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Business Ombudsman as an Institution for Improving Compliance with the Rule of Law Principles

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Abstract

The relevance of the chosen subject is conditioned upon the fact that law enforcement officers, upon exercising their powers, abuse the rights and obligations granted to them, violating the legal rights of business representatives. In other words, this refers to the arbitrariness of law enforcement agencies regarding business entities, which is incompatible with the rule of law principles. The purpose of this study is to summarise the current state of activity of the institution of business ombudsman and areas for its improvement, which will contribute to improving compliance with the rule of law principles. The system-structural method, systemic and dialectical methods, the method of critical analysis, analytical, formal-legal methods, as well as the method of documentary analysis and the Aristotelian method allowed achieving this purpose. The paper addresses the issue of violation of the rights of business representatives by law enforcement officers, which poses a threat to the rule of law principles. The authors identified the reasons for the introduction of rule of law. Conventional tools for protecting businesses from the arbitrariness of law enforcement agencies are highlighted. The study also noted the role of the Business Ombudsman Council as an effective tool in ensuring and implementing the rule of law regarding the business environment representatives. Attention is focused on the prospects for the development of ombudsmen who contribute to the protection of entrepreneurs' rights. It is concluded that it is necessary to expand the powers of the business ombudsman due to the recognition of the latter as a participant in criminal proceedings. The practical value of this study is that the proposals set out herein are aimed at improving the activities of the institution of business ombudsman in Ukraine, which would contribute to improving compliance with the rule of law principles

Keywords: human rights, business representatives, Business Ombudsman Council, arbitrariness of law enforcement agencies

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Introduction

Ensuring the rule of law is the basis of law and order in Ukraine, and its real existence is determined by the state of respect for human rights and freedoms in the exercise of power by law enforcement and judicial bodies. However, the analysis of statistical information and reports on the activities of law enforcement agencies, namely the report of the Business Ombudsman Council [1], indicates that it is law enforcement officers who, in the exercise of their powers, most abuse the rights and obligations granted to them, violating the legal rights of business entities and thereby undermining the authority of law enforcement agencies and effectively negating the results of the law enforcement and judicial system reforms. In particular, this refers to the arbitrariness of law enforcement officers regarding small, medium-sized, and large businesses, which is incompatible with the concept of the rule of law. For example, in 2018, out of 1,688 registered criminal offences under Article 212 of the Criminal Code of Ukraine¹, which covers tax evasion, only 39 cases were submitted to the court with an indictment, which in percentage terms does not exceed 2.4%, and in the first half of 2019, out of 653 registered criminal offences, only 71 criminal proceedings were filed to the court [2]. Evidently, most cases are openly groundless and constitute an attempt of law enforcement agencies to pressure businesses. Another example that indicates the arbitrariness of law enforcement officers concerns searches of business representatives with subsequent confiscation of property and consequential blocking of the entrepreneurs' work. Thus, in 2017, almost 120,000 searches were conducted, which is 1.3 times more than in 2016 [3]. At the same time, such searches could be performed either by the decision of the investigating judge, or without it. Despite the fact that these statistics are taken over the past years, the situation has hardly changed and indicates the arbitrariness of law enforcement officers regarding business, and, most importantly, the violation of the business representatives' rights, which jeopardises the rule of law.

After all, it is business representatives who provide employment and are among the largest taxpayers. At the same time, pressure on businesses forces the latter to engage in their activities in the shadows and look for ways to evade taxes. In turn, this generates an increase in the level of the shadow economy, which compromises the economic security of the state and affects all spheres of economic activity. In addition, the arbitrary actions of law enforcement officers lead to a decrease in the investment attractiveness of Ukraine and an increase in the level of corruption. Thus, according to BDO International Business Compass (IBC) for 2018, Ukraine ranks 131st in the investment attractiveness rating and 82nd in the Resource Utilisation Index

rating [4], and according to Transparency International in 2020, Ukraine ranked 117th out of 180 in terms of Corruption Perception [5]. Evidently, as long as the country does not reduce administrative pressure on business and corruption exists, the rule of law does not prevail, Ukraine will remain a country not only with a negative business image and an unfavourable investment climate in particular, but also with a low level of the economy in general.

