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Marketing of Financial Products to Vulnerable Elderly People

SUMMARY OF WORKING GROUP WORKSHOPS

AUTORITE DE CONTROLE PRUDENTIEL ET DE RESOLUTION
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Table of Contents

<i>PRODUCT DESIGN</i>	<i>4</i>
Context and issues	4
Report on the discussions	5
<i>DISTRIBUTION STRATEGIES</i>	<i>9</i>
Context and issues	9
Report on the discussions	11
<i>INFORMATION AND ADVICE PROVIDED TO CLIENTS</i>	<i>18</i>
Context and issues	18
Report on the discussions	20
<i>SUPPORT AND TRAINING FOR SALES NETWORKS</i>	<i>26</i>
Context and issues	26
Report on the discussions	27
<i>COMPLIANCE POLICIES</i>	<i>36</i>
Context and issues	36
Report on the discussions	38
<i>CONCLUSION</i>	<i>43</i>
<i>Appendices</i>	<i>44</i>

Following the public consultation on the document entitled “Marketing practices and ageing populations: how do we address cognitive decline in the elderly within the client relationship?”¹ conducted in 2019, the ACPR and the AMF wanted to hold more detailed discussions with the marketplace regarding the marketing of financial products to vulnerable elderly people, by launching a working group, and within this group workshops and consultations of bodies or authorities on subjects raised by the participants during the discussions (Conseil Supérieur du Notariat, Commission Nationale de l’Informatique et des Libertés - CNIL, Defender of Rights). The workshops brought together some thirty people, from federations and professional associations in the financial universe, banks, insurance companies, financial intermediaries, consumer protection associations, associations and foundations involved with population ageing issues and public institutions (Ministry for Justice, Financial Sector Advisory Committee - CCSF).

The ACPR and the AMF would like to thank all the participants very warmly for their motivation and the quality of their contributions to this work.

This document presents summaries of the five thematic workshops of the market working group on the marketing of financial products to vulnerable elderly people, organised by the ACPR and the AMF, which were held between November 2019 and February 2020. These workshops were preceded by a questionnaire sent to each stakeholder, the consolidated answers to which were presented at each meeting to stimulate discussion. Thus, each workshop followed a plan comprising:

- A recap of the regulatory environment;
- Discussion of operational issues faced by financial actors when marketing financial products to vulnerable elderly clients, as revealed in the answers to the questionnaires;
- Whenever possible, identification of paths for reflection which could be emphasised, according to certain members of the working group.

This document therefore reports these aspects for each workshop. They are supplemented in this report by boxes:

- On specific questions, drafted by certain contributors from the working group, or from professions or institutions with interest in the subject (green boxes);
- On international viewpoints, identified in the documentation provided by foreign supervisory authorities or professional federations (pink boxes). These boxes describe international practices or initiatives in a neutral manner, with the ACPR and the AMF giving no opinion regarding their legitimacy or relevance;
- Written by the ACPR and the AMF based on external sources (grey boxes);
- Written by the ACPR and the AMF based on information gathered via the aforementioned market questionnaires or during the various discussions with the stakeholders met since the start of the work in 2018 (yellow boxes).

These boxes are easily identifiable for the purpose of providing clarification on the subject.

This report has no normative purpose, but provides the stakeholders involved in this research with a wealth of material to study in greater depth the way in which the impacts of the demographic

¹ <https://www.amf-france.org/fr/actualites-publications/consultations-publiques/commercialisation-de-produits-financiers-aux-personnes-agees-vulnerables-le-pole-commun-amf-acpr>

transition can be taken into account in financial institutions' practices, collectively or individually. It brings together approaches, points of view and paths for reflection articulated around respect for the desires and preferences of vulnerable senior citizens for as long as possible, concern for their protection by striving for the primacy of their interests, and, lastly, the need to reassure advisers and institutions which have to cope with a twofold constraint of obtaining informed consent while not meddling in the client's affairs.

All the discussions took place within the legal framework governing financial institutions (the Insurance Distribution Directive - IDD² - and the Markets in Financial Instruments Directive - MiFID II),³ while respecting non-discrimination and recognising the diversity of situations of vulnerability.

² Directive (EU) 2016/97.

³ Directive 2014/65/EU.

PRODUCT DESIGN

The first workshop of the market working group concerned the design of products which fall within the scope of the ACPR-AMF joint unit, namely life insurance and financial instruments, and the potential for making better allowance for the interests of vulnerable elderly clients as of this phase, within the applicable regulatory framework.

Context and issues

Product governance and supervision requirements play a key role in protecting clients in the financial sector, because they require that products correspond to the needs of a particular target market in order to reduce cases of mis-selling. These requirements are specified in two basic legislative documents for the insurance sector and financial markets: IDD and MiFID II.

Within this framework, designers of insurance products and manufacturers of financial instruments must determine a target market during the process of validation of each product prior to its marketing, in other words give a description of a “group of customers sharing common characteristics at an abstract and generalised level” in order to “adapt the features of the product to the needs, characteristics and objectives of that group of customers.”⁴

The target market must therefore be defined with a sufficient level of granularity, taking into account the characteristics, risk profile, complexity and nature of the product.

Before bringing them to market, designers of insurance products and manufacturers of financial instruments must perform appropriate tests on their products and instruments in order to assess whether they correspond to the needs, objectives and characteristics of the target market.⁵ Then, once marketed, the products and instruments must undergo monitoring and a review, and this throughout their lifetime, notably in order to assess whether they remain appropriate for the needs, characteristics and objectives of the target market initially defined.

It is also incumbent on the distributors of financial instruments to determine an actual target market, based on the more precise knowledge of their own clients, consistent with the target market defined by the manufacturer.⁶

In the case of financial instruments, manufacturers and distributors are expected to rely on five cumulative criteria appearing in the guidelines of the European Securities and Markets Authority (ESMA) of 5 February 2018 to define the target market:⁷

⁴ Recital 5 of Delegated Regulation (EU) 2017/2358 supplementing the IDD with regard to product oversight and governance requirements for insurance undertakings and insurance distributors (see, also in this sense, Article 5 of this Regulation).
Recital 71 and Article 24 of MiFID II.

⁵ Article 6 of Regulation (EU) 2017/2358 mentioned above and Article 9 of Delegated Directive (EU) 2017/593 supplementing MiFID II with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

⁶ ESMA Guidelines 35-43-620 on MiFID II product governance requirements: “The distributor has to specify the actual target market, considering the boundaries of the potential target market set by the manufacturer. (...) *When refining the manufacturer’s target market, the distributor should not deviate from the fundamental decisions made therein*”.

⁷ ESMA Guidelines 35-43-620 on MiFID II product governance requirements, in particular section 18(e).

- The type of clients to whom the product is targeted (in particular, whether they are retail clients, professional clients and/or eligible counterparties);
- Clients' financial knowledge and experience;
- Clients' financial situation, and in particular their ability to bear losses;
- Clients' risk tolerance;
- Clients' objectives and needs.

The relevance of each criterion should be analysed taking into account the relation between the various criteria, given that together they contribute to the definition of the target market for a specific product.

The manufacturers and distributors of financial instruments must use the same criteria to define the negative target market, i.e. a group of clients whose needs, characteristics and objectives are incompatible with the product. Regarding the criterion relating to clients' needs and objectives, the ESMA Guidelines stipulate that a product may "be designed to meet the needs of a group of clients of a specific age."⁸ Now, a client's age may have an impact on their objectives and needs, and a specific product might not be suitable for a particular age group, notably because of the recommended investment period.

In the case of insurance, a series of Questions and Answers by the European Insurance and Occupational Pensions Authority (EIOPA) of July 2018,⁹ specifying how the IDD should be interpreted and applied, states that the "description of the target market could include clients' age group". The client's age could therefore constitute one criterion, among others, to be taken into account when defining the target market, in strict compliance with the obligation of non-discrimination due to age. In this respect, a negative target market may not be defined by merely setting an age limit which would systematically exclude persons reaching or exceeding that age.

Report on the discussions

The texts implementing the European regulations do not rule out the possibility of taking a person's age into consideration in defining the target market, while taking other relevant criteria into account.

For the marketing of financial products to elderly clients, the issues relating to product design appeared, to be related to two main subjects during the workshop: the design of products intended for senior citizens, and the limits or bans on marketing above a certain age.

⁸ ESMA Guidelines 35-43-620 on MiFID II product governance requirements, in particular section 18(e).

⁹ Question 1612 of the EIOPA Questions and Answers (Q&A) archives: *"The level of granularity of the target market and the criteria used to define the target market and determine the appropriate distribution strategy should be relevant for the product and should make it possible to assess which customers fall within the target market in light of their needs, characteristics and objectives (...). In particular for IBIPs [Insurance-based investment products], the description of the target market could include the age (category) of the customers belonging to target market, the personal household and dependents situation of the customers belonging to the target market, the occupational situation and the relevant occupational pension and insurance scheme of the customers belonging to the target market, the level of risk tolerance of the customers belonging to the target market, the financial situation of the customers belonging to the target market, and the financial and non-financial objectives and investment horizon of the customers belonging to the target market."*

a) Financial or life insurance products designed more specifically for the elderly are not a common practice at present

In light of the answers to the questionnaire and monitoring of the offers available in the market, and without having made an exhaustive review of the offers, it appears that few institutions design financial investment products intended specifically for senior citizens. Although certain products were mentioned, but they are sold to both elderly and less elderly clients.

