

# VIII. Insurance

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## Glossary

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### APS

Portuguese Insurers Association

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### ASF

Portuguese Insurance and Pension Funds Supervisory Authority

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### DGS

Directorate-General of Health

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### Ordinance 256/2011

Ordinance no. 256/2011 of 5 July, approving the standard general conditions of mandatory labour accidents insurance policies for employees, and the respective standard special conditions

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### RJCS

Decree-Law no. 72/2008 of 16 April, establishing the legal framework for insurance contracts

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### SNS

National Health Service

## VIII. INSURANCE

### VIII.A. Background

The insurance sector is, paradigmatically, the branch of the financial system that is most likely to cope with unforeseeable events. Typically, through an insurance contract, “the insurer covers a specific risk of the policyholder or of a third party, by agreeing to provide an agreed benefit in case the aleatory event provided for in the contract occurs, and the policyholder agrees to pay the respective insurance premium”<sup>(1)</sup>. This means that, in return for payment, the insurer undertakes to cover a risk and to provide the agreed benefit, if an event identified as a claim occurs. **The central question regarding the performance of insurance contracts is knowing whether, and to what extent, events occurring due to the COVID-19 pandemic are covered by the insurance contract** (*i.e.*, under the express and implicit own risk of the insurance contract). It should be noted, however, that this does not wholly exclude the possibility of an insurer raising the argument in favour of amending or terminating the contract on the basis of a change in circumstances<sup>(2)</sup>.

The scope of cover set out in insurance contracts essentially results, on one hand, from the declaration of risks covered by the contract and, on the other, from those which are not covered, by reference to the exclusion clauses. These clauses may take different forms within the insurance contract itself, from absolute exclusions, for risks which are definitely excluded from coverage, to relative exclusions, for risks which may or may not be included in the coverage, namely through the coverage envisaged under the special conditions.

In light of the risks covered by the insurance contract, the law and commercial practice have grouped these contracts into insurance categories or branches. Among the effects potentially caused by the coronavirus, the following insurance contracts should be taken into special consideration: (*i*) life insurance; (*ii*) health insurance; (*iii*) insurance against operational losses; (*iv*) labour accidents insurance; and (*v*) credit insurance.

**Primarily, the coverage of risks caused by the coronavirus should always be examined through the specific wording of an insurance contract, particularly in the scope of coverage and relevant exclusions.**

On the other hand, the conditions set-forth by these insurance contracts are more or less standardised in the Portuguese market, and so, without prejudice of a case by case analysis, it can be expected that the application of certain exclusions will echo under most insurance contracts.

Exclusions from cover in insurance contracts for epidemics, pandemics and, in general, those resulting from infectious and contagious diseases are understood differently in each of these insurance contracts. They may result from a generic exclusion or be worded more specifically (for example, “damage arising from the transmission of diseases and pathologies of any kind”). It should be noted that every exclusion must be interpreted in light of various factors, in particular, the context of the insurance contract itself and the scope of coverage, since the mere existence of an exclusion that mentions risks relating to diseases or pandemics does not necessarily or immediately mean that these are not covered.

In this context, the ASF has issued some clarifications, given the most frequently issues related to the coverage of certain types of

<sup>(1)</sup> Cf. Article 1 of RJCS.

<sup>(2)</sup> *Vide*, [chapter II](#).

insurance<sup>(3)</sup>. The APS, as representative of its insurance company members, has also issued information relating to the performance of insurance contracts<sup>(4)</sup>. In addition, the European Insurance and Occupational Pensions Authority (EIOPA) has prepared a short guide listing recommendations for consumers<sup>(5)</sup>. It should be stressed that these elements do not change the wording or the substance of existing insurance contracts, but merely set out general and indicative guidelines. The coverage of each insurance contract therefore relies on the specific agreement of the parties.

Finally, it should be noted that the legislative measures which directly concerned the insurance sector were aimed at addressing specific issues of a sectorial nature<sup>(6)</sup>, without this having significantly altered the legal framework applicable to the conclusion and performance of insurance contracts, with the exception of the legal regime for the payment of the premium, which is expected to change in the meantime.