Thus, at present, both in Ukraine and around the world, there is a problem of violation of the business representatives' rights and, accordingly, non-compliance with the principles of the rule of law. This indicates the need to find new ways to solve this problem, because the existence of arbitrariness on the part of law enforcement officers regarding business representatives poses a threat to the stability of public relations and acts as a gross violation of human rights. Hence, *the purpose of this paper* is to summarise the current state of activity of the institution of Business Ombudsman and areas for its improvement, which will contribute to improving compliance with the rule of law principles. To achieve this purpose, the following *tasks* must be solved: to establish the importance of introducing the rule of law; to identify conventional and alternative tools for protecting businesses from the arbitrariness of law enforcement agencies; to summarise foreign practices of the business ombudsman; to analyse the current state of the Business Ombudsman Council; to suggest ways to improve the institution of the Business Ombudsman.

Literature Review

Familiarisation with the content of recent publications and research demonstrates that the issue of the Business Ombudsman's activity as an institution for improving compliance with the principles of the rule of law is scientifically covered. In particular, I. Vyakina, based on the analysis of the survey results of managers of small, medium-sized, and large enterprises in 2016-2018, including business entities of various types of economic activity and legal forms, notes that business representatives do not feel safe in the current business conditions [6]. In the subjective perception of entrepreneurs, there is no reduction in the administrative burden on business. At the same time, inspectors remain focused on collecting fines, while inspections remain fiscal [6]. J. Saloranta emphasises that the creation of provisions on access to remedies, the definition of responsibility and the adoption of enforcement measures at the national level should be key features of any regulatory initiative to strengthen responsibility for the observance of human rights [7]. According to other researchers, from the

¹Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

standpoint of modern constitutional doctrine and trends in the development of constitutional law, as well as internal and external challenges in the field of human rights in Ukraine, the relevance and importance of the development and effective operation of specialised services for the protection of human rights, including specialised ombudsmen, and even business ombudsmen, is undoubted, and the legislative regulation of corresponding public relations and processes is a requirement of the time [8].

O. Batanov and T. Goloyadova note that in Ukraine, in connection with the reform of various spheres of life and the development of civil society institutions, the issue of modernising the constitutional legal mechanism for the protection of human rights is being updated [9]. Evidently, the introduction of the institution of the Ombudsman – the Verkhovna Rada Commissioner for Human Rights, is a significant way to ensure human rights [9]. M. Olenev notes that the creation of the institution of the Ombudsman as a state body is one of the momentous achievements of democratic transformation [10]. This is an essential mechanism for protecting human rights and strengthening the rule of law in the activities of state bodies and their officials [10]. Furthermore, the work of the Ombudsman is one of the ways to ensure human rights and an additional legal guarantee. A special feature of the Ombudsman is the almost complete absence of any “power” functions and compulsory powers, and their activities do not cancel or entail a review of the competence of state bodies [11]. I. Chistyakova and I. Krivdina note that the institution of a business ombudsman is a fairly new phenomenon in the system of protecting the rights of entrepreneurs in Ukraine, an additional mechanism for resolving disputes out of court [12]. At the same time, the analysis of the world practice of establishment of the institution of Business Ombudsman indicates the existence of various models that have the following common features: 1) lack of power in such institutions; 2) exercise of powers on the grounds of mediation based on the norms of Ukrainian administrative law. At the same time, the Business Ombudsman does not duplicate the powers of the judicial branch of government, anti-corruption and antimonopoly institutions, etc. [12].

Proceeding from the above, it can be concluded that the problem of human rights violations, and, for our part, non-compliance with the principles of the rule of law, is not new, and the latest scientific developments generally focus on the violation of the rights of entrepreneurs and the need to create and operate institutions to protect the rights of business representatives.

Materials and Methods

In the course of studying the activities of the business ombudsman as an institution for improving compliance with the rule of law principles, both general scientific and special methods of cognition were used. Thus, the

system-structural method was used to consider the recent publications covering the activities of the Business Ombudsman as an institution for improving compliance with the rule of law principles, and the results of the study were systematically presented. The systematic approach as a general scientific method allowed determining the reasons for the introduction of the rule of law in general. The dialectical method is used to determine the essence of the establishment and operation of the institution of business ombudsman. One of the main methods that allowed covering the role of the business ombudsman institution in protecting the rights of entrepreneurs from the arbitrariness of law enforcement agencies is the critical analysis method. The analytical method allowed considering the prospects for the development of ombudsmen who contribute to the protection of entrepreneurs' rights. The formal legal method allowed analysing the legal grounds of the Business Ombudsman Council's activities. At the same time, the method of documentary analysis was used to develop proposals and recommendations for improving the activities of the institution of business ombudsman in Ukraine. The Aristotelian method allowed formulating proposals for improving the activities of the institution of business ombudsman in Ukraine. In particular, it is proposed to expand the powers of the Business Ombudsman, recognising the latter as a participant in criminal proceedings, which would help meet the needs of representatives of small, medium-sized, and large businesses. The regulatory framework of this study included both Ukrainian and international regulations, as well as reports on the activities of corresponding institutions. Thus, the provisions of the Constitution of Ukraine were used to highlight the main aspects of the introduction of the rule of law.