These products or their specific features illustrate certain main objectives and needs commonly assumed as being those of elderly clients and liable to evolve according to the various stages of ageing: receiving a supplementary income, coping with unforeseen expenses, especially health costs, protecting one's close relations by building up a capital, transferring one's wealth under favourable tax conditions, or preparing for dependence.¹⁰

However, it was noted that financial advertising is intended in this specific case for an elderly population, notably via the images selected.

Although the elderly share objectives which may be common, related to the various stages of their ageing, their needs and desires with respect to savings and investment are diverse, depending in particular on their financial and family situation, their financial knowledge and experience, their risk tolerance and their ability to bear losses. For example, a product or instrument reconciling liquidity and security will not be suitable for all elderly clients.

The members of the working group found that product governance rules and rules regarding advice are basic fundamentals of client protection.¹¹

b) Limits on marketing depending on age: discussion relating to the risk of discrimination

Limits on marketing depending on age are practices which already exist in the market for certain products and instruments. In 2018, the ACPR and the AMF met a sample of credit institutions and insurance companies to find out more about the existing measures to manage and protect the oldest clients. During the interviews, a number of professionals mentioned that they had chosen to limit investment recommendations regarding certain products and instruments that they consider complex or risky, such as structured products (for example structured EMTNs),¹² alternative investment fund (AIF) units,¹³ or transactions on miscellaneous property.¹⁴

¹⁰ AMF Savings and Investment Barometer (November 2019).

¹¹ In life insurance (IDD) and for the investment advisory service (MiFID II).

¹² Structured Euro Medium Term Notes (EMTNs) result from the combined issue of an EMTN and a structured product.

¹³ As defined by the provisions of Article 4 of the 2011/61/EU directive on alternative investment fund managers (AIFMD), AIFs are collective investment undertakings which (i) raise capital from a number of investors with a view to investing it, in accordance with a defined investment policy, in the interest of these investors; and (ii) are not subject to authorisation under Article 5 of the 2009/65/EC directive (UCITS). AIFs include most collective investment undertakings which are not UCITS.

¹⁴ As defined by Articles L.550-1 et seq. of the Monetary and Financial Code, an intermediary in miscellaneous property is anyone who invites one or more customers or potential customers to acquire rights to one or more properties by stressing the possibility of a direct or indirect financial return, or having a similar economic effect.

Example of limits on marketing due to age and the product's characteristics

One of the institutions met by the authorities in 2018 stipulated the following limits for new life insurance business or capitalisation contracts with clients aged over 85:

- From age 85 to 89, the maximum level of units of account is set at 30% (excluding 100% euro offer);
- From age 90 to 94, the only possible offer for subscription is the 100% euro fund solution;
- Lastly, as of age 95, only a 100% euro fund subscription on a capitalisation contract is possible.

The institutions in question explained these limits on marketing by a rationale of declining risk awareness as we grow older. As age is an investment horizon indicator, they aim to ensure security for the client's assets.

However, some of the participants in the working group considered that these practices could potentially entail a risk of discrimination.

On the one hand, such practices could suggest that all clients above this age threshold are in a similar situation, thereby ruling out the possibility of considering the diverse profiles and situations of elderly clients. Furthermore, they create a problem by setting a "threshold" based on age, above which a person should be considered as excluded from the population which could invest in a given product, thereby suggesting that age alone could be a reliable indicator of a person's capacities.

The working group participants mostly felt that the target market should be determined taking into account the various criteria which contribute to its definition, such as the client's financial situation, including their ability to bear losses and risk tolerance, but also their general objectives and their related investment horizons (a succession objective will therefore be different from a precautionary saving objective). For this reason, the distributor should take care to personalise the advice given in response to the personal needs of their clients, and to document it precisely.

The systematic examination procedure for subscriptions after age 85

The French Insurance Federation (FFA), in its **Compendium of ethical commitments of insurance companies** who are FFA members dated March 2019¹⁵ states that: "*Subscriptions at very advanced ages in conditions which point to a significant risk of subsequent disputes should be ruled out. The insurance company should establish a systematic examination procedure for subscription applications above a certain age and, in any case, above age 85, in order to verify the appropriateness of the planned life insurance transaction for the subscriber.*"

On the FFA model explained above, the idea of introducing an internal policy based on one or more key ages, around which institutions might consider it useful to increase their due diligence, was regarded by a number of participants as a relevant solution for preventing marketing of products or instruments that are potentially unsuitable for elderly clients, without necessarily entailing an automatic prohibition of marketing.

¹⁵ <https://www.ffa-assurance.fr/la-federation/publications/deontologie/recueil-des-engagements-caractere-deontologique-des>

DISTRIBUTION STRATEGIES

The working group's second workshop concerned strategies for distribution of products to vulnerable elderly clients. The discussions hinged in particular on the question of the most suitable distribution and communication channels for these clients, in an environment of increased digitisation of client relationships.

Context and issues

The IDD and MiFID II directives mentioned above provide for product governance obligations to ensure that the distribution strategies are compatible with the defined target market. Designers of insurance products and manufacturers of financial instruments must provide the distributors of these products and instruments with all the information they need to enable them to understand and identify the target market and determine a distribution strategy that is compatible with that target market. In the case of insurance products, distributors who find that an insurance product is not suitable in view of the interests, objectives and characteristics of the target market defined by the designer, or who note other product-related circumstances that could have negative repercussions for the client, should inform the designer of this quickly and change their distribution strategy for said insurance product, if necessary.¹⁶ In the case of financial instruments, distributors are required to adjust the theoretical target markets determined by the instruments' designers to the reality of their clients and to define a distribution strategy that is compatible with the actual target market determined in this way, although without deviating from the fundamentals established by the designer or manufacturer.¹⁷

This legal and regulatory framework is completed by European rules on distance selling of financial services, the restriction of marketing or distribution of financial services and instruments,¹⁸ and national rules relating in particular to direct marketing¹⁹ and also advertising,²⁰ notably to take account of issues related to the choice of the distribution channel at a time when remote subscription or arbitrage (by telephone or online) is tending to replace conventional appointments in branch offices, irrespective of the target clients.

Distance selling of financial services and direct marketing

Directive 2002/65/EC on the distance marketing of consumer financial services is one of the founding texts regarding distance selling. Transposed in particular in Articles L. 121-20-8 et seq. and L. 222-1 et seq. of the French Consumer Code, it aims to define the rules applicable to contracts entered into at a distance between a professional and a consumer regarding a financial service. Being a maximum harmonisation directive, it governs pre-contractual and contractual information, the consumer's right of withdrawal and the due diligence to be performed before selling a financial

¹⁶ Article 11 of Commission Delegated Regulation 2017/2358.

¹⁷ Paragraph 49 of the aforementioned ESMA Guidelines: "*The distributor should take the distribution strategy identified by the manufacturer into account and review it with a critical look*".

¹⁸ ESMA intervention powers; Article 40 of Regulation 600/2014 of 15 May 2014 relating to markets in financial instruments (MiFIR), to cope with the risks represented for investors by certain speculative products.

¹⁹ Articles L. 341-1 to L. 343-2 of the Monetary and Financial Code.

²⁰ In particular, Articles L. 533-12 and L. 533-12-7 of the Monetary and Financial Code.

service to a client (enquiring about their financial situation, investment objectives and experience, for example). It is currently undergoing revision by the Commission.²¹

To these general provisions can be added, regarding insurance, the provisions of Article L. 112-2-1, in particular III and IV, of the French Insurance Code, especially referring to the provisions of Article L. 132-5-1 of said Code, which specify the information to be provided to the consumer before concluding a distance contract.

This digitisation of financial processes inevitably entails a dematerialisation of contractual relationships. Regarding this, the ordinance of 4 October 2017²² aims to give priority to digital media and dematerialisation facilities, in order to improve, facilitate and allow smoother exchanges between financial-sector organisations and their clients (unless the client objects). In accordance with the provisions of this ordinance (now Articles L. 111-10 of the French Insurance Code and L. 311-8 of the Monetary and Financial Code), the professional must, in all cases, inform the client clearly and precisely regarding the dematerialised communication mode and the fact that at any time they may go back to a paper medium at no extra cost, except if the service provided is of an exclusively electronic nature.

Regarding financial instruments, direct financial marketing occurs when a professional contacts a person, without being solicited by them, to offer them the execution of financial transactions or the provision of services relating to such transactions. Contact may be established in the home, in the workplace or in any place whose primary role is not the marketing of financial products, instruments and services. It is also possible to be solicited remotely by mail, e-mail or telephone. Direct marketing acts consist in establishing contact, without being solicited, at the initiative of the professional.²³

The provisions of Article L. 341-1 of the Monetary and Financial Code define the persons authorised to perform direct marketing, the products that can be marketed directly, and the conduct-of-business rules. Products for which the maximum risk is not known at the time of subscription or for which the risk of loss exceeds the amount of the initial financial contribution cannot be marketed directly.

Regarding insurance products,²⁴ in 2019 the Financial Sector Advisory Committee (CCSF) published an opinion on cold calling for non-life insurance²⁵ (outside the scope of this study), which aims to remedy the sometimes improper practices of professionals, by providing, in particular, in the case of cold calling to prospective clients, for the end of "one-step" sales and the generalisation of obtaining written consent. Legislative changes are being examined by the French Parliament and Senate at the start of 2021.

