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## Sectoral report on the duty of care in the distribution of insurance-based savings and investment products

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The FSMA has carried out a series of inspections of insurance brokers<sup>1</sup> in recent years, focusing on compliance with the duty of care when distributing insurance-based savings and investment products<sup>2</sup> intended for retail clients.

This sectoral report provides an overview of the most important observations, good practices and recommendations that the FSMA has drawn from these inspections<sup>3</sup>.

The sectoral report consists of seven sections:

- an executive summary (Section 1);
- a description of the FSMA’s approach to inspection (Section 2);
- an overview of the applicable legal framework (Section 3);
- the observations made by the FSMA on compliance with the duty of care (Section 4);
- the good practices identified with regard to the duty of care (Section 5);
- the FSMA’s recommendations (Section 6);
- an example of a suitability statement (Section 7).

This report addresses only the matters covered during the said inspections. By way of example, the obligations relating to sustainability preferences were not yet in force when the on-site inspections were carried out.

### **1 We have observed a slight improvement in insurance brokers’ compliance with duty of care obligations, but there is still considerable room for improvement**

Since the entry into force of the “AssurMiFID” legislation, followed by the transposition of the IDD Directive, the FSMA has reinforced its supervisory actions focusing on compliance with the conduct of business rules in the insurance sector. It has, since then, taken a number of initiatives to ensure that

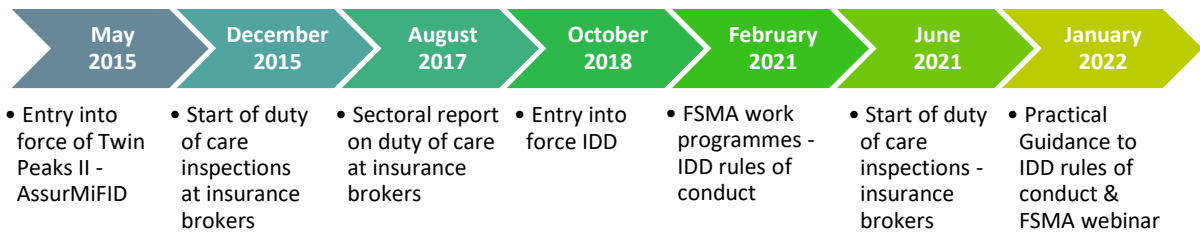
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<sup>1</sup> In this report, “broker” is used to mean insurance brokers as defined in Article 5, 21°/1 of the Law of 4 April 2014 and subject to the provisions of the IDD Directive.

<sup>2</sup> More specifically, to insurance contracts of classes 21, 23 and 26. In this report, “product” is used to mean an insurance-based savings or investment product of classes 21, 23 or 26.

<sup>3</sup> Although the report is addressed to brokers, it may also prove useful for other categories of insurance intermediaries and insurance companies.

insurance intermediaries are aware of their obligations to their clients and that they organise their operations appropriately<sup>4</sup>.



The table below gives an overview of the FSMA's observations at the end of the inspections covered by this report.

The **colour green** indicates a point that the FSMA considers largely to be **under control**. The points where the FSMA sees **some room for improvement** are indicated in **yellow**. The **colour orange** indicates a point where the FSMA sees **considerable margin for improvement in the sector**.

<sup>4</sup> One important milestone was the publication, in August 2017, of a sectoral report on compliance with the duty of care obligations among insurance brokers. That report was drawn up on the basis of a series of visits to insurance brokers (available in [Dutch](#) and [French](#) only).

EXECUTIVE SUMMARY	
Collecting information	
	<b>Most brokers collect information, before providing advice</b> , on the client's demands and needs, knowledge and experience, financial situation and investment objectives. In a limited number of cases, the <b>collection or documentation</b> of client information is <b>very summary or non-existent</b> . Sometimes, brokers <b>collect information or document the collection of information</b> from clients <b>after the insurance contract has been concluded</b> .
	Collecting information about the <b>client's knowledge</b> is still too often based on the client's self-assessment or a confirmation by the broker that the client knows or does not know the main features of the product. The client's knowledge is rarely objectivized. Some brokers indicate that they test the <b>client's knowledge</b> , but most of them do not document that assessment.
	Some brokers assign their clients an investor profile based on the client's answers to their questionnaire. The use of <b>investor profiles</b> involves a process of standardization and does not always make it possible to capture all the information needed to assess suitability.
	Questions on <b>risk tolerance</b> often contain <b>vague terms</b> that do not make it possible to identify precisely or to quantify the client's actual risk tolerance.
	A number of brokers use several questionnaires, whose scope and certain questions overlap (mainly as regards the <b>investment horizon</b> and <b>risk tolerance</b> ). This gives rise to a risk of inconsistency between a client's answers that is not always addressed by the broker. In fact, most of these brokers do not check the consistency of the information they collect.
	In some cases, the information collected about the client is <b>not correctly reflected in the documentation in the client's file</b> . As a result, it is difficult to assess whether the associated transactions are suitable.
Assessment of suitability and of demands and needs	
	Brokers assess the <b>suitability of recommendations to buy</b> , but they do not do so systematically for recommendations to sell or to change the underlying assets. In the event of advice to change the underlying assets, brokers do not always carry out an analysis of the expected costs and benefits.
	Brokers assess whether the <b>products suggested are consistent with the client's demands and needs</b> . In some cases, because of a lack of documentation or incorrect documentation of the client's demands and needs, brokers are not able to show that the product suggested is indeed consistent with the client's demands and needs.
	Most brokers give their clients a <b>suitability statement</b> , but few of them provide a <b>personalized recommendation in respect of client's demands and needs</b> . They generally do not (sufficiently) explain in the suitability statement <b>how their advice is suitable</b> , in light of the client's knowledge and experience, his or her financial situation (including the capacity to bear losses) and his or her investment objectives (including risk tolerance) and the client's other characteristics.

