



Legal implications of the COVID-19 pandemic and nationwide quarantine in Ukraine

16 March 2020 – On 11 March 2020, in response to the threat of the novel coronavirus (COVID-19) pandemic, the Ukrainian government adopted Resolution No. 211 introducing a nationwide quarantine effective from 12 March through 3 April 2020.

This alert memorandum discusses the following aspects of the pandemic in Ukraine:

- the **quarantine** as introduced in Ukraine
- the COVID-19 pandemic as a **'force majeure'** event in relation to contractual obligations
- the **competition law implications** of coordinated activity among market players in relation to COVID-19
- **disclosure or notification requirements** in the context of COVID-19
- **employment law aspects** of the COVID-19 situation
- **privacy aspects** of conducting health checks
- ticket refunds and additional compensation payments by **airlines**

As discussed in detail below, the COVID-19 crisis does not automatically serve as excuse from complying with the provisions of mandatory law in Ukraine or with the terms agreed contractually by an affected party. The measures that companies are planning to implement or have already put in place in response to the situation must be in line with existing Ukrainian law.

Legal implications of Ukraine-wide quarantine

The legal implications of the quarantine in Ukraine consist of the measures set out in Resolution No. 211, further measures introduced by the government on 13 and 14 March 2020 by way of Resolutions No. 287-p and 288-p but also those that started to apply by operation of law upon the introduction of the quarantine.

Resolutions No. 211, 287-p and 288-p provide for the following quarantine-related measures:

- students are prohibited from attending educational institutions of all types;

- public events and mass gatherings expected to be attended by 200 people or more may not be held, except for reasons of public necessity. Sports events are permitted provided that they are not attended by the public;
- certain state border checkpoints, including the international passenger aviation transportation checkpoints, have been closed through 3 April 2020; and
- subject to some exceptions, foreign nationals and stateless persons are temporarily banned from entering into Ukraine through 3 April 2020.

The introduction of the quarantine also forms the basis for local authorities in Ukraine to exercise certain extraordinary powers within their jurisdiction under the Act of Ukraine on the Protection of Citizens against Infectious Diseases No. 1645-III dated 6 April 2000. In particular, the local authorities may:

- require any company or institution, including those that are not owned by the state of Ukraine or the respective municipality, to participate in the implementation of local measures to combat the pandemic, including by making their employees available for such works;
- seize vehicles, buildings, structures, equipment and other property of any company or institution, including those that are not owned by the state of Ukraine or the Kyiv municipality, if required for the implementation of anti-epidemic measures. Local authorities must reimburse the value of the seized property or its running costs in full in compliance with the approved procedure;
- introduce a stricter regime to control entry to and departure from the municipality, including by way of checkpoints; and
- introduce stricter requirements for the quality of food products and drinkable water as well as for the conditions of their production, processing and sale as compared to otherwise applicable food and water safety standards.

Following the introduction of the nationwide quarantine, local authorities in Kyiv have adopted further restrictions with effect from 12 March (to be expanded on 17 March) through 31 March 2020 to contain the contagion, as follows:

- theatres, cinemas, museums, amusement parks/centres, shopping malls (except for groceries, household stores and pharmacies), sports centers and gyms, household services, SPAs and beauty salons, nights clubs, etc. must be shut down;
- limited operation of the food service business – restaurants, cafes, bars must be shut down for public but they can deliver food;
- shows and other live performances may not be held;
- public events and mass gatherings must be limited as much as possible;
- any company or institution, including those that are not owned by the state of Ukraine or the Kyiv municipality, must not allow any employee who shows the signs of infectious disease to enter the workplace; and
- intercity travel must be limited as much as possible.

Similar measures have also been introduced in other Ukrainian major cities.

COVID-19 as a 'force majeure' event in contracts

In the context of the COVID-19 pandemic, situations may emerge where a contracting party—with reference to force majeure—fails to perform an obligation under a contract. Under Ukrainian law, a party that fails to perform a contractual obligation may be exempted from liability if it proves that this failure has occurred as consequence of a force majeure event, regardless of whether or not this is explicitly set out in the respective contract. Although Ukrainian law does not contain an exhaustive list of such circumstances, a breach of obligations by a counterparty of the defaulted party, unavailability of necessary products, or a debtor's inability to pay are expressly excluded.

Unless the respective contract provides otherwise, a force majeure event is confirmed by the Ukrainian Chamber of Commerce and Industry (UCCI). The UCCI would confirm a force majeure event if:

- such an event is extraordinary (is exceptional in nature and outside of the parties' control);
- such an event was not foreseeable at the time of entering into the contract;
- such an event could not be avoided (was imminent); and
- there is a causal connection between the event and the failure by the applicant to perform its obligations.