²¹ Note: In accordance with the provisions of Article 23, section 7, of the IDD, "In the case of telephone selling, the information given to the customer by the insurance distributor prior to the conclusion of the contract, including the insurance product information document, shall be provided in accordance with Union rules applicable to the distance marketing of consumer financial services. Moreover, even if the customer has chosen to obtain prior information on a durable medium other than paper in accordance with paragraph 4, information shall be provided by the insurance distributor to the customer in accordance with paragraph 1 or paragraph 2 immediately after the conclusion of the insurance contract".

²² Ordinance 2017-1433 of 4 October 2017 relating to the dematerialisation of contractual relationships in the financial sector.

²³ Article L. 341-1 of the Monetary and Financial Code.

²⁴ Articles L. 221-16 and L. 221-17 of the French Consumer Code establish a framework for cold calling and commercial prospecting.

²⁵ https://www.ccsfin.fr/sites/default/files/medias/documents/ccsf_avis_demarchage_19novembre-2019.pdf

Report on the discussions

a) Examination of the various distribution channels and the merits of the multichannel approach

In the current context of technological transformation of the financial sector, with the diversification of distribution and communication channels, growing dematerialisation of processes and a reduction in the number of branch offices, financial institutions are developing strategies that are increasingly based on digital technology. In general, clients increasingly want to manage their financial affairs independently, quickly (instantaneity, fluency, mobility, etc.) and in an informed manner (e.g. using comparators). However, these various changes pose the question of the suitability of the various distribution channels for the needs and special requirements of the most elderly clients.

The three main distribution channels are appointments in the branch office, telephone interviews and the internet. Regarding marketing to the elderly, each channel can have advantages and disadvantages which are not all specific to elderly clients, but could be amplified in their case. The members of the working group identified the following aspects:

Distribution channel	Advantages	Disadvantages / risks
Appointment in branch office	<ul style="list-style-type: none"> - The adviser knows their client; they can adopt a personalised approach and adapt the conditions in which they are received. - The adviser can take the time to explain with a paper medium. - The verification of consent is generally more effective in person, because it includes non-verbal communication. 	<ul style="list-style-type: none"> - Elderly people may have difficulty travelling to the branch office. - Many clients, whether elderly or not, decline the branch-office appointments proposed by their adviser. - Some advisers are not sensitive to the follow-up of elderly clients. - The purpose of each appointment must be agreed beforehand, even though the adviser may reply to possible additional requests from these clients. - Some flexibility is needed in the management (cancellation or postponement) of appointments, including on the part of the adviser if they consider that all the conditions are not met for decision making.
Telephone	<ul style="list-style-type: none"> - The telephone reduces travel. - Mobile phones can receive SMS messages. - The telephone offers quick contact and, potentially, an immediate reply to requests for information. 	<ul style="list-style-type: none"> - Technical or hearing problems may create communication problems and result in misunderstandings. - The telephone limits interaction between the adviser and the client, as well as non-verbal communication.

	<ul style="list-style-type: none"> - The telephone can prove useful for providing help with the use of websites and/or the provision of supporting documents needed in the case of a subscription. 	<ul style="list-style-type: none"> - A telephone interview does not allow use of documentation or visual materials to support explanations. - The recording of telephone communications ensures traceability (controls).
Internet	<ul style="list-style-type: none"> - All the information is easily accessible for people who are at ease with digital systems. - Subscribing to products online gives time to think. - Online solutions may be suitable for people who have difficulty travelling. - For certain institutions and certain products, the formalities can be carried out from a computer or a smartphone, which provides flexibility for the client. 	<ul style="list-style-type: none"> - This channel requires access to computer hardware and an internet connection. - Some people have difficulty using digital systems. - Clients must be able to manage their access security correctly (IDs and passwords, for example). The internet is the place where scams are most prevalent, and this could create information and data security risks. - The ergonomics of platforms does not always appear suitable for elderly clients. In particular, pre-contractual information may not be easy to find or understand. - Online subscription requires other means of authentication and consent than for a face-to-face appointment.

While most of the participants in the working group considered that, as a general rule, a face-to-face interview would be more relevant with an elderly person because it would make it possible to interact more to ensure, in particular, that the information provided is correctly understood, this solution cannot always be used, either because the client is not able to travel to a branch office due to reduced mobility for example, or due to the nature of the firm's business (an online bank, for example), or its internal organisation.

Therefore, even though elderly people may face difficulties using digital systems, this channel seems to offer significant advantages in the eyes of the professionals present: digital subscription allows a client to become acquainted with the information regarding the product and the contract conditions at their own pace.²⁶ Moreover, it is generally assumed that the digital divide between segments of the population (the young and the not so young) will tend to diminish over time. New and future generations of senior citizens will be increasingly at ease with digital systems because they will have lived with them longer.

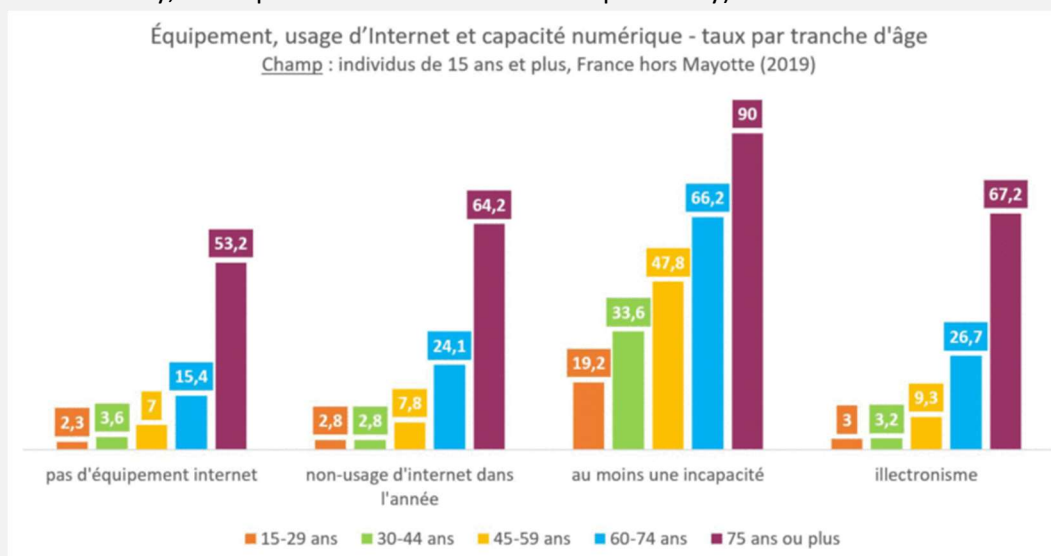
²⁶ This is especially useful knowing that the time needed for understanding and decision making generally increases with age.

Spotlight: Senior citizens and digital technology (source: ARCEP 2019 digital barometer and INSEE Senior Citizens Observatory)

In recent years, the use of digital technology and the internet has accelerated sharply in all age groups, thus partly attenuating the digital divide due to age. This phenomenon has possibly been increased by the health crisis related to the Covid-19 pandemic.

The proportion of people aged 75 and over using the internet almost every day has increased significantly, from 5% in 2009 to 19% in 2019. Senior citizens are more aware of the benefits of using digital systems, especially being able to perform administrative formalities more easily without having to travel, but also being able to maintain social links with family and friends, which can reduce the feeling of isolation which may be fairly pervasive in people as they grow older. The most elderly have also become better equipped with smartphones and other digital systems (tablets, etc.); the fraction of people aged 70 and over making mobile use of the internet increased from 17% in 2016 to 31% in 2019.²⁷

However, a large proportion of this population is even now suffering from "digital illiteracy", or "illectronisme", which the French national statistics institute INSEE defines as the fact of not having the basic digital skills (sending e-mails, viewing one's bank accounts online) or not using the internet (due to a disability, incompetence or else a material impossibility).²⁸



24% of the 70-74 age group, 40% of the 75-79 age group, 49% of the 80-84 age group and 59% of those aged 85 and over never use the internet. Despite progress made recently, the most elderly do not always possess computer hardware: in 2019, 15.4% of the 60-74 age group and 53.2% of those aged 75 and over had no internet access in their home, whatever the type of device (computer, tablet, mobile phone) and connection.²⁹

²⁷ 2019 Digital Barometer - Survey on the dissemination of information and communication technologies in French society in 2019 (https://www.arcep.fr/uploads/tx_gspublication/rapport-barometre-num-2019.pdf).

²⁸ <https://observatoire-des-seniors.com/67-des-75-souffrent-dillectronisme/>

²⁹ <https://labo.societenumerique.gouv.fr/2019/11/07/autonomie-numerique-des-personnes-agees/>

Apart from the question of equipment, senior citizens are also less "digitally educated" on average since nine out of ten people aged over 75 suffer from at least one digital disability. This disability may take the form of difficulties in searching for and finding information online, or in communicating and using basic software such as a word processor.³⁰

However, 100% digital subscription raises issues with regard to obtaining the person's consent. For example, it does not make it possible to check whether the person (especially if they are vulnerable) really understands what they are committing themselves to, whether or not they are subject to pressure from their family circle, or whether a third party has used their login identifiers fraudulently to subscribe to a product. Also, while it may seem to be suitable for elderly clients in certain respects,³¹ fully online subscription may represent a risk by accelerating conclusion of the contract. The discussions in the working group showed the extent to which the concept of time is altered in some people by ageing, and that it was necessary to allow vulnerable elderly clients time to make a decision, without necessarily impairing their capacity, which is in no way called into question.³² This is the reason why some institutions consider that investments in certain complex and/or risky products can only be made in a branch office, at least partly.³³

For remote transactions,³⁴ some financial institutions already provide for additional alerts to those defined by the regulations, e.g. within the framework of a service of reception and transmission of orders (RTO), depending on whether or not the orders placed are appropriate. They state that they use alerts to identify unusual transactions or behaviours, irrespective of the client's age.

