define the Ombudsman's right to unrestricted access to all relevant documents, databases and materials, including those that might otherwise be legally inaccessible or confidential (Principle 16).

6. Does the law provide for any strain on the Ukrainian budget?

Today, the Business Ombudsman Council is fully funded by international donors. About half of the funds are provided by the EU, the rest - by 13 countries: Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Sweden, Switzerland, Great Britain, the USA.

The law provides for the possibility of attracting other legal sources of funding, including the state budget. However, the law stipulates that all contributions are voluntary and must be agreed with the Supervisory Board (para. 15 of the Draft Law). Supervisory Board Members will also be able to participate in financing with their consent.

In 2019, the institution's budget was about 1.9 mn US dollars. It is worth noting that this budget takes into account all operating costs, office rent payment, expenses related to its maintenance, insurance, business trip and team salaries: one foreigner and 30 employees, including 20 highly-qualified Ukrainian lawyers.

7. Why is the institution headed by a foreigner?

It is true that the first Business Ombudsman of Ukraine was a Lithuanian Algirdas Šemeta, a former European Commissioner for taxation, combating fraud, and financial planning. The second was a Pole Marcin Świącicki, a former mayor of Warsaw, a member of the Sejm and minister of the first democratic government of Poland. In fairness, they were the only foreigners in the BOC: their deputies and everyone else were Ukrainians. **However, the law does not require a foreigner to be a Business Ombudsman.**

The law stipulates that the Business Ombudsman is elected based on open competition results. The Decision on who will be the Business Ombudsman is unanimously made by the BOC Supervisory Board. The Ukrainian government has a third of votes in the Board.

Prohibiting foreigners from participating in the competition for a position in a non-governmental institution that does not issue orders, but only issues recommendations and is funded by international donors would be discriminatory.

A foreigner as a business ombudsman strengthens trust of Ukrainian business and international donors in the institution and guarantees its independence from political interests and economic groups. The five-year experience of the Business Ombudsman Council shows an optimal balance in the BOC composition – one foreigner and two Ukrainians. It would be illogical to change the structure, which has proved its effectiveness, and would lead to imbalance.

8. Are there examples of Business Ombudsman Institutions in other countries?

Ombudsman Institute was established due to a need to protect human rights, however later specialized ombudsmen institutes began to develop worldwide in order to observe adherence to the rule of law in different spheres (children's ombudsman, consumer ombudsman, tax ombudsman, patient ombudsman). In XX century ombudsmen protecting entrepreneurs' rights appeared in New Zealand, Australia and the U.S. There is a separate SME ombudsman in Poland. Following the model of the Business Ombudsman Council in Ukraine the similar institutions were established in Kyrgyzstan, Uzbekistan and Georgia.

In this context, Koretsky Institute of State and Law emphasizes that despite discrepancies in title (tax ombudsmen (Georgia, Pakistan), procurement ombudsmen (Canada), business ombudsmen with a wide range of responsibilities in different areas (the U.S., Russia, Australia etc.), they share a common goal that to control adherence to the rule of law in respect to rights and interests of business community representatives.

Ukraine needs operation of a separate institute of the Business Ombudsman as:

- The Business Ombudsman Council already has a positive five-year experience in the country. In particular, Ukrainian business has shown a high level of trust in the BOC.
- The business climate in Ukraine is still not favorable enough for investment. The functioning of such an institution is important for the protection of legitimate business interests against corruption and malpractice of state bodies.
- The Ministry of Foreign Affairs of Ukraine through its missions in other countries highlights the BOC as tool to protect business interests, which helps to attract foreign investment.
- BOC's activities give a green light for further cooperation with international donors, such as the EBRD, EU countries, the United States and others.

9. Is it true that the law provides for immunity of the Ombudsman and his/her Deputies?

The previous Draft Law considered by the Verkhovna Rada of the VIII convocation, contained the following provision. The current Draft Law does not provide immunity, but leaves a special procedure for bringing the Business Ombudsman and his/her Deputies to liability.

According to the Constitution of Ukraine, charges may be brought by the prosecutor in charge of the case. There are about 11,000 prosecutors in Ukraine. If a Business Ombudsman suddenly investigates a case dealing with a criminal scheme involving a prosecutor, the prosecutor may try to influence the Business Ombudsman and his/her Deputies by bringing charges against them. Therefore, in case of a Business Ombudsman and his/her Deputies another requirement must be met - a suspicion notice must be made by the Prosecutor General. A Similar procedure is already in place, it is applied to other positions: deputies of the Verkhovna Rada and local councils, the Chairman of the NACP and the Verkhovna Rada Commissioner for Human Rights.

It should be noted that this approach is completely in line with the Constitution.

It should be noted that since its establishment, the Council has received about 350 complaints about decisions, actions and omission of the Prosecutor's Office. So, it is important that the ordinary prosecutor could not hinder the work of the Office as soon as he or she so desires, by initiating, a search for example.

In our opinion, entrenchment of a special procedure for bringing the Business Ombudsman and his/her Deputies to liability, and particularly suspicion notice by the Prosecutor General of Ukraine or the Deputy Prosecutor General – the Head of the Specialized Anti-Corruption Prosecutor's Office is quite justified. By the way, this approach is currently preserved for the people's deputies of Ukraine, the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, the Head of the National Agency for Corruption Prevention and his/her Deputy and other officials. However, detention, arrest, any form of search or inspection of the Business Ombudsman and his/her Deputies may not take place without the consent of the Prosecutor General. If all prosecutors were given the respective powers, this could lead to unreasonable obstacles to the Business Ombudsman Institution activities.

