

Non-payment of insurance premium – legal consequences during COVID-19 pandemic

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Introduction

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Introduction

On 27 March 2020 Parliament passed an act whereby insurers, under certain circumstances, despite non-payment of an insurance premium, are temporarily prohibited from either terminating the insurance contract or refusing cover.

The Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law of 27 March 2020 (the COVID-19 Mitigation Act) grants consumers and micro-enterprises (ie, companies with up to nine employees and an annual turnover of up to €2 million) a temporary right to refuse performance (*Leistungsverweigerungsrecht*) in the context of contracts for essential continuing obligations (*wesentliche Dauerschuldverhältnisse*). For consumers, such contracts are considered essential if they cover services of general economic interest. For micro-enterprises, such contracts are essential if they cover services necessary for the adequate continuation of business operations. Contracts for continuing obligations also include insurance contracts.

Usual consequences of non-payment

On conclusion of an insurance contract, policyholders must pay the insurance premium on the terms agreed. The consequences of non-payment differ depending on whether the non-payment concerns:

- a one-time premium or the first premium of more to follow; or
- a subsequent premium.

Where a one-time or first premium is overdue, insurers are generally allowed to rescind from a contract. If a one-time or first premium is overdue when an insured event occurs, insurers need not provide cover (Section 37 of the Insurance Contract Act). Where a subsequent premium is overdue, policyholders enjoy a higher level of protection. Insurers may set policyholders a payment deadline of at least two weeks by means of a so-called 'qualified warning notice' (which must meet the requirements of Section 38(1) of the Insurance Contract Act). After the expiry of the two-week deadline without payment of the subsequent premium, policyholders are in default and insurers may terminate the contract without notice. Moreover, insurers need not perform anymore (Section 38 of the Insurance Contract Act).

Policyholders' temporary right to refuse performance due to COVID-19

On 1 April 2020 the COVID-19 Mitigation Act introduced a new Article 240(1) Introductory Act to the Civil Code (EGBGB), pursuant to which consumers and micro-enterprises are granted a temporary right to refuse performance (*Leistungsverweigerungsrecht*) for essential insurance contracts concluded before 8 March 2020 (initially limited to 30 June 2020). In other words, policyholders can *de facto* obtain deferment of payment. The government can extend this right to refuse performance until 30 September 2020 at the latest.

For insurers, this means that under the COVID-19 Mitigation Act they cannot put a policyholder in default as they usually would even if a premium is overdue. Thus, insurers are also temporarily prohibited from rescinding from an insurance contract (in cases of one-time or first premium payments) or terminating it (in cases of subsequent premiums). Without default, no default interest or legal costs (eg, for lawyers or debt collection agencies) incur for this period. Moreover, insurers

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remain obliged to perform.

The prerequisites for policyholders' right to refuse performance are as follows:

- For consumers:
 - ◊ the insurance contract must have been concluded before 8 March 2020;
 - ◊ the insurance contract must cover services of general economic interest;
 - ◊ the non-payment must be based on circumstances attributable to COVID-19; and
 - ◊ the performance must be impossible without endangering the consumer's adequate means of subsistence or the adequate means of subsistence of its relatives entitled to maintenance.
- For micro-enterprises:
 - ◊ the insurance contract must have been concluded before 8 March 2020;
 - ◊ the insurance contract must cover services necessary for the adequate continuation of its business operations;
 - ◊ the non-payment must be based on circumstances attributable to COVID-19; and
 - ◊ the performance of the service owed must be impossible without endangering the business's economic foundation.

Pursuant to the COVID-19 Mitigation Act, to enforce the new right to refuse performance the policyholder must invoke it by way of an objection (*Einrede*) – that is, the policyholder must expressly refer to this right and prove the abovementioned prerequisites. Should the policyholder be unable to discharge this burden of proof, Sections 37 and 38 of the Insurance Contract Act apply as usual.

For this reason, from an insurer's point of view, it is advisable to send the written notification or qualified warning notice required under Sections 37 and 38 of the Insurance Contract Act as usual because they are still required to exercise the rights in Sections 37 and 38 and an insurer's right to refuse its performance.

Pursuant to Article 240(2)(3) of the EGBGB, policyholders cannot refuse to pay a premium if this would be unreasonable for the insurer (ie, if failure to pay the premium would endanger the insurer's economic foundation). It can be assumed that this will usually not be the case.

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