A few examples of precautions which make it possible to check the effective consent of all clients were mentioned by certain institutions during the workshop:

- The double-click, with the second click corresponding to a confirmation by the client after verification of the client's request by the institution;
- Blocking times to ensure that the client has become properly acquainted with the pre-contractual information documents before expressing their consent;
- For cases of proxy, in order to trace the operations performed by the agent, the principal and the agent have different online banking access codes.

However, some members of the working group considered that some of these practices could actually penalise clients by hindering the fluency and speed expected of the financial institution (risk in the event of a price fluctuation in financial markets, for example). Moreover, they consider that the client journey would probably be weighed down, with the result that the client might give up on subscribing or turn to a market participant which has not adopted such a practice.

More generally, some institutions consider that the risks involved in distance selling can be reduced by a multichannel approach in some cases. This seems especially useful in case of serious doubts regarding the reality of the consent of the client in question. In some organisations, this approach is systematic for elderly clients investing in risky products. In some institutions, electronic signature of the

³⁰ <https://observatoire-des-seniors.com/67-des-75-souffrent-dillelectronisme/>

³¹ It is less tedious than a subscription on paper, especially if the person suffers from arthritis and if it is hard for them to travel or hold a pen.

³² Article 414 of the French Civil Code consecrates the principle of presumption of the legal capacity of adult persons, in the following terms: "*Majority is defined as eighteen complete years; at this age, everyone is capable of exercising the rights enjoyed by them*".

³³ Subject to the obligations entailed by the duty to advise (cf. Part 3 of this report).

³⁴ An ACPR-AMF working group on digital click paths is currently working on informed consent in the context of marketing on the internet.

transaction is accompanied by a telephone interview with an adviser for verification, especially in the case of anomalies or contradictions in the client's replies. Regarding this point, some participants in the working group asserted that the systematic adoption of a telephone confirmation call for all transactions would entail an onerous and complex organisation.

Example of a telephone confirmation call reported by a market participant

With an online bank, in the event of incompatibility between the client's profile and their subscription application, in addition to the regulatory warning notice stipulated in MiFID II,³⁵ a telephone confirmation call makes it possible to ensure that the person has properly understood the products that they want to invest in (explanations and rewording). In practice, this concerns the riskiest products. This confirmation call becomes systematic over the age of 85, for all types of transactions in financial instruments.

The participants in the working group agreed that the choice of distribution channel should ultimately be up to the client, depending on their situation and needs: accordingly, no channel should be excluded on the grounds of the client's age. An additional channel may be proposed by the institution to secure consent. It should be noted here that telephone conversations are always recorded, to be able to trace consent.

b) Discussions relating to travel by advisers to the client's home

From the regulatory viewpoint, there is no obligation for banks and insurers to travel to the client's home if the latter so requests. However, some networks said that they already offer this service, in particular for arranging a proxy when the principal has difficulty travelling, in order to ensure that the principal and agent understand the scope of the proxy and the rights and obligations of each party.

While the idea of occasional travel to existing clients' homes may seem relevant in some cases, it cannot be adopted systematically according to numerous institutions, either because of their internal organisation or because of the nature of their business (online banking). The choice of whether to propose the service of home visits by advisers depends on the commercial policy and territorial coverage of the institutions.

Numerous participants in the working group mentioned the fact that, to avoid encouraging prohibited direct marketing activities, home visits should be strictly limited:

- To existing clients, excluding any prospective client;³⁶
- At the explicit request of those clients;
- For customary arbitrage operations on products already owned or transactions that have already been the subject of a branch appointment.

³⁵ Articles L. 533-13 of the Monetary and Financial Code and 314-9 and 314-50 of the AMF General Regulation.

³⁶ In the case of financial instruments, two conditions must be met in order that this visit may not be considered as direct marketing: the person must already be a client, and furthermore the proposed transaction must not be unusual. Article L. 341-2 of the Monetary and Financial Code: "*The rules concerning the direct marketing of banking services or other financial services shall not apply [...] where the person approached is already a client of the person on behalf of whom the contact is made, provided that the proposed transaction, in terms of its characteristics and the risks or amounts involved, is similar to the transactions usually carried out by said person*".

For some of the participants, these home visits are covered by a specific procedure to guarantee traceability of communications (e.g. email, postal mail or preliminary telephone interview specifying the context of the home visit, a complete report, etc.).

c) Digital communication media suitable for all, and not reserved for elderly clients

Financial institutions increasingly give priority to their website (site accessible to the general public and client area) to publish information on products and contracts. However, in addition to the internet use problems mentioned above, age-related sensory disorders (decline in visual and hearing acuity in particular) can complicate elderly people's access to and correct understanding of information.

The working group participants discussed the existing means to adapt website ergonomics and functionality more effectively to clients' visual or hearing disorders: more instructive content (with more videos, for example), digital magnifier, oral reading of a page. They consider that these solutions could be proposed more systematically and more visibly. In client areas, highlighting the adviser's number is a solution that is easy to apply, for example.

However, some participants stated that care should be taken to ensure that the tabs or contents devoted specifically to senior citizens on a growing number of financial institutions' websites should not stigmatise these clients. In their opinion, use of these dedicated sections should be paid special attention if they are not to be viewed negatively by the target population.

International spotlight: accessibility of websites for all clients

In the United Kingdom, the Alzheimer's Society has produced guidelines regarding the accessibility of websites³⁷ for people suffering from dementia³⁸ and for older people.³⁹

For this purpose, the Alzheimer's Society is supported, *inter alia*, by the work of the World Wide Web Consortium.⁴⁰

For example, the guidelines for older people stipulate as follows:⁴¹

- For declining visual faculties: maximise the legibility of essential texts; simplify and remove non-essential visual elements; make relevant use of colours; position important content where the user will start looking; minimise vertical scrolling and avoid horizontal scrolling;

³⁷ <https://www.alzheimers.org.uk/about-us/accessibility>

³⁸ <https://www.alzheimers.org.uk/blog/how-design-website-someone-affected-dementia>

³⁹ <https://www.alzheimers.org.uk/blog/how-design-websites-older-people>

⁴⁰ The World Wide Web Consortium (W3C) is an international community, administered by mutual agreement between the MIT, ERCIM, Keio University and Beihang University with a view to bringing the World Wide Web to its full potential (<https://www.w3.org/Consortium/facts#org>).

Regarding more specifically of W3C's work on questions of website accessibility, cf. <https://www.w3.org/standards/webdesign/accessibility>, and in particular <https://www.w3.org/WAI/standards-guidelines/wcag/>

Some financial institutions (for example HSBC and Lloyds, cf. in particular <https://www.hsbc.com/accessibility> or <https://www.lloydsbank.com/help-guidance/accessing-our-website.html>) refer to these standards regarding the accessibility of their website. Accordingly, these institutions have, in particular, applied the following recommendations: using highly contrasting colours; allowing text enlargement; making sections legible for screen readers; making links meaningful; "click here" is not used; when images are used, inserting a text alternatively so that people who cannot see the image may read the text (this alternative text can be read by screen reading devices); making mobile banking applications available in an enlarged version, and incorporating audio functions for people who cannot see the buttons.

⁴¹ https://docs.google.com/spreadsheets/d/1lebBDNot0sol7wMP8tXGXJ7OMko0dsrN_FZEK51Aql/edit#gid=0

- For declining coordination faculties, help elderly people interact: target surfaces that are sufficiently wide, avoid double-clicks; leave menus open; minimise the need for using the keyboard;
- For declining hearing and language faculties: ensure that the audio content is audible, that the delivery is not too fast; minimise background noise; adjust the volume;
- For declining memory, attention, and learning and reasoning faculties: use a concise, direct writing style; allow the user the time needed;
- Regarding the user's knowledge: use familiar vocabulary; describe the various steps followed by means of text;
- Help the user search successfully by creating a broad, conspicuous search field at the top right-hand of the first page;
- Develop the user's trust by asking only for the information that is strictly necessary.

INFORMATION AND ADVICE PROVIDED TO CLIENTS

The third workshop of the working group concerned consideration of the interests of vulnerable elderly clients when providing pre-contractual and contractual information, and when providing advice and assessing the appropriateness and suitability of planned transactions. According to the members of the working group, the "decumulation" phase⁴² could entail more challenges for elderly clients than the phase involving investment in a financial product.

Context and issues

a) Obligations regarding pre-contractual and contractual information

The obligations relating to pre-contractual and contractual information for the client contribute to ensuring the integrity of the client's consent; they are defined by European and national regulations. More particularly, the information obligations concern the characteristics of products and services, and their related costs and charges.

The information obligations were strengthened simultaneously with the entry into force of the MiFID II and IDD directives and the PRIIPs Regulation,⁴³ which stipulate in particular that the information provided to clients for financial instruments and life insurance must be clear, accurate and non-misleading.

In particular, in order to ensure clarity of information and the comparability of investment products packaged by the client, some pre-contractual information must now be submitted in a standardised form: the Key Information Document (KID).⁴⁴

In accordance with the provisions of Article L. 132-5-1 of the French Insurance Code, insurers must provide the client with an information prospectus on the key characteristics of the contract, which may also take the form of a box on the first page of the insurance proposal.

