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# FMA CIRCULAR

  

## REGARDING BACKDATING OF INSURANCE CONTRACTS (VAG 1978)

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In view of recent developments, this Circular Letter deals with the topic of backdating insurance contracts and is directed at all insurance undertakings supervised by the FMA. It sets out the FMA's legal opinion on the topic of backdating insurance contracts, developed in the context of its statutory remit. The legal basis is in no way affected by this Circular Letter. No rights or obligations beyond those defined in the statutory provisions may be deduced from this Circular Letter.

It has been noted during the presentation of actuarial bases in accordance with Article 18 of the Insurance Supervision Act (VAG; *Versicherungsaufsichtsgesetz*) that insurance undertakings often set the earliest possible commencement of insurance cover before the start of sales. In this context, the FMA deems backdating to exist where the commencement of an insurance contract's term precedes the conclusion of the contract<sup>1</sup>.

The question of provisional cover (Article 1a para. 2 of the Insurance Policy Act – VersVG; *Versicherungsvertragsgesetz*), which is distinct from retroactive insurance cover, remains unaffected by this Circular Letter. With life assurance genuine retroactive insurance is conceptually not possible where the policyholder is taking out insurance against their own death with the cover start date preceding the application date<sup>2</sup>. The FMA therefore assumes that backdating is being used in practice for a purpose other than commencement of the insurer's material liability.

In any case, backdating appears to be inadmissible for the following reasons in particular:

- n obtaining an assumed interest rate that differs from the currently valid rate (this would mean circumventing the Maximum Interest Rate Regulation (*Höchstzinssatzverordnung*));
- n obtaining a lower premium due to a younger age of entry (pursuant to Article 18 para. 3 VAG the premiums shall be sufficient to ensure ongoing compliance with the obligations under the insurance contracts);
- n insurability despite exceeding the maximum age (cf. Article 18 para. 3 VAG);
- n circumventing unisex scales of premiums;<sup>3</sup>
- n obtaining the full government subsidy (e.g. as part of state-sponsored retirement provision), where considered inadmissible by the tax authorities.

Therefore, backdating is considered admissible only where the insurance undertaking is able to document in an individual case per group of premiums that it is merely being used as a legally admissible arrangement in the context of the provisions pertaining to insurance contract law, tax law and subsidy law and thus neither constitutes circumvention nor a

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<sup>1</sup> In this regard, the crucial aspect is the conclusion of a contract under civil law. With the policy model prevailing in practice, the insurer conclusively accepts the policyholder's application in most cases by sending out the policy.

<sup>2</sup> The essence of retroactive insurance is that the commencement of the insurer's material liability is brought forward to a date preceding the formal beginning of insurance cover, namely the conclusion of the contract.

<sup>3</sup> See Judgment of the Court of Justice of the European Union in Case C-236/09, Test-Achats.

breach of the principle of equal treatment as enshrined in insurance law. Collecting a risk premium for the past is considered inadmissible since the insured event is already known not to have occurred. The insurer should not obtain advantage through the fact that they will not need to pay any benefits.

Where there are justified reasons for applying backdating, it may only cover a few weeks; otherwise the FMA would have to take supervisory measures in accordance with Article 104 VAG. This does not apply to purely technical changes to the beginning of insurance cover resulting from comparisons of coverage capital in the course of contractual amendments.

In conclusion, the FMA considers that the earliest possible commencement of insurance cover should be set in the actuarial bases as being after the start of the sale process. Backdating insurance contracts is considered admissible only in exceptional cases and taking into account legitimate interests to be explained by the insurance undertaking.