<sup>(3)</sup> Accessible at <https://www.asf.com.pt/NR/exeres/D17D147A-3E63-4718-9D80-167FA8752810.htm>

<sup>(4)</sup> Accessible at <https://www.apseguradores.pt/pt/comunica%C3%A7%C3%A3o/not%C3%ADcias/2020/articleid/146/coronav%C3%ADrus-posi%C3%A7%C3%A3o-do-setor-segurador>

<sup>(5)</sup> Accessible through the link <https://www.asf.com.pt/NR/rdonlyres/C83320B0-E002-4131-AD53-6C2EFE860D17/0/GuiaParaoConsumidorEIOPA.pdf>

<sup>(6)</sup> See, for example, for trips organized by travel agencies and tourism, taking place between March 13, 2020 to September 30, 2020, which do not occur or are cancelled due to the outbreak of the pandemic of COVID-19 disease, the provision of maintenance of travel insurance that was contracted at the time of purchase of the travel service, in cases where a voucher of equal value is issued to the payment made by the traveler and this is used for the same trip, even if on a different date (cfr, article 3(2) (a)) of Decree-Law no. 17/2020, of April 23).

### VIII.B. The legal framework for the payment of the premium

The general regulation foreseen for the insurance premium is envisaged under Articles 51 to 61 of the RJCS. When referring to premiums, we are considering the legal designation enshrined in article 51 of the RJCS: everything due by the policyholder, excluding tax and parafiscal charges, *i.e.*, the total amount, net of tax, to be paid by the policyholder. The premium may be *unique*, this being the most common case in short-term insurance contracts, such as travel insurance, or *periodic* insurance. It may also be subject to change during the insurance contract (*e.g.*, proportional reduction in cases of overinsurance (Article 132 of the RJCS)), or updated according to the insured value. As for the maturity of the premium, the initial premium or the first fraction thereof is due on the contract date, unless otherwise agreed (Article 53(1) of the RJCS), with the following fractions and subsequent annuities due on the dates established in the contracts (Article 53(2) of the RJCS).

When considering the consequences of failure to pay the premium, the following distinction should be taken into account:

- a) general insurance (Article 57(2)(a) of the RJCS), subject to the regime for non-payment of the premium provided for in Articles 59 to 61 of the RJCS; and
- b) insurance and operations regulated in the chapter on life insurance, crop and livestock insurance, mutual insurance in which the premium is paid out of the proceeds and insurance covering large risks, except to the extent that the application of the regime under (a) is agreed upon by the parties and does not conflict with the nature of the agreement (Article 57(2)(b) of the RJCS).

Of particular relevance, subject to the regime under (a) are insurances such as damage insurance, in particular, civil liability insurance.

Having said this, the RJCS establishes that, as a general rule, “[the] *risk coverage depends on the prior payment of the premium*”. (Article 59 of the LCS). It should also be noted that under Article 61 of the LCS: (i) the failure to pay the initial premium, or the first instalment thereof, on the due date, determines the automatic termination of the contract from the date of its execution; and (ii) the failure to pay the premium for subsequent annuities, or the first instalment thereof, on the due date, prevents the extension of the contract. This regime does not apply to insurance contracts described under (b) above. As such, non-payment of the premium on the due date does not give rise to a situation of delay; in fact, it implies the absence of cover, in particular, by virtue of the termination of the contract, or by preventing the extension of the contract.

At this point, it should be noted that the premium regime provided for in Articles 59 and 61 is absolutely mandatory (Article 12(1) of the RJCS) - that is, the parties cannot agree on a regime more favourable to the policyholder, insured or beneficiary, except in the case of large risks insurance (Article 12(2) of the RJCS). Therefore, the parties are not able to deviate from the legal regime, adapting it to the current circumstances.

In this context, it is expected that an exceptional regime for the payment of the insurance premium will be published, allowing the parties to agree on a more favourable regime for the policyholder, namely through the payment of the premium at a later point in time after the beginning of the cover.

### VIII.C. Health insurance

The pandemic caused by COVID-19 has implications for the implementation of **health insurance contracts**, given the need to rely on hospital treatment, including inpatient care, whose provision and/or financial support

are part of the typical insurer benefits in these contracts. However, as the ASF notes, “infectious and contagious diseases, when in a state of epidemic or pandemic, as is the current case of COVID-19, are generally excluded from a health insurance contract”<sup>(7)</sup>. In any case, in principle, and notwithstanding the application of an exclusion, the insurance contract will remain in force, and the precise scope of the coverage has to be taken into consideration – for example, confirming whether it also includes additional diagnostic actions, or only treatment and hospitalisation. However, the parties may have included this cover, in which case, therefore, the insurer benefit is dependent on the agreement of the parties, specifically, on the sum insured, the period of hospitalisation and providers care network.