Providing information	
	Some brokers use <b>clauses that are not very clear</b> , with the risk of giving rise to confusion about the broker's responsibility for assessing suitability. Some clauses are <b>inappropriate</b> , since they involve transferring to the client a responsibility that lies with the broker.
	A number of brokers give their clients <b>an appropriateness statement in addition to the suitability statement</b> , which may lead to confusion about what service is in fact being provided. In a limited number of cases, brokers <b>incorrectly told</b> the client that the <b>transaction took place without advice</b> , at the client's initiative.
	Brokers do not systematically provide their client with the requisite information before an insurance contract is concluded, such as the list of insurance companies they are working with, an indication that they base their advice on an impartial analysis, their mode of remuneration or whether or not they are providing their client with advice.
	Some brokers state that they base their advice on an impartial analysis, although this is not the case. In some cases, brokers do not understand the requirements associated with an impartial analysis. Moreover, in cases where an impartial analysis is conducted, the client's file does not always contain <b>documentation attesting to the impartiality of the advice</b> .
	Some brokers provide their clients with <b>marketing communications</b> . Marketing communications are <b>not always identifiable</b> as such, and <b>do not always meet the information requirements</b> provided for by law.

## 2 The FSMA carried out its inspections using a tried and tested methodology

To select the brokers to be inspected, the FSMA conducted a risk assessment.

The objective of the inspections is to verify whether insurance brokers complied with the conduct of business rules concerning the duty of care. They covered the following aspects:

- the collection, consistency and updating of client information;
- the assessment of the suitability of transactions (in cases where advice is provided regarding an insurance-based savings or investment product);
- the information provided to clients in connection with the duty of care.

The inspections were carried out based on a work programme focused on the duty of care. The work programme is available on the FSMA's website<sup>5</sup>.

<sup>5</sup> See [IDD work programmes](#) (in Dutch and French only).

The brokers who were inspected have received individual inspection reports. The reports contain all the observations resulting from the inspection. Each observation is accompanied by a measure appropriate to the degree of gravity of the infringement identified. The measures are orders<sup>6</sup>, recommendations<sup>7</sup> and/or points requiring attention<sup>8</sup>.

Based on the individual report, each broker had to draw up a remediation plan that describes the measures it intends to take in response to the various observations made by the FSMA. Each remediation plan was followed up individually by the FSMA.

The observations found in this report are those made at the time of the inspection and during the follow-up.

### 3 Brokers must ensure that the product envisaged is consistent with the client's demands and needs and must assess the suitability or appropriateness of the transactions envisaged

Brokers must identify and ensure that the product envisaged is consistent with the client's **demands and needs**. They must also follow the additional rules specific to the duty of care regime chosen.

Where a broker provides **advice**<sup>9</sup> regarding insurance-based savings or investment products, the broker must verify that the transaction in question is **suitable** to the client<sup>10</sup> (suitability assessment).

Where a transaction in an insurance-based savings or investment product is **not part of an advice**, the broker must carry out an assessment of its **appropriateness** (appropriateness assessment).

Brokers may not give rise to **any confusion** as to the nature of the services they offer. They must provide their clients with information that is accurate, clear and not misleading.

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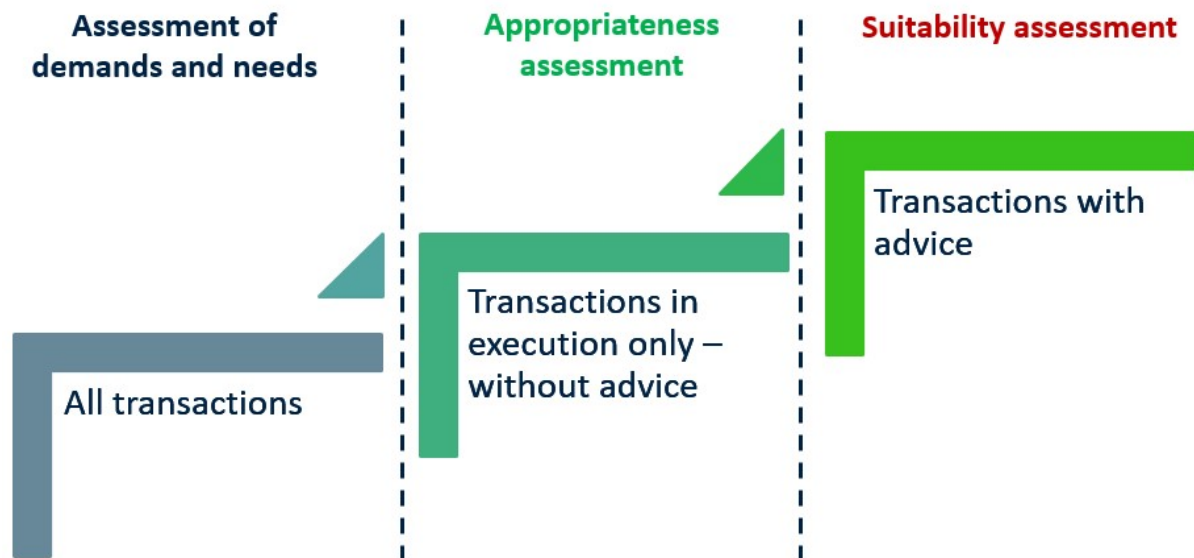
<sup>6</sup> An "order" is a measure by which the FSMA orders the firm to take corrective action by a deadline set by the FSMA. This measure arises from the identification of an infringement of the IDD conduct of business rules or of any other related legislation or regulations or of a shortcoming in a firm's organization, in light of the requirement that the firm's organization ensure compliance with the aforementioned rules. The corrective measures have to be validated by the FSMA and will be the object of specific follow-up. The orders are based on Article 307, § 1 of the Law of 4 April 2014 on insurance.

