

**SUPERVISORY STATEMENT ON EXCLUSIONS IN INSURANCE PRODUCTS
RELATED TO RISKS ARISING FROM SYSTEMIC EVENTS**

EIOPA Consultation Paper (EIOPA-22-288), Deadline: 18 July 2022

BdV Comments

Context and objective:

Pandemics, climate change or large cyber-attacks are examples of systemic events. These are defined as severe events which cause broad-based disruptions, significant adverse effects to public health or safety, to the economy or to national security. In the wake of such events, other financial risks develop as a result of increasing insolvencies or vulnerabilities, making society prone to suffer from indirect impacts as well direct ones, further increasing vulnerability and ultimately resulting in a loss of trust from consumers and capital.

Following these events, there is an increasing risk that insurance products may become unaffordable, or unavailable for these events. There is also a risk that products which may have had originally covered these events and/or which may have been silent in relation to coverage for these events may explicitly exclude them. Beyond the above considerations, these systemic events also underlined increasing consumer detriment in light of ambiguous contractual terms and lack of clarity on whether losses arising from such events are covered leading to disputes between policyholders and insurance undertakings, reputational risks for the sector and significant losses for all parties involved.

Questions to Stakeholders:

Q1:

Stakeholders' views on the treatment of exclusions on risks relating to systemic events are sought. In particular, do stakeholders agree on the possible risks identified for consumers and insurance undertakings?

BdV comment:

Yes, we agree following to the explanations outlined under "context and objective" of this consultation, especially no. 2.1 to 2.3 (CP, p. 6-7). In our

contribution to EIOPA's forthcoming Consumer Trends Report for 2022 we already gave several examples for recent natural catastrophes in Germany in 2021 and increasing cyber risks (Comments to Insurance Questionnaire - 31.05.2022).

<https://www.bunddersicherten.de/stellungnahmen>

Business Interruption Policies are not in BdV's remit, because following to BdV's statutes only private insurances for individual consumers have to be taken into consideration. But it is well known by judicial journals and the media that there were a lot of actions taken by SME against insurers caused by refused indemnisations and non-transparent contract clauses. For more detailed information please contact the association of insurance brokers BDVM representing SMEs: <https://bdvm.de/en/>

Q2:

Stakeholders' views on the treatment of exclusions in the POG process are sought.

BdV comment:

Yes, we agree following to the explanations outlined under "context and objective" of this consultation, especially no. 2.4 (CP, p. 7).

In our contribution to EIOPA's forthcoming Consumer Trends Report for 2022 we outlined the following examples that the product monitoring was not as exact as necessary: With regard to professional disability there were cases following to which insurers refused to accept that symptoms of disability are actually caused by corona infection. The burden of proof is on the side of the insured person. Additionally cases have been reported that persons who have symptoms of Long Covid had to accept an increase of health premiums (loading of risk) or, if they wanted to change the health insurer that the contract conclusion was rejected.

Q3:

Stakeholders' views on how to ensure clarity on exclusions are sought. In particular, in relation to how to ensure a balance between providing an exhaustive list of exclusions versus making the terms and conditions overly complex.

BdV comment:

Yes, we agree (cf. no. 2.6 and 2.7, p. 7, of CP). At the same time we stress that the problem "how to ensure a balance between providing an exhaustive list of exclusions versus making the terms and conditions overly complex", is not limited to "systemic" risks, but to any insurance contracts covering "usual" risks (life and non-life).

In our comment for the forthcoming 2022 Consumer Trends Report we gave the following example: Trip cancellation insurances mostly have a clause which includes "unexpected serious illness" ("unerwartet schwere Krankheiten") as reason for trip cancellation. But the insurer did not explain in its terms and conditions which illness could be considered as "unexpected" as well as "serious" (e.g. pneumonia or influenza). That is why BdV considered this clause as non-transparent and therefore not applicable and went to court. After several years the judicial procedures of appeal have reached the highest level of the Federal Court of Justice ("Bundesgerichtshof"), but a date for the final decision is still not yet fixed.