In the case of financial instruments and services, professionals must provide their clients and especially their potential clients in due time with relevant information about the professional and its services, the proposed financial instruments and investment strategies, the execution venues and all related costs and charges. The information must be provided in an understandable form so that clients, and in particular potential clients, may reasonably grasp the nature of the investment service and the specific type of financial instrument proposed, as well as the risks involved, and make their investment decisions on an informed basis.⁴⁵ In all cases, they must present content that is accurate, clear and non-misleading.

⁴² Decumulation refers to a specific moment in the investment cycle of a saver, following the phase of accumulation of savings, which corresponds to the gradual consumption of those savings after retirement.

⁴³ Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). Thinking is currently being done on the European level to revise the PRIIPs Regulation in order to improve the information provided to investors, especially with regard to investment funds.

⁴⁴ The Key Information Document is to be submitted to customers in cases of marketing of "packaged" products such as multi-asset life insurance contracts and units of real estate investment companies (SCPIs). Its presentation, its content and the conditions of its revision are stipulated by Delegated Regulation (EU) 2017/653 supplementing the PRIIPs Regulation.

b) Advice and suitability requirements

For the marketing of a life insurance contract, distributors must enquire about the client's requirements and needs, their financial situation, investment objectives, and their knowledge and experience of financial matters. Gathering this information is a prerequisite for exercising the duty to advise, which requires that the professional offer their client an appropriate contract that is consistent with their requirements and needs.⁴⁶ If the information necessary for this evaluation cannot be obtained from the client, the distributor shall warn the client.

Distributors can also provide a personalised recommendation service as an extension of their duty of advice and information.⁴⁷ This service is based on a comparative analysis of various insurance solutions in order to recommend to the client those which correspond best to their requirements and needs. The provision of this service entails an assessment of the suitability of the recommended contract(s).

Under the terms of its Recommendation 2013-R-01, the ACPR recommends in particular, when gathering the client's requirements and needs, that clearly inconsistent replies given by the client be identified and managed by putting in place alert mechanisms.

Regarding financial instruments, the provision of the so-called RTO investment service (reception and transmission of orders) is subject to a suitability test:⁴⁸ the service provider collects information about the client's knowledge and experience in order to determine whether the service or the financial instrument is appropriate.⁴⁹ When the client does not communicate the necessary information or when service providers consider that the service or instrument is not appropriate, based on the information provided, the service provider must warn the client before providing the service.

The provision of investment advice or the portfolio management service is subject to a suitability test based on the client's knowledge, experience, financial situation, including their ability to bear losses, and investment objectives, including their risk tolerance. On completion of this test, if the service provider considers that the product is unsuited to the client's profile, it must refrain from marketing the product.

When the service provider has informed its client that it provides an advisory service independently, this advice is based notably on the assessment of a sufficiently broad and diversified range of financial instruments as regards their type and their issuers (which are not closely linked to the service provider) and entails no payment of a monetary or non-monetary inducement to the service provider by a third party (excluding minor non-monetary benefits), unless they are reimbursed to the client.

In the guidelines on certain aspects relating to MiFID 2 suitability requirements,⁵⁰ ESMA has given several indications regarding the suitability requirements relating to the provision of this investment service, especially to elderly clients. In particular, ESMA states that, to perform the suitability

⁴⁶ Article L. 522-5-I of the French Insurance Code.

⁴⁷ Article L. 522-5-II of the French Insurance Code.

⁴⁸ Article L. 533-13-II of the Monetary and Financial Code.

⁴⁹ Exceptionally, in accordance with Article L. 533-13-III of the Monetary and Financial Code, the provision, at the customer's initiative, of only the services of order execution or receipt and transmission of orders is subject to no test when these services concern non-complex financial instruments and when the service provider has previously clearly informed the customer that it is not required to assess the appropriateness of the financial service or instrument and that the customer does not benefit from the corresponding protection.

⁵⁰ ESMA35-43-1163 FR.

assessment, age should be taken into account because *"it is mostly important to ensure a correct assessment of the investment objectives, and in particular the level of financial risk that the investor is willing to take, as well as the holding period/investment horizon, which indicates the willingness to hold an investment for a certain period of time"* and that *"firms should also take into account the nature of the client when determining the information to be collected. For example, more in-depth information would usually need to be collected for potentially vulnerable clients (such as older clients could be) or inexperienced ones asking for investment advice or portfolio management services for the first time."*

The ESMA⁵¹ guidelines also specify that: *"Firms are reminded that the suitability assessment is not limited to recommendations to buy a financial instrument. Every recommendation must be suitable, whether it is, for example, a recommendation to buy, hold or sell an instrument"*. Significant changes in terms of investment or divestment, whether they be one-off or the result of numerous transactions for small amounts, or else changes in the beneficiary clauses for life insurance, are already the subject of special due diligence from financial institutions.

Report on the discussions

a) How to make it easier for the client to understand the information provided

Once the documentation has been submitted, it must be read and understood by the client to enable them to make a commitment on an informed basis.

When permitted, adaptations have already been made by certain institutions with regard to font size, illustrations, tutorials, glossaries and text spacing.

Apart from the documentation format, the working group's discussions showed that the adviser can use various levers to foster a proper understanding by the client. For example, in the case of a sale in the branch office, being careful to listen to the client "actively" (i.e. repeating things back to the client and asking questions). In the case of distance selling, some participants suggested that acceptance of the general conditions might only be taken into consideration once a certain time lapse has been allowed to read the information, or else to propose online help functionalities at an earlier stage, such as chatbots or balloon help.

⁵¹ https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387_fr.pdf

AMF studies on the legibility of documents submitted to clients

It is necessary to design information documents that are understandable, attractive and use everyday language appropriate for the general public.

The studies performed by the AMF⁵² over the past two years show that the target for the legibility of regulatory information documents has yet to be reached.

The European regulations⁵³ require that professionals provide clients with understandable information, to enable them to grasp the characteristics of the proposed investment products. They specify, for example, in the case of collective investment products, that the objective of the Key Information Document is to provide investors with concise information which presents the essentials necessary for them to make a decision. This should be presented in a format that makes it easy to read, in particular by using character fonts of sufficient size. It should be worded clearly, using wording which makes it easier for the investor to understand the information provided, in particular by using clear, concise and understandable wording, avoiding jargon and the use of technical terms.

To make the regulatory documents more easily readable, more informative and more attractive, it seems necessary to apply the customary principles of legibility:

- Highlighting of important information;
- Use of short sentences and the active voice;
- Simple vocabulary;
- An attractive layout.

b) Preserving independence of decision making during the decumulation phase under optimal conditions

Older people generally face new needs (need for a supplementary income on leaving working life, expenses related to health or autonomy, wealth succession, etc.) which may lead them to gradually unlock all or part of their savings.⁵⁴ The market working group agreed on the fact that most of the challenges relating to the marketing of financial products to vulnerable elderly people are generally concentrated in this "decumulation" phase.

Redemption, sale and withdrawal decisions may have a significant impact on the financial situation of a client who so requests, and should therefore receive extremely meticulous advice. When trying to determine whether the client's request is appropriate in light of their personal situation, the adviser is

⁵²<https://www.amf-france.org/fr/actualites-publications/publications/rapports-etudes-et-analyses/la-lisibilite-des-documents-dinformation-des-placements-isr-etude-de-linstitut-csa-pour-lamf>

<https://www.amf-france.org/fr/actualites-publications/publications/rapports-etudes-et-analyses/etude-amf-csa-sur-la-lisibilite-et-lappropriation-par-les-epargnants-de-la-documentation-des>

⁵³ Chapter 2 of the PRIIPs Regulation and Delegated Regulation (EU) 2017/653 of 8 March 2017 provide for the drafting and provision of the Key Information Document, which constitutes accurate, loyal, clear and non-misleading precontractual information.

⁵⁴ The post-retirement period of life can be divided into two major stages: retirement, then the "fourth age", around 80, when the need to have a financial investment for improved independence may become critical. These two stages are key moments which could be appropriate for generalising customer appointments. Note that some institutions already do so, while for the others this arrangement could only be adopted gradually given the number of customers concerned.

faced with several imperatives, which are sometimes not easy to reconcile: respect for the client's independence of decision making, the duty to advise and/or the assessment of appropriateness and suitability to proceed with this decumulation in optimal conditions, and vigilance in the case of strong presence of a family circle. They also face a risk of disputes related to a possible undermining of the client's freedom to make use of their own wealth,⁵⁵ a possible violation of the adviser's obligation of non-interference⁵⁶ or a possible refusal of a sale.

A number of participants (such as personal assistance associations) stressed the need to preserve clients' independence of decision making for as long as possible.

Proposals by the AMF and FBF (French Banking Federation) ombudsmen, Marielle Cohen-Branche and Marie-Christine Caffet

In 2018, life expectancy at birth in France was 85.3 years for women and 79.4 years for men (versus 84.7 and 78 in 2010).⁵⁷ However, it is important to distinguish between life expectancy at birth and life expectancy "in good health" or "without disability". At age 65, a woman can expect to live 23.2 more years (19.4 years for men), but the number of remaining years to live without disability is on average 11.2 (10.1 years for men). Therefore, although the French are living longer and longer on average, these additional years are lived with more disabilities.⁵⁸

It is thus becoming essential to reflect on means for assisting vulnerable elderly people experiencing more physical or neuropsychological problems, which ultimately cause a gradual loss of autonomy and potentially lead to dependence. A person can be considered dependent when they can no longer perform certain acts of everyday life by themselves and feel the need for help in everyday life. Prevention of and support for the loss of autonomy have become essential public policy issues in France and in many developed countries, with the goal of fostering "ageing well". Since 2002, measurement of the degree of dependence has been based on the AGGIR chart ("Autonomie G rontologie Groupes Iso-Ressources"). Depending on the levels reached by this indicator, various types of aid (human or material) are put in place to make the everyday life of a person in a situation of loss of autonomy easier.⁵⁹

Most elderly French people grow older in satisfactory conditions of autonomy. Only one out of five people (20%) aged over 85 is dependent. The average age of loss of autonomy for carrying out certain essential everyday life acts is 83 years.⁶⁰

⁵⁵ For withdrawal or arbitrage transactions or changes in the beneficiary clause, the adviser cannot oppose the will of the customer. However, they should be assisted as well as possible in accordance with the principle of the primacy of customers' interests which underpins the regulations relating to customer protection.