<sup>7</sup> A "recommendation" is issued in response to shortcomings in a firm's implementation of the IDD conduct of business rules or of any related legislation or regulations within its organization. By means of a recommendation, the FSMA encourages that firm to alter the way it implements certain rules or to make changes to its organization. The FSMA expects the firm to draw up an action plan that sets out in detail the actions to be taken, the deadline by which they will be implemented and the person who will be responsible for the implementation of the action plan.

<sup>8</sup> A "point requiring attention" is an element to which the FSMA wishes to draw the firm's attention, but without requiring the firm to put in place an action plan over the short term.

<sup>9</sup> Advice consists of providing a client with personalized recommendations, at the client's request or on the initiative of the distributor of insurance products, about one or more insurance contracts.

<sup>10</sup> "Client" should be understood to mean both an existing and a potential client.



When conducting an **appropriateness assessment**, brokers assess the following aspects:

- the client's knowledge;
- his or her experience.

When conducting a **suitability assessment**, brokers assess the following aspects:

- the client's knowledge;
- his or her experience;
- his or her investment objectives, including risk tolerance;
- the client's financial situation, including capacity to bear losses.

The information collected about the knowledge and experience of the client must be adjusted according to the **nature of client**, the **type of the insurance-based** savings or investment product envisaged, as well as the **complexity** of the product and the associated **risks**.

Brokers should test the client's knowledge of the essential characteristics of the insurance products concerned. Brokers must also assess the client's knowledge of the disadvantageous tax implications if one exits a pension savings contract or a Class 21 life insurance contract before maturity.

Where a product is subscribed to by joint owners, brokers should either collect information from the policyholder designated by the policyholders to represent them, or should collect information from each joint owner and take the most prudent situation as the basis.

If a broker does not obtain sufficient information on a client, he or she must abstain from providing any advice.

Brokers can rely on the information provided by the client unless they know or ought to know that the information available to them is manifestly outdated, incorrect or incomplete.

Appropriateness or suitability is assessed at the level of the product as a whole and any of its underlyings (such as the underlying funds in the case of a Class 23 life insurance product).

Brokers who provide advice to a retail client must provide the latter with:

- a **suitability statement** that explains why the investment advice is in line with the client's knowledge and experience, financial situation and investment objectives;
- a **personalized recommendation** that explains to the client why a particular product best fits his or her demands and needs.

Brokers must **keep the information collected** regarding the demands and needs, knowledge and experience, financial situation and savings and investment objectives of each client **for at least five years**. Where a broker provides ongoing advice, he or she must regularly update the information used as a basis for such advice.

The observations and measures described in this report are based on the following standard **legal and regulatory texts**:

- Articles 279, 280, 281, 283, § 1, 284, §§ 1-3, 285, 290, 291, 294, 295, §§ 1-3 and 296 of the Law of 4 April 2014 on insurance.
- Articles 9 to 19 of Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products.

A handbook providing practical guidance on IDD rules of conduct, dated January 2022, provides more detailed explanations of the legal and regulatory framework that applies to the rules of conduct in the insurance sector<sup>11</sup>.

## 4 Observations made by the FSMA on compliance with the duty of care

### 4.1 Observations made by the FSMA on the collection of information

#### 4.1.1 Brokers use standardized questionnaires to collect information on their clients

The FSMA observed the following:

- Most brokers use a questionnaire drawn up by the federations in the sector (for example, the “Jean le Courtier” questionnaire) to collect the requisite information from their clients. Some brokers use questionnaires that they have drawn up themselves or that were prepared by insurance companies. Others use tools developed by a third party (consultants). These questionnaires and tools do not always meet the legal requirements as regards the collection of information. Moreover, they are not always adapted to the specific situation of the broker that uses them. The FSMA stresses that brokers are ultimately responsible for compliance with the rules of conduct, even if they base their actions on tools or questionnaires developed by third parties.

<sup>11</sup> The handbook is available on the FSMA website via the following links: [Dutch](#) and [French](#).

- Some brokers use several questionnaires, with a number of overlapping fields and questions. This brings with it operational risks, including the risk of inconsistency between the answers given to similar questions in different documents.
- Some brokers use (sections of) questionnaires drawn up by professional federations that were designed for another product than the product at hand.

#### 4.1.2 The information collected is not always complete or documented

The FSMA observed the following:

- In a limited number of cases, brokers do not collect or document (almost) any information on the client before a contract is signed.
- In some cases, among others where remote advice (e.g. by telephone, Teams, etc.) or home visits are used, the documentation or collection of information is not completed in time, i.e. before advice is provided.
- In a limited number of cases, brokers collect information from persons other than the policyholder (for example, from the beneficiary or the potential donor).
- Where jointly owned contracts are involved, brokers do not systematically designate one representative or collect information from each policyholder.