10. How are Ombudsmen held liable in other countries?

In many countries around the world, the ombudsman enjoys immunity. The national legislation of many states provides for a special procedure for bringing the Ombudsman and his/her Deputies to liability, as well as lifting the immunity of the persons concerned. In particular, the Venice Commission (consultative body of the Council of Europe) in its own compilation of conclusions on the establishment of the Ombudsman confirmed that such an approach is quite well-founded and provides the best guarantees for the independence of the body and its perception in society.

Bringing to criminal liability or imposition of administrative penalties on the Ombudsman and/or his/her Deputies requires the consent of:

- Parliament – in the Czech Republic, Serbia, Armenia, Portugal, Albania, Slovenia; Poland, Georgia and Latvia (at the request of Prosecutor General); Estonia (at the request of the President);
- Two chambers of Parliament – in Bosnia and Herzegovina, Romania;
- Constitutional Committee – in Sweden
- President – in Uzbekistan (at the request of the Prosecutor General).

In some European countries, the Ombudsman also enjoys immunity. For example, the legislation of Hungary and Croatia envisages that the Ombudsman and his/her Deputies enjoy the same immunity as Members of Parliament. In Albania, the People's Advocate enjoys the same immunity as a judge of the Supreme Court.

Usually, it is Prosecutor General who submits the request for consent to bring the Ombudsman to liability. It should be emphasized that the **current Draft Law, unlike the relevant laws of several leading European countries, does not contain immunity guarantees for the Ombudsman and his/her Deputies.**

Instead, the proposed Draft Law stipulates a special procedure for bringing the Business Ombudsman and his/her Deputies to criminal liability or imposition of administrative penalties - with the consent of the Prosecutor General of Ukraine. Such provisions fully comply with the content of the Constitution, as, according to Article 131-1, the Prosecutor's Office, in particular, shall carry out organization and procedural management of the pre-trial investigation, supervision of covert and other investigative and search actions of law enforcement bodies

11. How does the law make institution independent from individual political and economic interests?

The law sets strict requirements for the Business Ombudsman and his/her Deputies. One cannot elect 1) persons with political or economic interests in Ukraine; 2) persons declared incompetent by a court having a criminal record; 3) persons who are or have been civil servants in Ukraine for the last three years or have held positions in Ukraine in public, local self-government authorities, or legal entities belonging to state or local self-government bodies management sphere for these positions.

Accordingly, a foreigner holding the position enhances this guarantee. This is important for both Ukrainian and foreign investors.

The Supervisory Board approves quarterly and annual reports of the institution, appoints and dismisses the Business Ombudsman and his/her Deputies, carries out general supervision over activities. However, the Supervisory Board has no right to influence both individual and systemic BOC's recommendations.

The BOC Supervisory Board does not receive any remuneration for its work.

The law provides for criminal prosecution for illegal influence on the Business Ombudsman and his/her Deputies aimed at preventing them from performing their official duties. A similar procedure is provided in the current legislation for a number of other positions.

Thus, criminal liability is stipulated for influencing in any form a law enforcement officer, forensic expert, State Enforcement Service employee, or a Private Enforcement officer, as well as a close relative of the State or a Private Enforcement officer to prevent him/her from performing his/her official duties, carrying out forensic activities or to have an illegal decision taken.

Criminal liability is also provided for illegal influence in order to prevent them from performing their official duties or to make illegal decisions on the President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, the People's Deputy of Ukraine, the Prime Minister, the Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, the Chairman of the Constitutional Court of Ukraine, a judge of the Constitutional Court of Ukraine, the Chairman or a member of the High Judicial Council, the Chairman or a member of the High Judicial Qualifications Commission of Ukraine, the Commissioner of the Verkhovna Rada of Ukraine for Human Rights or his representative and other positions.


12. What is the Business Ombudsman advantage over other business protection institutions?

BOC services for business are free, that is especially important for small and medium enterprises, which cannot afford lawyer and law firm services.

The procedure for applying to the BOC is very simple, especially compared to going to court. Complaints are considered fairly quickly: a complaint is preliminary assessed for compliance with the BOC eligibility criteria up to 10 days, and the investigation itself lasts for up to 90 days. In exceptional cases, the Business Ombudsman may extend these deadlines.

On the other hand, the BOC is a non-profit public organization having “soft power” only. It issues reasoned recommendations, but cannot force government agencies to comply with them. The law requires civil servants to provide a reasoned response and explain why certain recommendations are not followed. The institution does not interfere in the work of courts, but can help entrepreneurs convince the state body to enforce a court decision that has already entered into force.

Over 5 years of its operations in Ukraine the BOC succeeded in building a high reputation in the market. The partners note the independence of the institution, a deep level of professionalism and legal expertise of its employees. Public authorities take its recommendations into account, while complainants appreciate its assistance – 97% of business representatives who filled out the feedback request form were satisfied with working with the BOC.



You can submit a complaint to the Business Ombudsman Council:



Via the website: boi.org.ua



By email: info@boi.org.ua



Personally in the office: Podil Plaza
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30A Spaska Str., Kyiv.