⁵⁶ The principle of non-interference, which has been defined by legal theory based on established legal precedents, prohibits credit institutions from interfering in the affairs of their customers, with regard to whom they must maintain a position of neutrality. As a consequence, a bank must perform the transactions requested by its customer (or by the holder of a proxy); a serious and conspicuous anomaly in the functioning of the account could lead the adviser to refuse the execution of a customer's order.

⁵⁷ <https://www.insee.fr/fr/statistiques/4277640?sommaire=4318291#:text=Pr%C3%A9sentation,les%20femmes%200%2C2%20an>

⁵⁸ <https://drees.solidarites-sante.gouv.fr/etudes-et-statistiques/publications/communiqu s-de-presse/article/a-65-ans-l-esperance-de-vie-sans-incapacite-s-eleve-a-11-2-ans-pour-les-femmes>

⁵⁹ Research reports – Financing the loss of independence related to ageing – Differing perspectives of actors in the sector: <file:///C:/Users/N815592/Downloads/C286.pdf>

⁶⁰ <https://solidarites-sante.gouv.fr/archives/loi-relative-a-l-adaptation-de-la-societe-au-vieillessement/article/personnes-agees-les-chiffres-cles>

A discussion was held in October 2019 between the FBF and AMF ombudsmen. They recommended that financial institutions check that the transactions requested by a client make it possible to retain sufficient precautionary savings to cope with age-related expenses (pay and payroll taxes for domestic help, possible or foreseeable entry into a home for elderly dependents, healthcare, etc.).⁶¹ In their opinion, the adviser's due diligence regarding the size of the client's precautionary savings is a full part of their duty to advise.

c) Discussion on the organisation of a second appointment in case of doubt regarding the client's informed consent

Professionals may, on the basis of the relationship that they maintain with their client and their common sense instincts, observe a change in the client's behaviour. This change could lead them to doubt this client's capacity to give informed consent for important financial decisions.

Legal spotlight: Capacity and consent

Article 1128 of the French Civil Code stipulates that three requirements must be met for an agreement to be valid: the consent of the parties, their capacity for signing a contract, and lawful and definite content. Capacity and consent therefore refer to two different concepts.

Legal capacity means the ability to have rights and obligations and to exercise them oneself (for example, the capacity for signing a contract). Article 1145 of the French Civil Code states that "*any natural person may enter into a contract except in a case of incapacity provided for by law*". Incapacity could result from being deprived of a right (known as "incapacity of enjoyment") or the impossibility of making a commitment by themselves (known as "incapacity of exercise": this is the case, in particular, for minors and protected adults, unless otherwise specified).

It is not the role of the adviser to judge the impairment of a person's legal capacity; that is a legal decision. Naturally, financial institutions apply the guardianship or curatorship measures decided by a judge when processing the cases of the clients concerned.

Consent can be defined as the will to commit one's person and/or one's property. Although the French Civil Code does not positively define the concept of consent, legal theory considers it as an expression of will.

The opinion of the National Advisory Committee on Human Rights (CNC DH) of 16 April 2015 on the consent of vulnerable persons⁶² gives a reminder that before the Law of 5 March 2007,⁶³ the question of people's capacity and consent was posed basically in a binary manner: when you have

⁶¹ Dependence has a cost, which covers all the expenses related to assistance in everyday life, healthcare and any costs of accommodation in an institution. <https://www.service-public.fr/particuliers/vosdroits/F763>, <https://www.pour-les-personnes-agees.gouv.fr/actualites/cout-dun-hebergement-en-ehpad-en-2018>, <https://www.cnsa.fr/actualites-agenda/actualites/prix-des-ehpad-en-2018-et-evolution-par-rapport-a-2017>

⁶² National advisory committee on human rights, Opinion on the consent of vulnerable persons, 16 April 2015: https://www.cncdh.fr/sites/default/files/15.4.16_avis_sur_le_consentement_des_personnes_vulnerables_2.pdf

⁶³ Act No. 2007-308 of 5 March 2007 reforming the legal protection of adults made numerous changes, including:

- The switch from the term "those without legal capacity" to "protected adults", thus adopting a more humanistic approach;
- Consecration of the principle of non-judicial remedies: judicial measures are no longer the first measures to be taken in cases of vulnerability.

legal capacity, you can consent; conversely, persons without legal capacity cannot consent. This law made it possible to take into fuller consideration the state of "vulnerability", which is different from incapacity in that it can go hand-in-hand with an impairment of the faculties of the person having legal capacity without necessarily leading to the application of severe protective rules consequently hindering the freedom of action of their beneficiary.⁶⁴ Thus, certain people, for whom the impairment of their physical or mental faculties does not place them in a situation of legal incapacity, might not be able to express fully-informed consent.⁶⁵ This intermediate situation, which the ACPR and the AMF have called a "grey area",⁶⁶ is the heart of the matter for financial institutions and supervisors. Vulnerable persons who are not placed under a legal protection regime must nevertheless be able to exercise their rights and freedoms with complete security.

It is not incumbent on the adviser to search for the existence of or diagnose a vulnerability. However, they may, when providing the pre-contractual information or carrying out their duty to advise, monitoring the habits of their client and the functioning of the client's account, form a reasonable doubt regarding the existence of a vulnerability in their client, which could prevent them from taking a financial decision on an informed basis.

In that case, even more care should be taken than with other clients regarding the expression, collection and respect of the consent of that client and, insofar as possible, ensure that it is updated regularly.⁶⁷ The CNCDH opinion specifies that it is necessary to pay attention to what a vulnerable person says, which can be easily neglected, especially if they are *"confiscated by a family circle or an institutional circle which is strongly present and speaks in their place. In this regard, the right of consent implies above all for this person their right to express themselves"*.

Accordingly, some institutions have established specific procedures when the adviser has doubts about a client. An example of this is the organisation of a second appointment in the case of a new investment or a request for divestment. This appointment aims to permit the following:

For the client:

- It allows them the time needed to become acquainted with and/or understand the documentation and information provided by the adviser during the first appointment;
- If they show signs of fatigue, they could be received at a time that is most suitable for discussion, during which they could be more capable of understanding and/or expressing their needs clearly;
- It establishes a climate of trust with the client.

For the institution:

⁶⁴ CNCDH opinion: "People may therefore be considered as vulnerable persons when they are not capable of exercising sufficiently satisfactorily their rights and freedoms, due to their situation of poor health or disability, their age or their economic conditions of existence; as such they are extremely exposed – more than the average for the comparable population – to risks of physical, mental or social impairments in the short term or longer term, including violent acts and/or negligence of all kinds. This category includes: elderly people, disabled persons or those with precarious health, persons who are physically and psychologically feeble, and persons living in conditions of extreme poverty".

⁶⁵ CNCDH opinion: "[...] A large majority of vulnerable persons are not persons whose will or discernment is impaired; but their state of ageing, or their illness or the social, health and economic environment in which they live place them in a situation of particular vulnerability and restrict their choices".

⁶⁶ The "grey area" concept was consecrated by the Report of the 116th Congress of French Notaries, Paris, 8-10 Oct. 2020, available online. Mentioned in particular in Part II, title 2, subtitle 2, chapter II, "The notary faced with de facto vulnerability".

⁶⁷ CNCDH opinion: "Consent may not be expressed in a completely defined manner, and it always remains subject to change; in this sense caution is still required both when receiving but also when using consent. Accordingly, the consent received should not be considered as a permanent given: it is important not to confine individuals to a prior choice, and to check that the consent still applies. Consent must be reversible, and individuals should, if possible, be allowed the possibility of retracting at any time".

- It can provide another point of view regarding the situation (the views of a line manager or, where applicable, a specialised contact person in the institution - cf. Part 5 of this report);
- It can analyse the marketing risk;
- It can document the situation with regard to positive law, where applicable;
- It can make a decision on the situation to market or not to market.

SUPPORT AND TRAINING FOR SALES NETWORKS

The fourth workshop of the market working group concerned adviser training and support for sales networks in understanding the implications of marketing financial products to vulnerable elderly clients.