The provisions of the Criminal Code of Ukraine were used to determine the nature of abuses by law enforcement agencies regarding small, medium-sized, and large businesses. In particular, it was found that most frequently law enforcement officers put pressure on entrepreneurs under the article concerning tax evasion. Familiarisation with attempts to introduce the institution of a business ombudsman legislatively served as the basis for referring to the relevant draft laws concerning the institution of a business ombudsman. The provisions of international regulations suggests that it is necessary to expand the capabilities of the Business Ombudsman Council. Analysis of the report of the Business Ombudsman Council allowed identifying the bodies whose actions are most often complained about by the business environment representatives. Furthermore, the authors of the study managed to identify key problems that Ukrainian enterprises face most frequently.

Results and Discussion

The introduction of the rule of law is conditioned by several aspects. Firstly, by expansion of the principle

of legality established for Ukrainian legal science by adapting fundamental legal factors – constitutional norms and principles of the Fundamental Law¹ and international standards of human rights and freedoms to its content. Secondly, the recognition, along with the definition of the law as the main form of law, of the need to use the potential of other sources of law. Thirdly, the special status of the judiciary as a professional and collegial arbitrator on legal issues, authorised to make final legal decisions primarily on the protection of human rights and freedoms [13]. At the same time, the violation of this principle by law enforcement officers regarding business entities forces the latter to look for various ways to solve this problem. At the same time, for most entrepreneurs in Ukraine, protecting interests and restoring violated rights is a rather inefficient process, because most complaints were refused based on illegal decisions of state bodies. After that, entrepreneurs had to resolve disputes in court, which is an incredibly expensive process due to the cost of such resources as money, time, mental strength, business downtime or losses caused by the trial [14].

Evidently, conventional tools for protecting businesses from the arbitrariness of law enforcement agencies are not always effective, so in Ukraine various institutions have been created and are currently working to support and protect the interests of business, including business associations and other public organisations, which mainly contribute to establishing communication with the heads of law enforcement agencies and drawing public attention to the situation with pressure on businesses. However, since 2014, the Business Ombudsman Council, established in accordance with Resolution of the Cabinet of Ministers No. 691², has become an essential and effective tool in ensuring and implementing the rule of law regarding the business environment representatives, whose activities are aimed at creating transparent working conditions for businesses, as well as combating corruption and illegal actions primarily on the part of state bodies. In general, this authority has been established as a permanent advisory body under

the Cabinet of Ministers of Ukraine, which considers complaints of entrepreneurs regarding violation of their legitimate interests through corruption actions, including local self-government [15]. Notably, ensuring personal security, human and civil rights and freedoms is a sophisticated legal complex that combines national and international means. At present, the institution of an Ombudsman is actively used in state systems for protecting the rights and freedoms of citizens from the arbitrariness of state government bodies and from abuse of power by officials. In Ukraine, the institution of the Ombudsman is at the stage of development and improvement, especially now, in the period of changes and reform of the current legal system [16].

When introducing the institution of a business ombudsman, Ukraine relied on the practices of foreign countries, where this institution has been functioning and developing in a certain form for quite a long time. The end of the 20th century saw isolated cases of creating the institutions of business ombudsman. In particular, the United States of America, Australia, Georgia, etc. have this experience. At the same time, the activities of such institutions are based on mediation, when applicants apply to them to solve problems out of court. Each country has the right to independently choose the form of the business ombudsman institution in accordance with generally accepted models, and, accordingly, the functions and powers of these institutions. However, the main functions of the Ombudsman relate to the protection of human rights (less often – private legal entities), expressed in the form of recommendations and mediation [12].

At the same time, the prospects for the development of ombudsmen, which contribute to the protection of entrepreneurs' rights, include the following ones (Fig. 1). Notably, the expansion of the application of the Ombudsman concept in private legal relations should take place to provide alternative dispute resolution and support by states for ombudsman schemes in the private sector by recognising them as alternative methods of dispute resolution to unload the state dispute resolution system [17].