Conclusion: The difficulty is less an "exhausted" versus a "complex" list of exclusions, but the "material" clarity of the exclusions themselves.

Q4:

Stakeholders views are also sought on how to ensure balanced approach that takes in consideration that providing all exclusions may not be possible whilst not mis-lead consumers to believe some risks are excluded (i.e., the ones mentioned in the example) and others are not (i.e., the one not mentioned).

BdV comment:

As pointed in our comment on Q3, the difficulty is less an "exhausted" versus a "complex" list of exclusions, but the "material" judicial clarity of the exclusions themselves (cf. no. 2.6 and 2.7, p. 7, and no. 3.7, p.9, of CP). Additionally the exact information, which risks are included or excluded, must be part of the advice given by the intermediary following to article 20 (1) of IDD ("personalised recommendation" and its documentation). Even if no "advice" is given, the "personalised recommendation" must include this issue as well, otherwise the omission may become an issue of breach of information duties by the

intermediary (obligation of "fair, clear and not-misleading" information following to Article 17 of IDD).

Q5:

Stakeholders view on how to ensure a balanced and consumer centric product review when a risk becomes uninsurable because of a systemic event are sought.

BdV comment:

We fully support EIOPA's position that a balanced and consumer centric product perspective has to be taken, if a risk may become unaffordable or even uninsurable (cf. no. 3.3, p. 8, of CP). But there is "no one size fits for all" solution. Each insurance class in which this may happen has to be analysed separately starting with the question: are the "end-users" of an insurance contract private consumers or retail investors or is it B2B-relationship, because the thresholds of "affordability" are very different depending on the category of "end-users"? Another question should be: are there any solutions which are already implemented which may be used in this special case as well (for ex.: state subsidies from a certain threshold on like for terrorism risks, which may be implemented for natural catastrophes as well)?

The core requirement of a "balanced and consumer centric product review" should therefore be the appropriate balance of risk coverage and of the amount of the premium. "Best" consumer protection does not entail the offer neither of the cheapest product nor of the one with the largest risk coverage possible and therefore the most expensive product, but the offer which combines individually basic and necessary risk coverage and the appropriate amount of premiums. There should be neither any protection gaps nor any redundancy of risk coverage. In a market economy insurance follows the "law of the large numbers", i.e. probability calculation of risk events combined with adjusted calculation of premiums. If this rule cannot be applied anymore due to massively adverse macro-economic circumstances (terrorism, natural catastrophes, ransom and cyber crimes, pandemic, etc.), then the private insurance industry is simply not the right partner to solve these macro-problems. This fact is already exemplified by "war exclusion clauses" which are applied in case of civil or interstate wars.

Q6:

Do you agree with the proposed EIOPA approach to the assessment of the treatment of exclusions on systemic events in insurance contracts?

BdV comment:

Yes, we fully agree the proposed EIOPA approach with regard to

- the "communication with consumers in general" (especially no. 3.6, 3.8 and 3.10 of CP),
- the "treatment of systemic exclusions in the POG process when new products are developed" (especially no. 3.13, 3.14 and 3.16 of CP),
- the "supervision of POG process as regards to the treatment of systemic exclusions" (especially no. 3.18., 3.19 and 3.20 of CP).

As already outlined in our comment on Q 3, we stress again that the proposed EIOPA approach to the assessment of the treatment of exclusions on systemic events in insurance contracts should not be limited to "systemic" risks, but applied to any usual insurance contracts (life and non-life).

Q7:

Do you agree with the policy option chosen by EIOPA (Annex I)?

BdV-comment:

Yes, we agree (preferable option 2; cf. CP, p. 19).

Q8:

Do you agree with the analysis of costs and benefits (Annex I)?

BdV comment:

Yes, we agree. We particularly stress the important conclusion that if - following to option 1 - no action is undertaken, there are definitely no benefits for the consumers.