Context and issues

The distributors of insurance products and their sales staff⁶⁸ should have the relevant knowledge and abilities needed to perform their tasks and comply with their obligations in a satisfactory manner. In addition to the initial training demanded for professional competence, insurance intermediaries and their sales staff, as well as the staff of insurance companies, are subject to obligations of continuous training and professional development, in order to maintain a satisfactory performance level corresponding to the position they hold and the market in question. The training period is at least 15 hours per year. These training sessions can be organised internally or via an external organisation, and can be followed in person or at a distance.⁶⁹

Pursuant to Article L. 533-12-6 of the Monetary and Financial Code, investment services providers (ISPs), including asset management companies, must make sure that the sales staff have the necessary knowledge and competence to comply with the legal requirements and ethical standards in force and to understand and apply the internal procedures. Those who have complied with the obligations of verification of minimum knowledge by passing the AMF examination are deemed to meet this requirement. ISPs are also required to ensure that the knowledge and expertise of their sales staff are maintained over time. This obligation is materialised by a review, each year, of the knowledge and competence of the sales staff that they employ.⁷⁰ Moreover, as regards financial investment advisers, the system of verification of minimum knowledge was extended to their activity from 1 January 2020.⁷¹ The industry associations of financial investment advisers must ensure that the knowledge of their members is updated by the selection or organisation of training sessions, with an obligation of 7 hours of training per year.⁷²

These continuous learning obligations contribute to the general objective according to which all distributors of insurance products and financial instruments must act in the best interests of clients, by having the level of knowledge and experience needed in particular to provide good-quality advice.

⁶⁸ Staff whose activities consist in providing recommendations regarding insurance or reinsurance contracts, in presenting, proposing or helping to conclude these contracts or in performing other preparatory work for their signature.

⁶⁹ These IDD provisions have been transposed into the French Insurance Code, in particular Articles L. 511-2, R. 512-13-1 and A. 512-8

⁷⁰ The ESMA guidelines for the assessment of knowledge and competence specify the criteria for assessment of this knowledge and competence, the level of which varies depending on the content of the services provided and the complexity of the products proposed.

⁷¹ Article 325-36 of the AMF General Regulation.

⁷² Article 325-38 of the AMF General Regulation.

Report on the discussions

a) Raising the awareness of the sales networks

The participants in the working group confirmed that certain sales networks are already sensitive to the quality of reception of vulnerable elderly people and to the need to be especially attentive to the environment in which the interview takes place, especially very practical aspects such as the lighting, peaceful surroundings and duration of the appointment.

Optimal conditions for an interview between an elderly person and their adviser

By Catherine Mouaci, head of the social research and innovation support unit, Fondation Médéric Alzheimer

"A number of elderly or very elderly people suffer from no sensory and cognitive disorders, making them like any other contact in administrative and commercial relations. However, health statistics indicate that 22% to 40% of people aged over 80 develop Alzheimer's disease or a similar complaint. Nevertheless, every human being, despite their vulnerabilities, is entitled to be respected and to receive communication that is relevant to their needs.

In their relationship with their bank, a person may wish to be accompanied by a close relative. Even though this third party may be a facilitator during the interview, it is nevertheless essential to make sure that the elderly person agrees and is the person who is primarily addressed throughout the discussion. When the person is alone during the discussion, always make sure that the banker's statements have been correctly understood.

When making the appointment, remind the person of the objective of the interview, the interview procedure and the subjects to be discussed. The ritualisation of the organisation will make this reassuring. During the conversation, make sure to address the person by their last name and first name as often as possible, and express the proposals made to them clearly. Use simple words and short sentences containing a single item of information at a time. Likewise, ask simple questions that require short answers and prefer closed-ended questions or multiple-choice questions to open-ended questions. For example, "Would you like a coffee?" which is preferable to "Do you want something to drink?". Make sure that the person has proper notions of time and the value of their transactions (euros, francs, other values, etc.). It is essential to examine a single topic one after the other, to break down the transactions that they have to do, and to explain each sequence and the explicit transition to the next point.

Be attentive to the fact that some people may have difficulty doing two things at a time; for example, writing and hearing what is being explained; other people may have abstraction difficulties, and written explanations may therefore be more easily understood than certain graphs.

Regarding the form, in the branch office or in their home, propose a customary environment, easily accessible, quiet, well lit and likely to be in keeping with their habits, bearing in mind that vigilance levels are often higher from 8.30 am to 10.00 am and from 3.30 pm to 5.00 pm. The duration of the

appointment should be adapted to the person's capacity for concentration; this should not exceed 30 minutes.

Paying attention to diction and speaking more slowly optimises the person's capacity for taking in information, since the speed of processing it declines with age. Take care to speak to the person placing yourself right opposite them, on the same level, sufficiently close, and leave time to facilitate interaction. Offering documentation in contrasting colours may make it easier to become familiar with them.

At each stage, summarise the information that is important, the decisions taken together and their consequences, and ask the person to express what they have understood in their own words."

In the networks, the advisers seem to be generally trained in fundamental fields and on issues that could more specifically concern elderly clients (for example, wealth succession, the financing of independence, etc.). On the other hand, the situation appears more uneven with regard to ways of examining these subjects with persons who are getting older. Likewise, raising awareness of the potential vulnerabilities of this age group and their potential impacts on financial decision making and ways of securing decisions seem to be dealt with less explicitly.

The issues mentioned by the participants in the discussions concerned, in particular, updating of the beneficiary clauses in life insurance or securing proxies, but also the attitude to be adopted faced with decisions which could appear unusual given the client's behaviour, or even suggest a financial scam.

More generally, the discussions in the working group showed that an adviser for whom the various challenges and issues relating to vulnerable elderly clients are familiar is likely to understand their needs better and guide them more effectively in their financial formalities by securing the financial decisions taken; in other words, performing their duty to advise more effectively.

Thus, an awareness-raising programme designed to provide advisers with keys to gain a better knowledge of the general characteristics of vulnerable elderly clients, in order to take their specific features into account more effectively, and thereby secure the client relationship, was considered of interest to several institutions. An example of cooperation between a major UK financial institution and an association specialised in ageing was presented during the session and was appreciated by most of the participants. Many stated that a market approach for the financial sector would make sense.

In this respect, for some members of the working group, such awareness raising would seem more effective if it were provided in person⁷³ or by "blended learning", i.e. making joint use of e-learning and the conventional in-person method, facilitating work on case studies and based on experience feedback.

The format of this awareness-raising programme would depend on the size and structure of the network. Its educational content could, ideally and with a view to convergence, be shared by the institutions, thanks to the action of the industry federations and associations.

⁷³ In-person learning may be physical or at a distance, but involves interactions, as opposed to e-learning which is a learning approach in face of the computer.

Examples of training provided to advisers and financial institutions for managing elderly clients

By Olivier Chomono, Managing Partner of Cabinet La Curatélaire, law faculty lecturer

"For the financial investment adviser and financial institutions, the independent will of elderly populations is now a key issue. Before presuming someone is incompetent, everything should be done to assess whether, with a relevant approach, they could safely undertake the act that they want to conclude.

Some organisations provide high-level specialist training which allows professional statisticians in finance and law to respond to the wealth management concerns of elderly clients and discover or consolidate wealth management techniques adapted to the later stages of life.

These short-cycle or in-depth training courses consider wealth management techniques or strategies for elderly clients, vulnerable or not, dependent or not, whose life expectancy is constantly increasing.

Ageing goes hand-in-hand with new wealth management issues which, depending on the size of the client's wealth and their life history, are very closely related to fear of lacking, fear of dependence, the increasing stress of asset management and the need to plan ahead for succession. In their approach, the adviser must take into account the elderly client's family and social environment, the situation of the spouse, whether there are children, care workers and possibly nursing staff. The practitioner builds a relationship founded more than ever on respect for their client's independence, their fundamental rights and their personal dignity.

Faced with a momentary or lasting lack of discernment, the practitioner learns to distinguish between the concepts of capacity and consent, in order to circumscribe the field of application of any residual independence, to assess the need to organise a legal protection system, and to analyse how to deal with unlawful acts."

b) Interview with the adviser at key moments in life

Retirement is a pivotal moment of change in people's living standards and life styles: it is generally a phase of declining income, but also, for the most affluent, a time for carrying out certain projects.

Accordingly, the discussions of the working group showed that, on the occasion of this "key moment in life", most institutions organise a check-up appointment with their clients who possess financial savings, in order to review their current products and future needs.

Some participants in the working group considered that this pre- or post-retirement appointment could be usefully supplemented by a subsequent appointment as the client grows older (age 80 plus or minus two years was mentioned by some participants). They considered that this interview could be the ideal occasion to better anticipate new needs related to the entry into the "fourth age", to identify any decline in autonomy and, in that case, make better practical arrangements, secure financial decisions and address issues related to the decumulation of savings and wealth succession.

Some participants in the working group expressed the idea that certain legal tools, such as a proxy, could be discussed with the client. Others specified that it is not the role of financial sector professionals to suggest a proxy to a client. According to the proposal from the AMF and FBF ombudsmen, if the client expresses the will to organise a proxy, a good practice could be, for the adviser, *"to meet with the principal and the agent to ensure that the relationship is neutral and that it is indeed established with primacy given to the client's interest"*. The FBF ombudsman considers that the scope of the proxy (restrictive list of products targeted and expenses concerned, capping of the amounts authorised by the principal) and the traceability of transactions performed by the agent (in particular those performed from the principal's online personal space) should be agreed clearly by the parties who are signatories to the proxy.

An expert workshop, run by the chairman of the 116th Congress of French Notaries, held discussions in greater depth and presented existing legal solutions, in particular the recent tool provided by the future protection mandate,⁷⁴ and the procedures for its control by the notary.⁷⁵ It was mentioned that it is useful to make informative and pedagogical guides and brochures freely available to clients, allowing them to improve their knowledge thereof, and referring to the notaries for more information. The production of such documentary materials with a neutral and informative content could be envisaged by the professionals, in partnership with the Conseil Supérieur du Notariat or specialised associations.