Recently, the president of the UCCI discussed in public that, in certain cases, the spread of COVID-2019 may be recognised as a force majeure event. However, consideration will be given to the particular situation rather than to the general circumstances.

In some situations, the contracting parties may have regulated in the contract the scope of force majeure events, the notification rules to be followed in the event of a force majeure event, and the legal consequences of force majeure in more detail as compared to the general rules of Ukrainian law. It is therefore necessary to carefully review those clauses in the light of the present situation.

In this respect, the following aspects are generally worth considering, among others:

- for contracts concluded prior to the appearance of COVID-19 in December 2019, it can be generally stated that the parties could not have anticipated the worldwide spread of the COVID-19 virus, whereas for contracts concluded since early 2020, this circumstance needs to be individually assessed and demonstrated;
- the party invoking the force majeure defence must demonstrate, in the specific context of the contract, why and exactly how the COVID-19 outbreak affects the performance of the contract—the mere reference to the appearance of the virus is not sufficient to support it; and
- the party invoking the force majeure defence must demonstrate why it cannot be expected to counteract the impact of the coronavirus outbreak on performance under a particular contract, e.g., why the impact of the pandemic on the contract cannot be mitigated by employing another supplier.

In summary, COVID-19 is not a generic "blank cheque" for rescinding a contract. The effects of the outbreak must be examined individually in the context of the specific contract and the applicable governing law. In addition to the force majeure provisions in contracts, it is essential for affected companies to assess the situation and prepare for the necessary steps by reviewing the notification and dispute resolution provisions of the relevant contracts.

Competition law implications of coordinated actions among market players in relation to COVID-19

In light of COVID-19, companies may need to align the measures they have taken for precaution and safety, or to maintain uninterrupted operation with their business partners—either because the partners themselves have already adopted such measures, or because the partners might be unable to continuously supply or operate.

It is important to keep in mind that even in the present predicament, companies may not allow anticompetitive practices as prohibited under the Act of Ukraine on the Protection of Economic Competition No. 2210-III dated 11 January 2001. Ukraine's competition authority, the Antimonopoly Committee of Ukraine, continues to monitor unfair conduct and if coordination of market practices is established, an infringing company may be subject to significant sanctions.

Under Ukrainian law, coordination of market practices is prohibited if it leads to a commercially unjustified price increase and/or growth of product deficit. Prohibited coordinated practices include, among others, price fixing, market sharing, limiting production or supply to certain markets, restricting access to the market for other businesses, and offering different terms under equivalent agreements to different counterparties.

In some cases, such coordination may be lawful (for example, the working out of safety and health-related measures within an industry association). However, if the coordination may influence the market behaviour of competitors, it is likely to raise serious competition law concerns. In the current situation, Ukraine's competition authority will be watching closely the retail and pharmaceutical markets as a priority. Any increase in prices for high-demand goods, such as face masks, hand sanitizers, general sanitary products and food products is likely to be scrutinised. On 13 March 2020, Ukraine's prime minister publicly instructed the Antimonopoly Committee to review the prices for goods in higher demand because of the outbreak.

Coronavirus pandemic: an event subject to disclosure or notification requirements?

Under Ukrainian securities law, issuers of shares and bonds must disclose certain information in the manner and within the timeframe provided by law. In particular, as part of annual regular reporting, issuers are required to submit a management annual report that contains, among other information, description of the risks and uncertainties to which the issuer's business is exposed. Although the law does not elaborate on which risks must be disclosed, potential disruption to the issuer's business due to the outbreak of COVID-2019, including significant supply disruptions, service outages, massive cancellation of orders, or disruption in the existing markets, must be mentioned in such report.

Issuers must submit their next annual report by 30 April 2020.

Due to the COVID-19 outbreak, some companies may suffer significant business disadvantages or at least go through changes that they may need to report to their creditors (e.g., banks, bondholders) under the terms of their financing arrangements. To this end, it is particularly important for the companies concerned to consider the relevant provisions of their credit agreements and bond prospectuses including, in particular, the notice, consent, approval and termination provisions thereof.

Certain employment law aspects of the COVID-19 situation

As discussed above, in connection with the introduction of the nationwide quarantine, the local authorities in Kyiv have required all companies and institutions, including those that are not owned by the state of Ukraine or the Kyiv municipality, (i) to ensure the regular disinfection of shared areas, (ii) to ensure the increased supply of fresh air and (iii) not to allow access to its premises to any employee

who shows the signs of infectious disease. It is likely that the other local authorities will largely follow suit.