As regards gathering information about the client's knowledge and experience, the FSMA observed the following:

- Documentation of the client's knowledge is almost always limited to a confirmation (by the broker or the client) that the client knows or does not know the principal characteristics and risks of the products. Several brokers stated that they test the client's knowledge during the interview but most of them do not document their assessment.
- The questions used to test the client's knowledge do not systematically cover all the risks and essential characteristics of the products, such as the costs, any tax disadvantage in the event of early redemption of tax savings contracts. The client's knowledge of specific product mechanisms such as drip feed<sup>12</sup> or stop loss<sup>13</sup> is also not always tested.
- Most brokers do not have appropriate procedures to handle cases where a client may wish to retake the test immediately after having incorrectly answered one or more questions intended to test their knowledge. In particular, they do not use a second set of questions about knowledge of the essential characteristics of products.

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<sup>12</sup> With drip feed, the client deposits the entire premium at once into the insurance-based investment product (usually the amount is held in cash or in a money market fund). Subsequently, a (fixed) part of the premium is periodically invested in the investment funds.

<sup>13</sup> Stop loss is an option that is triggered when a predefined loss threshold is reached. In the case of a Class 23 insurance product, for example, this may involve the loss of a certain amount in an underlying fund. If the predefined threshold is reached, the option may, for example, give rise to the automatic transfer to a less risky fund.



- As regards the collection of information about the client’s **experience**:
  - In several cases, brokers do not collect or do not document correctly the number and/or volume of client transactions.
  - Some brokers use subjective or imprecise terms when assessing the number of transactions carried out by the client, such as ‘occasionally’ and ‘regularly’.

As regards collecting information about the client’s **financial situation** and **investment objectives**, the FSMA observed the following:

- Questions on risk-related behaviour often contain vague terms<sup>14</sup> that do not make it possible to identify precisely or to quantify the client’s actual risk tolerance.
- Where they measure their clients’ risk tolerance, some brokers use multiple choice questions in which the potential increase is higher than the potential decrease. This runs the risk of distorting the client’s risk perception. Moreover, this practice is not justified, since the difference in potential does not reflect the economic and financial reality of these products.
- In some cases (for example, when providing advice on tax products), brokers do not collect or do not document all the information required on the client’s financial situation (including his or her capacity to bear losses) and risk tolerance.

#### **4.1.3 Most brokers ensure they have up-to-date information on their clients before providing them with advice, but they do not always check that the information they collect is consistent**

The FSMA observed the following:

- Most brokers make sure that before they provide advice, they have up-to-date information about the client. Where necessary, they once again collect the needed information. Some brokers systematically collect the relevant information about the client at each meeting.
- A number of brokers who repeatedly collect information about the same topic<sup>15</sup> do not check that the information they have collected is consistent. The result is inconsistencies between the different answers provided by the client, in particular as regards their investment horizon, investment objectives and risk tolerance.
- In some cases, the information collected about the client is not correctly reflected in the documentation in the client’s file. As a result, it is difficult to assess whether the associated transactions are suitable. By way of example, it can happen that a Class 23 product is offered to a client although, according to the documentation available, he or she does not have knowledge about Class 23 products or information about his or her knowledge has not yet been collected.

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<sup>14</sup> For example, the terms “some risks, albeit limited”, “fall significantly over the short term”, “fluctuations”, “fall considerably more than expected”.

<sup>15</sup> This could occur as a consequence of the use of multiple questionnaires, for example one questionnaire provided by a professional federation, and another by an insurance company.

#### 4.1.4 Some brokers classify their clients according to investor profile, but they do not always design these profiles correctly

In some cases, brokers assign their clients an investor profile or a standardized risk profile based on the client's answers to their questionnaire. To this end, a score is assigned for each type of answer. They then organize their clients into different groups, such as 'conservative', 'defensive', 'dynamic'. There is no legal obligation to classify clients according to standardized profiles.

This method entails a number of risks of which brokers need to be aware. As explained below, these risks depend on the way in which these profiles are used by brokers. In practice, the FSMA has observed the following:

- Some brokers base their advice only on their clients' standardized profiles. This means that the information collected is not used to its full potential. In such cases, the advice given is not based on all the requisite information about the client.
- The profiles are not always well defined, in view of the objective sought. Whilst the purpose of the profile is sometimes to assess the client's risk tolerance, some brokers take into account other information on the client to determine the latter, such as the client's knowledge and experience, financial situation and investment objectives. As a result, it happens that clients with a low risk tolerance are assigned a 'dynamic/offensive' profile, since they have advanced knowledge and experience, a long investment horizon and/or a good financial situation.
- In some cases, the broker's reason for using a profile is not stated.
- In other cases, the profile assigned to the client is incompatible with the client's individual answers (for example, assigning a client an 'offensive' profile, which denotes a profile for which the client "has a long investment horizon (minimum 8 years)" even though the client has indicated that he or she has an investment horizon of less than 8 years).
- In some cases, brokers provide the client with the weighting and the score of his or her answer to each question, thus revealing the way the investor profile is calculated. The client may thus be tempted to steer his or her answers in a way that will achieve a better score.
- An investor profile is sometimes assigned to clients although no advice is being given, which risks giving rise to confusion as to the service that is in fact being provided.
- In a limited number of cases, brokers allow their client to choose a higher-risk investor profile without taking into account the client's answers to the questions. As a result, the profile is no longer aligned with the information collected about the client. In such a situation, brokers generally transfer to the client the responsibility for potentially negative consequences of this choice.

## **4.2 Observations made by the FSMA about the suitability assessment, the consistency of products with the client's demands and needs and the statements to that effect**

### **4.2.1 Brokers assess the consistency of products with the client's demands and needs, but the documentation confirming that consistency is sometimes lacking**

The FSMA observed the following:

- Generally speaking, brokers propose products consistent with their clients' demands and needs. In one case, a product containing a death insurance was recommended to a client although the client had expressly indicated that he did not need to cover that risk.
- Some brokers do not document the client's demands and needs (for example, for death cover or the designation of a beneficiary) or do not document them correctly. They are therefore not in a position to demonstrate that the recommended product meets the client's demands and needs.
- In a limited number of cases, brokers distribute products that offer a positive return only in a positive scenario, and even then, only a very low return. They do not carry out an analysis that demonstrates why this product best meets the client's demands and needs, or how it compares to other products in the same range.