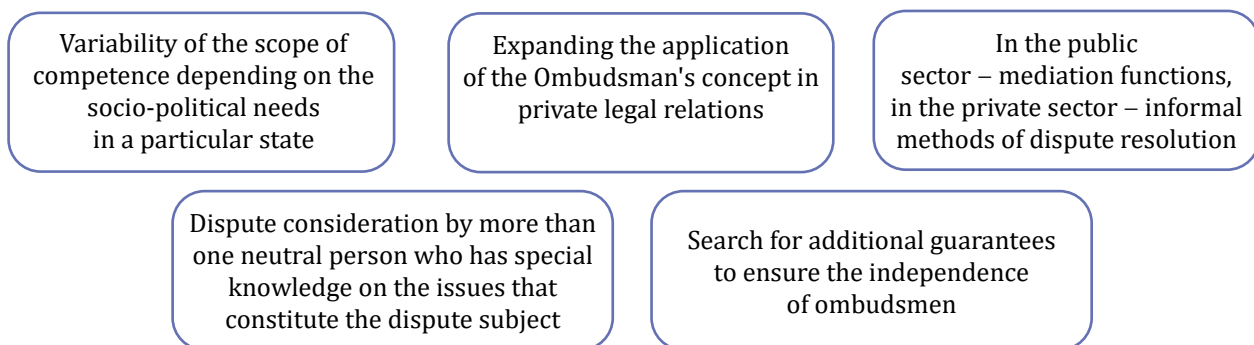


Figure 1. Development prospects for ombudsmen

Source: compiled by the author based on [17]

¹Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

²Resolution of the Cabinet of Ministers of Ukraine No. 691 "On the Establishment of the Business Ombudsman Council". (2014, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/691-2014-%D0%BF#Text>.

Returning to the Business Ombudsman Council in Ukraine, it should be noted that in 2020, this body received the most complaints from business representatives regarding the actions of the State Fiscal Service of Ukraine (1,193 complaints), the National Police of Ukraine (122 complaints) and the Office of the Prosecutor General (53 complaints) [1]. Analysis of complaints demonstrates that Ukrainian enterprises most often face such key problems as tax audits, procedural abuses, criminal proceedings against businesses, and corruption charges. At the same time, over six years of its operation, the Business Ombudsman Council, having considered complaints, helped return UAH 18.8 billion to Ukrainian enterprises [1]. However, due to the fact that the consideration of many complaints is outside the competence of the Business Ombudsman Council, and its legal status is not legislatively consolidated, business representatives are forced to overcome problems unassisted. To resolve this situation in Ukraine, there have already been attempts to introduce the institution of a business ombudsman at the legislative level (draft Law of Ukraine No. 4591 "On the Institution of the Business Ombudsman" of May 5, 2016¹ and draft Law of Ukraine No. 3607 "On the Establishment of the Business Ombudsman in Ukraine" of June 5, 2020²). However, due to legislative uncertainty and substantial shortcomings, these draft laws were never adopted.

Thus, based on the researchers' analysis of the aforementioned draft laws, to improve them, it was proposed to define the business ombudsman not as an individual, but as an official, because power is exercised in connection with the occupation of the corresponding position. Therewith, recognition of the Business Ombudsman as an official would help strengthen their status and human rights commissioner role [9]. In addition, legislative regulation requires the definition and establishment of measures in case of failure to provide information or documents on the part of state bodies or failure of bodies to comply with the recommendations provided. For this, it is necessary to officially determine the status of the Council and its powers by a special law, which will allow or limit certain actions or influence of the Council on state bodies [14].

Given all of the above, one of the priority tasks in terms of protecting businesses from the arbitrariness of law enforcement agencies and violations of rights should be not only to improve the current legislation governing the activities of law enforcement agencies, but also to expand the capabilities of the Business Ombudsman Council, considering the shortcomings of previous draft laws in accordance with the present-day realities,

as well as to strengthen public control in terms of monitoring violations of the rights of business entities by law enforcement agencies. In particular, the expansion of the capabilities of this body should take place by recognising the latter as a participant in criminal proceedings on certain types of crimes in the economic sphere. Only under such conditions would it be possible to achieve a higher level of law enforcement on the part of law enforcement agencies, guided by the principles of the rule of law, and to promote sustainable reforms in the field of justice and law enforcement agencies. This, for its part, would allow achieving economic growth indicators, help bring legal businesses out of the shadows and protect their rights to do business, increase the level of budget revenue, reduce corruption, increase the level of investment attractiveness of Ukraine, as well as create a favourable business climate.