Finally, it should be noted that in accordance with the directions from the APS, “in the event of the emergence of a suspected or diagnosed case of COVID-19, insurance companies, in accordance with the guidelines defined by the DGS, are required to refer these cases to the SNS specialist services”<sup>(8)</sup>.

### VIII.D. Life insurance

**Life insurance contracts** may have particular importance in this context, if the mortal victims of this epidemic are covered by insurance contracts that cover the risk of death of the insured. If the risks relating to a pandemic or epidemic are not excluded, the beneficiaries may have the right to payment of the amount set out in the life insurance contract.

According to the ASF and the APS, most life insurance agreements do not exclude situations

<sup>(7)</sup> Clarification accessible at <https://www.asf.com.pt/NR/exeres/57D136E4-8B3D-4ED9-BE09-F6515E05004B.htm>

<sup>(8)</sup> Accessible at <https://www.apseguadores.pt/pt/comunica%C3%A7%C3%A3o/not%C3%ADcias/2020/articleid/146/coronav%C3%ADrus-posi%C3%A7%C3%A3o-do-setor-segurador>

arising from epidemics and pandemics. However, any conclusion on the existence of coverage will always depend on the specific agreement of the parties, given the possible inclusion in particular situations of specific exclusions that exclude the coverage guaranteed by the insurer under the current pandemic.

#### VIII.E. Insurance against operational losses

Of particular relevance for economic agents, the insurance market has developed contracts which cover **operational losses of the insured**, guaranteeing the payment of benefits if the insured's business is interrupted for a period of time. This coverage is usually included in a general programme of coverage under multi-risk policies.

The measures approved with regard to the state of emergency, namely the closure of establishments, restrictions on movement and exercise of professional activity, the suspension of suppliers' businesses or the effects caused by the significant reduction in consumers purchasing goods and services, could have a negative impact on businesses, causing them to reduce or suspend their activity. However, multi-risk policies tend to be aimed at losses caused to the insured's business due to material damage to the undertaking's assets rather than factors external to the business. So, given that the effects caused by the pandemic do not cause that type of losses, it may be questioned whether or not the resulting operational losses are covered by the risks within the contract.

Even so, extensions of coverage could be taken out, specifically including risks related to losses caused by lack of suppliers and customers or caused by denial of access. Therefore, coverage of these losses by insurance contracts has to be analysed on a case by case basis, particularly taking into account the special conditions and potential extensions that were agreed by the parties.

#### VIII.F. Labour accidents insurance

In terms of the prevention of infection among employees, companies have been forced to adjust their production processes, encouraging tasks to be completed remotely, using distance communications. The change in the professional and labour environment and the reorganisation of employees' working activities through teleworking must be structured carefully between insurers and employers, for the purposes of the mandatory protection granted by the labour accidents insurance.

The conditions of labour accidents insurance are subject to the clauses within the standard general conditions of mandatory labour accidents insurance policies for employees, and the relevant standard special conditions, approved in an annex to [Ordinance 256/2011](#). In order to determine the coverage, these conditions define "Workplace" as "the place where the employee is located or to which it must go because of its work and in which it is directly or indirectly under the supervision of the policyholder"<sup>(9)</sup>, for which reason carrying out work by teleworking does not seem to affect the legally provided coverage.

That said, it should be noted that, even when teleworking, the employee still has the same rights, namely as regards reparation for labour accidents, and duties. It should also be noted that if the employee starts teleworking, the employer must document and report to the insurer the circumstances in which the professional activities will be carried out (*e.g.*, identifying the employees and working hours).

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<sup>(9)</sup> Cf. Clause 1(h) of the General Terms laid down for mandatory occupational accident insurance policies for employees, approved in an annex to Ordinance no. 256/2011.

### VIII.G. Credit Insurance

By taking out credit insurance, companies are covered against non-payment of debts by their debtors. This type of cover is particularly relevant for companies facing the effects on the economy and on economic operators of the pandemic caused by the Coronavirus, particularly in the ability of their debtors to meet their payment obligations promptly and to remain solvent.

The losses that could be covered by a credit insurance policy include non-payment or delay in payment of monetary obligations. Political, natural or contractual risks that prevent the

performance of these obligations and unusual and unexpected changes in production costs may be covered. However, policy exclusions should be interpreted carefully, given that payment delays or non-payments caused by political or extraordinary events, which could eventually include the current pandemic, may still be excluded.

Therefore, the scope of coverage of the credit insurance policy and the exclusions agreed by the parties should be confirmed. Specifically, the policyholder must take into account the approval of measures that could be interpreted as political risks or otherwise excluded from coverage.

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