### **4.2.2 Brokers assess the suitability of recommendations to buy, but they do not do so systematically for recommendations to sell or switch the underlying assets.**

The FSMA observed the following:

- Most brokers assess the suitability of the transactions envisaged, but they do not do so systematically in the case of advice to sell or change the underlying assets (known as 'switch'<sup>16</sup>); Moreover, they do not always carry out a cost-benefit analysis when advice involves a change in the underlying assets.
- Where arbitrage<sup>17</sup> is advised, brokers do not always indicate in the suitability statement how the advice suits with the client's preferences, objectives and other characteristics, taking into account the costs of the transaction.

### **4.2.3 Most brokers give their clients a suitability statement, but rarely a personalised recommendation based on the client's demands and needs.**

The FSMA observed the following:

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<sup>16</sup> A switch is a conversion within an insurance contract by which the transaction moves from classes 21 and 22 to Class 23 or vice versa, where a Class 23 transaction is linked to another investment fund.

<sup>17</sup> Arbitrage is the replacement of one savings or investment product by another savings or investment product.

- Most brokers provide the client, before a contract is signed, with a suitability statement on a durable medium<sup>18</sup>. However, they generally do not (sufficiently) explain the way in which their advice is suitable, in light of the client's knowledge and experience, his or her financial situation (including the capacity to bear losses) and his or her investment objectives (including risk tolerance) and the client's other characteristics<sup>19</sup>.
- Brokers do not generally provide, prior to providing advice, a (sufficiently) personalised recommendation that explains why a particular product best meets the client's demands and needs.

### 4.3 Observations made by the FSMA on providing information to the client

#### 4.3.1 Brokers do not generally give the client all the requisite information before an insurance contract is signed

The FSMA observed the following:

- Brokers generally inform their clients about the nature of the service they provide. In some cases, they do not inform their clients whether or not they provide them with advice.
- Some brokers do not indicate to their clients if they base their advice on an impartial analysis. Others state that they provide advice based on an impartial analysis, although this is not always the case. In some cases, brokers do not understand the requirements associated with an impartial analysis. Moreover, where an impartial analysis is carried out, the client file does not systematically contain documentation that demonstrates that the advice is in fact based on the analysis of a sufficient number of insurance contracts available on the market.
- Brokers who do not base their advice on impartial and personalized advice do not always provide the client, before the contract is signed, with the names and addresses of the insurance companies they work with. Sometimes brokers do not update the list of their partners on their website. It also happens that brokers only provide the list of insurance companies they work with via their website, although some of their clients may have chosen to receive this information on paper.
- A number of brokers do not inform the client if, for a given insurance contract, they work on the basis of fees, commissions of any kind, another form of remuneration or a combination of the above.
- Some brokers still refer, in the documentation they provide to the client, to legal bases that are now obsolete<sup>20</sup>.

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<sup>18</sup> A durable medium within the meaning of the Law of 4 April 2014 on insurance (Article 5, 19°/3) is any instrument:

- a. which enables the client to store information addressed to him or her personally in a way that is accessible for future reference for a period of time adequate for the purposes of the information, and
- b. which allows the unchanged exact reproduction of the information stored.

<sup>19</sup> Section 7 of this report contains an overview of the information to be included in the suitability statement, as well as an example of a suitability statement.

<sup>20</sup> Among other things, the AssurMiFID Regulation and the Law of 25 June 1992 on land insurance contracts.

### 4.3.2 Brokers sometimes give the client incomplete, misleading or ambiguous information

The FSMA observed the following:

- Some clauses in the documents that brokers give their clients are not adequate.
  - They are not always clear and sometimes give rise to confusion about the broker's responsibility. This is the case, for example, with the following clause:
    - *"You confirm that our firm no longer has to carry out market analysis for the savings or investment needs you wish to cover via our firm".*
  - Some clauses are misleading, since they consist in transferring to the client a responsibility that is incumbent on the broker or in mentioning only the obligations of the client without indicating the corresponding obligations on the part of the broker. This is the case, for example, with the following clauses:
    - *"If you provide us with incorrect or misleading information, our firm cannot be held responsible for any negative consequences".* They generally do not refer to the broker's responsibility for ensuring that the client information is not manifestly out of date, inaccurate or incomplete.
    - *"You acknowledge that the content of the insurance contract you have chosen fits with the analysis of your demands and needs".* With such a clause, the broker transfers to the client its own responsibility to ensure that the contract proposed is consistent with the client's demands and needs.
  - Some clauses are incomplete. This is the case, for instance, where the advantages are overemphasised in relation to the disadvantages of a product or a service. A few examples of incomplete clauses follow:
    - *"Your return may also be higher during the entire term of your contract".* The broker does not specify that the return may also be lower.
    - *"You can benefit from the new Supplementary Statutory Guarantee of the Protection Fund. ".* It is unclear whether this is referring to the protection fund or the guarantee fund, or both.
    - *"You thus benefit from the best market conditions".* This does not explain in what way these are the best market conditions.
    - *"The client does not pay entry costs".* Any other costs that may be borne by the client are not mentioned.
- Brokers do not always fill in the duty of care documents correctly:
  - In a limited number of cases, brokers incorrectly mention that the transaction is carried out without advice, at the client's initiative.
  - A number of brokers give their clients an appropriateness statement in addition to the suitability statement, which may lead to confusion about what service is being provided<sup>21</sup>.