Due to expansion of the capabilities of the Business Ombudsman Council, the approach to the role of this institution, proposed in this paper, is new, because it allows considerably strengthening the protection of business rights from arbitrary actions of law enforcement agencies and reduce corruption, which guarantees the rule of law in Ukraine. Moreover, further signing of memoranda of partnership and cooperation between the business ombudsman institution and law enforcement agencies will prevent unfair behaviour of law enforcement officers, work on solving systemic business problems and formalise permanent cooperation at the level of expert groups, as well as contribute to the implementation of systemic recommendations by the Business Ombudsman institution and the implementation of reforms in the law enforcement sector.

Furthermore, expansion of the capabilities of the Business Ombudsman Council is consistent with the signed Memorandum of Understanding on Support for the Anti-Corruption Initiative of Ukraine³, the parties to which recognise the importance of responsibility, transparency, and the rule of law for the proper functioning and effective regulation of the Ukrainian economy, as well as resolving the issue of corruption and unfair treatment of business entities in Ukraine. In addition, the proposed changes correspond to the course taken by Ukraine towards European integration, namely the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part in terms of establishing the rule of law and strengthening institutions at all levels in the field of governance in general and law enforcement and judicial bodies in particular.

¹Draft Law of Ukraine No. 4591 "On the Institution of Business Ombudsman". (2016, June). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58980.

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Conclusions

Consequently, the main need of business entities is the need to ensure an appropriate level of protection of their rights to conduct economic activities from the arbitrariness of law enforcement officers. Restoring business confidence in law enforcement agencies and creating conditions for protecting businesses will help entrepreneurs be interested in paying taxes to the budget, which will obviously reduce the level of the shadow economy, a quarter of which is in the shadow of Ukraine's official GDP. Despite the fact that foreign investors call repressive actions of law enforcement agencies one of the obstacles affecting capital attraction in

Ukraine, this requires the creation of such conditions under which these investors will rest assured that Ukraine has transparent business conditions, and law enforcement agencies are guided by the principles of the rule of law in their activities, which is the key to a favourable business climate. Accordingly, expanding the powers of the business ombudsman by recognising the latter as a participant in criminal proceedings will allow meeting the needs of business entities, because its activities would be aimed precisely at protecting the rights of entrepreneurs, which is essential for the observance of the rule of law principles.

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Бізнес-омбудсмен як інститут підвищення дотримання принципів верховенства права

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Анотація

Актуальність обраної проблематики обумовлена тим, що співробітники правоохоронних органів, здійснюючи свої повноваження, зловживають наданими їм правами й обов'язками, порушуючи законні права представників бізнесу. Інакше кажучи, мова йде про свавілля правоохоронних структур по відношенню до суб'єктів господарювання, яке є несумісним із принципами верховенства права. Мета статті полягає в узагальненні сучасного стану діяльності інституту бізнес-омбудсмена та напрямів його удосконалення, що сприятиме підвищенню дотримання принципів верховенства права. Досягнення поставленої мети уможливили системно-структурний метод, системний і діалектичний методи, метод критичного аналізу, аналітичний, формально-юридичний методи, а також метод документального аналізу та формально-логічний метод. У статті описана проблема порушення прав представників бізнесу з боку правоохоронців, що становить загрозу принципам верховенства права. Визначено причини запровадження принципу верховенства права. Виокремлено традиційні інструменти захисту бізнесу від свавілля правоохоронних органів. Наголошено на ролі Ради бізнес-омбудсмена як ефективного інструмента в забезпеченні та реалізації принципу верховенства права по відношенню до представників бізнес-середовища. Акцентовано увагу на перспективі розвитку омбудсменів, що сприяють захисту прав підприємців. Зроблено висновок про необхідність розширення повноважень бізнес-омбудсмена завдяки визнанню останнього учасником кримінального провадження. Практична цінність даної роботи полягає в тому, що викладені в статті пропозиції спрямовані на удосконалення діяльності інституту бізнес-омбудсмена в Україні, що сприятиме підвищенню дотримання принципів верховенства права

Ключові слова: права людини, представники бізнесу, Рада бізнес-омбудсмена, свавілля правоохоронних органів