In addition to the foregoing, below are key employment law considerations that are relevant to the COVID-19 situation. While pressures may be mounting, employers should be mindful that the labour-supervising authorities could still sanction certain employee-unfriendly practices.

Working from home. An employer may not introduce remote working for an employee unless the employee has granted his/her consent. Such a change of working conditions and schedules may not entail a decrease of the employee's salary.

Additional unpaid leave. Under the general rule, an employer may (but is not obliged to) grant an additional unpaid leave not exceeding 15 calendar days per year to an employee upon his/her request. However, in case of quarantine, the employer must grant such additional non-paid leave to a parent or custodian of a child under age of 14 for the period of quarantine. The employer is not allowed to force employees into an unpaid leave, including due to quarantine or in respect of employees who visited countries exposed to COVID-19.

Business shutdown. If an employer decides to temporarily shut down its business for commercial reasons, the employer must continue paying each employee no less than two-thirds of their salary.

Medical examinations. An employer may not require an employee to undergo a medical examination unless a statutory exemption applies, e.g., the employee is engaged in heavy works, the employee is under age of 21. In addition to these exemptions, Ukraine's labour safety regulator, the State Labour Service, currently recommends employers to immediately send employees for medical examination in case of identification of the first signs of the disease.

Work attendance. At present, an employee must show up at work as usual unless otherwise agreed with his/her employer. An employer may terminate employment on the usual basis for a failure to attend.

Suspension. In case an employer seeks to suspend an employee from work based on suspected illness, it would need to do so either by way of a work-from-home arrangement or as paid sick leave if confirmed by a medical examination.

Notifications to authorities. At present, an employer is generally not obliged to give any notices to authorities in relation to COVID-19 incidents or high-risk employees under Ukraine labour law, but may need to do so in its other capacity. We note that, currently, educational institutions and shopping malls are required to immediately isolate a person showing signs of COVID-19 illness and report the case to the health safety authorities.

Travel limitations. An employer may not restrict employees from visiting high-risk countries or generally travelling abroad. From the practical perspective, the employer may cancel the business trips and promote certain best practices to limit the risk of contagion.

Privacy aspects of health check of persons entering a facility

As discussed above, due to the introduction of quarantine measures at the national as well as local level in Ukraine, certain facility managers must set up a health check process in relation to all visitors, and employers must do so in relation to their employees.

In addition to these mandatory rules, employers and facility managers may seek to conduct further checks of their employees and visitors by asking them to provide information on their medical condition, personal contacts, or recent travels in order to be able to identify persons potentially infected with COVID-19. Such screening methods might include applying surveys and tests, or the measurement of body temperature, including with the assistance of receptionist colleagues or security guards.

Health data is considered a special category of personal data under Ukrainian data protection law. The processing of such data is generally prohibited unless an exception applies. We note, however, that Ukraine has yet to adopt a strict data protection regime similar to the GDPR.

Under Ukrainian data protection law, employers are generally allowed to collect health data of employees, subject to the general rules on data minimisation, necessity, proportionality and security. It is recommended for facility managers (otherwise than in capacity of employers) to collect the consent of visitors if these are identified or identifiable.

A possible solution for facility managers in certain cases might be to contract a healthcare institution for the examination of visitors, as healthcare professionals have much broader rights to process health data.

Ticket refunds and additional compensation payments by airlines

Airlines were among the first businesses hit by the COVID-19 outbreak. Regardless of carrier registration, a carrier is subject to the aviation rules of Ukraine if it performs flights to and from Ukraine.

According to Ukrainian aviation rules, an airline must reimburse the full price of a ticket or offer rebooking in the following cases that are relevant to the pandemic:

- the death or serious illness of a passenger or his/her close relatives;
- when airline reasonably believes that a passenger can pose a threat to other passengers or to the safety of the flight and consequently does not allow such passenger to board;
- a passenger cancels travel due to virus threat, but his/her ticket is refundable; and
- an airline cancels the flight.

Additionally, if a passenger is informed about a flight cancellation less than two weeks in advance, such passenger is entitled to additional compensation by an airline in an amount of EUR 250, EUR 400 or EUR 600, depending on the flight duration. If the airline cancels a flight due to governmental actions, such as mandatory suspension of flights to certain destinations, the airline should be able to refuse to pay such additional compensation relying on an “extraordinary circumstances” defence.

For more information on this alert memorandum, please contact **Kostiantyn Likarchuk**, Managing Partner, at Kostiantyn.Likarchuk@kinstellar.com, **Andriy Nikiforov**, Counsel, at Andriy.Nikiforov@kinstellar.com, your other regular firm contact or our COVID-19 task force in Kyiv directly at COVID.Kyiv@kinstellar.com. We are monitoring developments and will be pleased to provide you with further information.