<sup>21</sup> On the intermediaries' forms, some brokers ticked both the boxes "our firm provides advice" (in Dutch: "advies van ons kantoor", in French: "notre bureau fournit un conseil") and "our firm does not provide advice" (in Dutch: "uw keuze als client", in French: "notre bureau ne fournit pas de conseil").

- In some cases, brokers state simultaneously that their advice is - and is not - based on an impartial analysis.
- Most brokers communicate electronically with their clients. Some of them do not give their clients the chance to choose explicitly between paper and electronic communication. They generally indicate in the documentation given to the client that the communication will take place electronically and that the client consents to this mode of communication by signing the document in question. Moreover, some brokers communicate information to the client via their website, without asking the client for his or her explicit consent to the use of this means of communication.

#### 4.3.3 Some brokers provide marketing information to their clients but do not always specify that this is advertising or do not always follow the rules governing this matter

The FSMA observed the following:

- In some cases, brokers give clients investment information that qualifies as an advertisement<sup>22</sup> within the meaning of the RD Advertisements<sup>23</sup>. These advertisements are not always identifiable as such although the legislation requires that it be. Similarly, sometimes it is not specified that this does not constitute advice.
- The advertisements do not always meet the requirements of the RD Advertisements<sup>24</sup>.

## 5 Observations made by the FSMA on good practices as regards compliance with duty of care obligations

The FSMA points out the following good practices:

- Some brokers that provide advice on the basis of an impartial analysis, use a matrix that can be used each time advice is given, that makes possible a comparison of a set of factors across a series of products. They can thus select, in line with the demands and needs of a particular client, the relevant factors to be taken into consideration in the impartial analysis<sup>25</sup>. This type of analysis, carried out for each piece of advice given, makes it possible to determine the product that best suits to a client, based on his or her particular demands and needs.
- Some brokers communicate the personalised recommendation on the client's demands and needs within the suitability statement, in order to avoid having to provide multiple documents to clients in support of the advice given.

<sup>22</sup> Advertisements are defined as any communication that is intended specifically to promote the purchase, subscription to, entry into, acceptance of, signing up for or opening of a financial product, regardless of the channel used or the way in which it is disseminated.

<sup>23</sup> Royal Decree of 25 April 2014 on certain information obligations for the marketing of financial products to retail clients (Belgian Official Gazette, "RD Advertisements").

<sup>24</sup> In particular, Articles 11 and 12 of the RD Advertisements.

<sup>25</sup> The factors include the costs (management, entry, exit, tax) of the product, the minimum payment required, the possibility of making (free) withdrawals or additional payments, the guaranteed return (in Class 21), the asset allocation or the existence of any special mechanisms (such as drip feed or stop loss).

## 6 Recommendations made by the FSMA on compliance with duty of care obligations

### 6.1 Recommendations made by the FSMA on the collection of information

As regards the collection of information, the FSMA makes the following recommendations and recalls a certain number of legal requirements:

- Brokers must ensure that the tools and questionnaires they use to collect information on the client are compliant with the conduct of business rules. They must also ensure that they understand the tools they are using.
- Where they use a standardized questionnaire (such as those of professional federations), brokers should make sure to adapt the latter to their specific situation. Generally speaking, they should exercise prudence before using the tools or questionnaires made available by third parties and verify that these tools enable them to meet their legal obligations. No tool or standardized questionnaire has been formally validated by the FSMA. Brokers are ultimately responsible for collecting information and therefore for the underlying questionnaires they use.
- Brokers must ensure that they systematically collect and document information on the client's demands and needs, knowledge and experience, and in cases where they give advice, on his or her financial situation (including the capacity to bear losses) and investment objectives (including risk tolerance).
- Brokers must ensure that they collect information from the person subscribing for the contract, except in the case of legal or contractual representation. In particular, they should collect information on the knowledge and experience of the subscriber. The intervention of a relative is not permitted except in the case of legal or contractual representation, in compliance with the applicable rules<sup>26</sup>. As regards contracts with several policyholders, either a single representative should be designated, or information should be collected from each joint policyholder and the most prudent situation should be taken as the basis. If a minor is being represented (by a parent or guardian), the broker should collect:
  - the requisite information on the knowledge and experience of the representative;
  - by means of the representative, information on the financial situation and investment objectives of the minor.
- Brokers must comply with the following rules when collecting information on the client's knowledge and experience:
  - They must assess in an effective manner their clients' knowledge of the essential characteristics of products, and must document this and store the assessment of their knowledge. In so far as brokers are responsible for the process of assessing suitability and appropriateness, it is not enough to ask clients how they would assess their own knowledge.
  - Where applicable, they should collect information on the client's knowledge of certain options that may accompany a product (such as stop loss or drip feed).

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<sup>26</sup> In particular, civil law as regards the representation of a minor.

- They must adapt their collection of information in accordance with the nature of the product, that is, in terms of the different types of insurance products that they suggest.
  - They must abstain from using subjective or imprecise terms such as “occasionally” or “regularly” to assess the number of transactions carried out by the client.
  - They must collect and document the number and volume of the past transactions of the client.
- Where a client has replied incorrectly to a question about one of the essential characteristics of a product and would like to retake the test immediately, brokers should have a second set of questions to test knowledge. The set of questions should enable them to test the client’s knowledge of all the essential characteristics of insurance-based savings and investment products.
  - In order to assess a client’s risk tolerance, brokers must avoid using vague terms and must be able to quantify the client’s personal choices (for example, by means of graphs, figures or percentages).
  - Brokers must take all reasonable measures to ensure that the information collected from their clients is reliable. To this end, they must be sure that the information provided by their clients do not contain manifest inaccuracies or inconsistent answers.
  - Brokers must ensure that their documentation faithfully reflects the information they have collected on their clients. Accurate and exhaustive documentation of the information is essential to be able to demonstrate the suitability of the transactions they recommend to their client.
  - Brokers must ensure that they collect and document the information before they offer advice about a product. The client should, moreover, receive the suitability statement before a contract is offered and signed.
  - The use of standardized profiles does not exonerate brokers from their obligation to take into account, when assessing suitability, accurate and up-to-date information on the client’s knowledge and experience, financial situation and investment objectives. Brokers should make sure that the tool used to draw up these profiles is well suited to the objectives sought and have been properly designed. In particular:
    - If the client is assigned a profile, this must be consistent with that client’s individual characteristics.
    - Brokers should clearly define the objective of the profile and should know when and how to use it.
    - They should base the profile solely on the information about the client’s risk tolerance if the profile is intended to be used exclusively to determine the risk tolerance. They should not use information about other elements such as knowledge and experience, financial situation or other aspects of the investment objectives.
    - They should not explain to the client how they determine the investor profile, so as to prevent clients from adjusting their answers with a view to obtaining the profile they wish to have.
    - Nor should they allow clients to choose a higher risk profile than the one calculated on the basis of their personal situation.
    - They should not assign a profile to clients if they are not providing them with advice.



- They should ensure that their advice is based on the specific information collected about the client and not solely on the basis of standardized risk profiles.

## 6.2 Recommendations by the FSMA on the assessment of suitability and of demands and needs

As regards the assessment of suitability and of the client's demands and needs, the FSMA makes the following recommendations and recalls a certain number of legal requirements:

- Brokers must ensure that every product they recommend is:
  - consistent with the client's demands and needs;
  - suitable<sup>27</sup>, where they provide advice to the client, or appropriate<sup>28</sup>, where they do not.
- If the client gives the wrong answer to a question about an essential characteristic of a Class 21, 23 or 26 product, the client's knowledge of products of that class is considered insufficient. The broker cannot advise the client to purchase a product in that class, because the client does not sufficiently understand the category of products. All questions about knowledge of a given category of products should be assessed together, and the client should only see whether or not he or she has passed the test for the category of products in question.
- Where brokers provide advice, they must provide the client with a personalised recommendation prior to the conclusion of any specific contract, explaining why a particular product would best meet the client's demands and needs.
- The suitability assessment is not obligatory only for recommendations to buy products. It is also required in the event of advice during the lifetime of the product, including when there is a switch in underlying assets, and for recommendations to sell or to hold a product.
- In the event of an advice concerning a change in underlying assets, brokers must conduct an analysis of the expected costs and benefits of the change, so as to be able to demonstrate reasonably that the expected benefits are greater than the costs. Brokers should also carry out this cost-benefit analysis in the event that they advise an arbitrage.
- Brokers must document the collection of information about the client, as well as the suitability (or appropriateness) assessment and the analysis of the demands and needs. Documentation allows the broker to retain a written record of the fact that the product recommended is indeed suitable (or appropriate) and consistent with the client's demands and needs.

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<sup>27</sup> In accordance with Article 296, § 1 of the Law of 4 April 2014 on insurances, brokers who provide advice must assess, before the contract is signed, whether the product is suitable for the client. The suitability assessment must take into account the information collected about the client's knowledge and experience, financial situation, including the capacity to bear losses, and his or her investment objectives, including risk tolerance.

<sup>28</sup> In accordance with Article 296, § 2 of the Law of 4 April 2014 on insurances, brokers who do not provide advice must assess, before the contract is signed, whether the product is appropriate for the client. The appropriateness assessment consists in determining whether the client has the necessary knowledge and experience to understand the risks inherent in the service and the product.

### 6.3 Recommendations made by the FSMA on the suitability statement

As regards the suitability statement, the FSMA makes the following recommendations and recalls a certain number of legal requirements:

- Where brokers provide advice, they must, prior to the conclusion of the contract, provide the client with a suitability statement on a durable medium that specifying the advice given and how that advice meets the client's preferences, objectives and other characteristics.
- Brokers should, in the suitability statement, justify their advice on the basis of the client's specific characteristics. They should also avoid using standardized rather than personalized formulations.
- Brokers must be able to establish and record a suitability statement for **each piece of advice** provided regarding the suitability of a product. This obligation thus applies to the following cases as well:
  - The client receives advice but in the end does not buy the product.
  - The client receives advice on holding a product.
  - The client receives advice on selling a product.
- The suitability statement must include at least the following elements:
  - an outline of the advice given by the broker;
  - information on how the recommendation provided is suitable for the client, in particular how it meets:
    - the client's investment objectives, including his or her risk tolerance;
    - the client's financial situation, including his or her ability to bear losses;
    - the client's knowledge and experience.
- Moreover, the following elements should be included in the suitability statement<sup>29</sup>:
  - the name of the broker who provides the advice;
  - the date and, where several pieces of advice are given on the same day, the time when the advice was given to the client;
  - the name of the client or another form of identification of the client (e.g. the client number);
  - a description of the advice given, indicating:
    - information on the financial instruments about which advice was given, including:
      - the name of the financial instrument;
      - the type of insurance-based savings or investment product;
      - the periodicity of the premium or whether there is a single premium;
      - the amount of the contract or of the premium;
    - the nature of the transaction(s) recommended (purchase, sale, switch);
  - the personalised recommendation explaining why a particular product best meets the client's demands and needs;

<sup>29</sup> If the suitability statement is an integral part of a more general document which already includes these elements, it is not necessary to repeat them in the suitability statement.

- the justification of (reasons for) the positive result of the cost-benefit analysis in relation to the switch in the assets underlying the investment or to arbitrage.

#### 6.4 Observations made by the FSMA on providing information to clients

As regards the information provided to clients, the FSMA makes the following recommendations and recalls a certain number of legal requirements:

- If brokers do not systematically communicate with their clients on paper, they should allow the client to make an explicit choice between communication on paper or via another durable medium. Moreover, where they plan to provide certain regulatory information by means of their website, they should obtain the explicit consent of the client regarding this means of communication.
- Where they provide the client with information that is considered ‘advertising’ within the meaning of the RD Advertisements, brokers must ensure that they fulfil the requirements of the said Royal Decree. This applies both to information provided directly by the broker to the client and to information communicated to the client indirectly (for example, by means of a website that provides a comparison of products<sup>30</sup>).
- Brokers must provide the client with the following information, on the durable medium chosen by the latter and before the conclusion of a contract:
  - the services provided, namely, whether or not they offer advice on products;
  - where applicable, an indication that they base their advice on an impartial and personalized analysis;
  - if they do not base their advice on an impartial and personalized analysis, the name and address<sup>31</sup> of the insurance companies with which they (may) work;
  - the fact that, in relation to the insurance contract, they are remunerated on the basis of fees, a commission of any kind, another form of remuneration or a combination of the above.
- Where they inform their clients that they base their advice on an impartial analysis, brokers must document their market analysis and the conclusions they draw from it<sup>32</sup>. This analysis, carried out for each individual recommendation, should cover the key characteristics of a sufficient number of insurance products<sup>33</sup> and should not be limited to the products offered by the insurance

<sup>30</sup> Brokers are responsible for the information that appears on comparator sites that concern their products specifically.

<sup>31</sup> Insurance intermediaries who are under contractual obligation to work exclusively with one or several insurance companies must communicate the names of those insurance companies only.

<sup>32</sup> The ultimate objective of impartial advice must be to make a personalised recommendation regarding an insurance contract that best meets a client’s needs, based on a selection from among a sufficient number of insurance products that all meet the client’s demands and needs. It is thus not sufficient to compare a large number of similar insurance contracts once or several times a year and then to choose the one that is always recommended to each client during a given period. Each client has different demands and needs as regards a given risk. The insurance contract recommended after the market analysis must therefore be the one that best meets the specific demands and needs of the client in question.

<sup>33</sup> Such as the return, costs, risk level, minimum investment, the possibility of making withdrawals before maturity, any associated coverage.

companies with which they have a cooperation agreement. The analysis must make it possible to justify the recommendation of a given product by a given insurance company to clients with a particular set of demands and needs.

- Brokers must ensure that they provide their clients with information that is accurate, clear and not misleading:
  - They refrain from creating confusion about the duty of care model in which the transaction falls.
  - They avoid providing the client with an appropriateness statement in addition to a suitability statement;
  - They do not transfer their responsibility for the suitability assessment to the client or create confusion about the responsibility of the different parties.
  - They verify whether the standardized disclaimers they use effectively apply to their situation and, where applicable, explain their scope.
  - They only refer to current legislation.

## 7 Example of a suitability statement<sup>34</sup>

Below, the FSMA presents a possible example of the way brokers can justify their advice, taking into account the client's personal characteristics. Brokers must ensure that their suitability statements are appropriate to their activities and their clients. This example is purely illustrative in nature, but it offers brokers an idea of the level of detail the FSMA expects as regards the justification of their advice.

*"Our firm, Broker Smith, provided advice on <day><month><year> based on information that we collected about you.*

*After analysing this information, our firm, Broker Smith, advises you to subscribe to the Class 23 insurance-based investment product 'Product Y' of the insurance company Company Z, for a single (maximum) amount of 15,000 euros. Our firm advises you to spread your investment as follows:*

- *35 % underlying fund A;*
- *30 % underlying fund B;*
- *20 % underlying fund C;*
- *15 % underlying fund D.*

*Taking into account your personal situation, this product is suitable for you:*

- *You wish to grow your capital with a view to passing it on to your relatives.*
- *You have sufficient knowledge about the essential characteristics of Class 23 insurance products, the underlying assets and the associated risks, even though your experience with these products is limited.*

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<sup>34</sup> The sectoral report does not cover the obligations as regards sustainability preferences. As a consequence, the example above does not mention these either. However, distributors are required to explain, in their suitability statement, how they take these preferences into account in their suitability assessment.

- *You have a long-term investment horizon that is compatible with the 10-year horizon of this product.*
- *The product offers your portfolio sufficient distribution, thanks to the diversification of the underlying funds, while also exposing it to a limited capital risk. Although the product may undergo significant fluctuation, we consider that this risk is acceptable to you, in light of your risk tolerance (you are prepared to accept decreases of up to 30 %), as well as your ability to bear losses (financial reserve = 30,000 euros) and your savings capacity (monthly savings of 500 euros).*

*This product best meets your demands and needs for the following reasons:*

- *You wish to invest a single premium of 15,000 euros, which allows you to benefit from reduced entry fees for this product.*
- *You do not need to make any withdrawals during your investment horizon.*
- *The product is accompanied by death insurance. Therefore, you will be able, in accordance with your wishes, to save for your children.*

*Our firm, Broker Smith, also informs you that the recommended product does not require you to seek a periodic review of its arrangements".*