Legal tools to represent or assist a person: focus on the proxy and the future protection mandate
(source: expert appointment of 3 March 2020 with Maître Jean-Pierre Prohazska, chairman of the 116th Congress of French Notaries)

Longer life expectancy goes hand-in-hand with an increase in the number of elderly people likely to experience a certain vulnerability or weakening of their independence. The law protects those who are without legal capacity through various protective measures, "habilitation familiale" (family empowerment),⁷⁶ curatorship⁷⁷ and guardianship.⁷⁸ These protective measures make it possible, if necessary, to organise the representation of these persons' interests. They differ in their degree of protection and their flexibility.

Although these measures make it possible to manage many of the situations of incapacity that are faced, they cannot meet the needs of those who are vulnerable without being legally incapable. To support and protect as well as possible the persons who fall within this grey area, one solution lies in forward planning. Regarding this, two specific systems exist in France: the proxy and the future protection mandate.

In the financial sector, the proxy is a mandate by which the holder of a bank account (principal) authorises another person (agent) to manage it and have it operate in their name and on their behalf. The proxy application sent to the financial institution must be accompanied by precise details

⁷⁴ A tool for forward planning, the future protection mandate is a contractual measure opened as an alternative in priority to other legal protection measures.

⁷⁵ The control procedures are a condition of validity for any future protection mandate.

⁷⁶ <https://www.service-public.fr/particuliers/vosdroits/F33367>

⁷⁷ <https://www.service-public.fr/particuliers/vosdroits/F2094>

⁷⁸ <https://www.service-public.fr/particuliers/vosdroits/F2120>

regarding the scope of the proxy, i.e. the transactions that may be performed by the agent. A proxy may be general or limited to certain acts of types of transactions,⁷⁹ a certain amount or a certain period of time. To comply with a principle of balance, notaries recommend avoiding general proxies and preferably choosing a limitation in terms of scope and duration. Like the beneficiary clause in life insurance, the proxy that is established should be reviewed regularly to ensure that it still corresponds to the will of the principal as various events occur in life (deaths, divorce, etc.). With a view to a better understanding of the rights and obligations of each party, signature of the proxy should ideally be performed in the physical presence of the agent and the principal. The proxy is an arrangement that is well known and used by the general public, but it reaches its limits if the principal's faculties are too impaired. In this case, their consent to the transactions carried out may no longer be obtained, and the agent could be suspected of performing measures and transactions that do not comply with the interest of the principal.

The future protection mandate⁸⁰ - MPF - is a system created by the guardianship reform of 2007, allowing anyone to organise their hypothetical future dependence by planning beforehand their personal protection, physical and mental, without causing them to lose their rights or their legal capacity. The introduction of this system was able to compensate for the absence of protection which could be suffered by elderly people who are starting to experience an impairment of their mental or physical faculties, but who can no longer count on a possible proxy established for one of their relatives, due to the risk of dispute to which it could be subject.

Under the terms of the MPF, the principal designates beforehand a future protector to act in accordance with their will.⁸¹ Unlike a guardianship measure which must be decided by a judge, the MPF can be established by a private agreement, in which case it is limited to acts of administration (acts of day-to-day management, e.g. the sale or purchase of furniture for everyday use or of little value, or the conclusion of an insurance contract for property or civil liability) or by notary's deed, in which case it also covers acts of "alienation" (for example, signing a lease, buying real estate). In the latter case, the agent must report their acts to the notary each year; notaries therefore have a duty of supervision. They are bound to the judge by a duty of alert in the event of an observed dysfunction.

However, the MPF is a tool which has limits, including the absence of a public register listing the persons already benefiting from the system (this file is provided for legally but does not exist yet), or the possibility for the principal and the agent to perform joint transactions on the accounts, which could prove complicated for the professional who could receive contradictory orders.

c) Discussion on the fact of expressing a doubt regarding a client's potential vulnerability

⁷⁹ The working group noted that the increasing prevalence of the proxy was probably not desirable in the case of life insurance.

⁸⁰ <https://www.service-public.fr/particuliers/vosdroits/F16670>

⁸¹ When the agent observes that the health condition of the principal no longer allows him to take care of their person or deal with their affairs, they carry out the necessary formalities for the mandate to take effect.

This observation must be established by a doctor registered on a list produced by the Procureur de la République (public prosecutor) (the list of doctors is available in the courts). The doctor issues a medical certificate recognising the principal's incapacity. The agent then goes with the mandate and the medical certificate to the court registry to have the mandate signed by the clerk of court and thus enable it to be applied (<https://www.service-public.fr/particuliers/vosdroits/F16670>).

Every client, whatever their age, is presumed to have legal capacity.⁸² However, ageing can entail the decline of certain functions, particularly the so-called "cognitive" functions (including, in particular, consolidation, attention, thinking skills and short-term memory), which could have an impact on the ability of certain elderly clients to express fully informed consent when they make a financial decision. Thus, in performing their job, an adviser may have to pose questions regarding an elderly client who is not yet subject to a legal protection measure, but who does not seem capable of protecting their own financial interests. The discussions in the working group show that the advisers are faced with this type of situation fairly often.

This questioning therefore deserves to be viewed objectively by comparison with the client's usual financial behaviour and the implications of the transactions.

The adviser also has "know your customer" tools, and potentially certain information from computer controls and alerts designed for detecting abnormal transactions (in particular tools for monitoring account movements which can detect atypical transactions or withdrawals of exceptional amounts, etc.) which could usefully supplement their analysis to confirm or clarify a doubt regarding the risk of an uninformed financial decision. A second opinion would apparently back up the analysis of the situation to clarify or confirm the doubt and take the appropriate decision for the institution, namely either to continue with the sale by securing the collection of informed consent, or give a warning notice (clear and understood), or refrain from the sale.

In order to support advisers and help them identify these high-risk situations more effectively, some foreign institutions have given thought to a series of factual clues which could make it possible to conclude as to a reasonable doubt regarding the client's capacity for making an informed commitment in financial matters. This experience was noted as edifying by certain members of the market working group, who note that a set of clues could make it possible to better discern certain sensitive situations among the clients of French financial institutions.

⁸² Articles 1145 et seq. of the French Civil Code.

International spotlight: detection and management of cases of vulnerability

Many governments and international organisations (G20, GPFI, OECD) have examined the issue of population ageing, and at the same time the decline of the cognitive faculties, particularly in financial matters, both to analyse the phenomenon (clarify and quantify it) and to try to provide solutions. Population ageing and its consequences in financial matters is proving to be a major issue in many countries. Certain recent scandals have shown how acute the problem is. One illustration is the *Japan Post* scandal: in a low-interest-rate environment in Japan, the Financial Services Agency has highlighted dubious sales practices with elderly people.⁸³

The responses of governments, competent national authorities and financial institutions or their industry associations, for the detection and, where applicable, the management of high-risk situations in cases of vulnerability (often understood in a broad sense) appear highly diverse.

In Japan, for example, some actors have developed technological innovations to help detect and manage significant cases. One start-up is developing an application whose ultimate objective is to identify the first signs of cognitive decline by analysing spending habits by means of information sharing systems made possible by open banking. The application will send alerts to members of the family if it detects unusual expenses, in order to protect the persons from fraud.

In the United Kingdom, some banks (e.g. HSBC and Lloyds Banking Group) have signed partnership agreements with the Alzheimer's Society by which the staff in contact with clients are trained in the detection and, where applicable, case management of dementia,⁸⁴ whether diagnosed or not.

Again in the United Kingdom, cases of vulnerability (understood in a broad sense) can be detected through the emergence of red flags.⁸⁵ Certain protocols developed by specialists (the Royal College of Psychiatrists and Money Advice Trust) may also contribute to the identification and management of various vulnerability situations. For instance, the BRUCE protocol (Behaviour and talk, Remembering, Understanding, Communication, Evaluation) aims to encourage the detection of vulnerability situations due to difficulties of understanding or for decision making. The TEXAS protocol (Thank, Explain, eXplicit consent, Ask questions, Signpost) makes it easier for a vulnerability situation to be revealed by a client during an interview, and then, where relevant, for that situation to be managed. These protocols are described by the UK supervisory authority the Financial Conduct Authority, or by other entities (such as the Money Advice Trust). They form part of the tools available to financial institutions, and their use is stressed by certain institutions.⁸⁶

Other sectors of activity concerned by asset management, such as the notarial profession, are also faced with situations in which an elderly client seems to show an impairment of their faculties just

⁸³ <https://www.lesechos.fr/finance-marches/banque-assurances/japan-post-pris-dans-un-scandale-de-contrats-dassurance-abusifs-1159221>

⁸⁴ Neuro-psychiatric medical term used in cases of diseases such as Alzheimer's disease, even in the early stage.

⁸⁵ For example: <http://www.moneyadvicetrust.org/researchpolicy/research/Documents/Vulnerability%20-%20the%20experience%20of%20debt%20advisers%20-%20resource%20pack.pdf> ou <http://www.moneyadvicetrust.org/creditors/Documents/Vulnerability%20Guide%20for%20Advisers.pdf>

⁸⁶ Cf. FCA, Occasional Paper No. 31, Ageing Population and Financial Services, September 2017, page 34, and FCA, Occasional Paper No. 8, Consumer Vulnerability, February 2015, page 82.

<http://www.moneyadvicetrust.org/creditors/creditor/Pages/Vulnerability-resources-hub.aspx>, for example, "Vulnerability: the experience of debt advisers", November 2018

when major decisions are involved. In a bid to adopt an inclusive approach, capable of maintaining the capacity for decision making for as long as possible in reasonable conditions of protection of the client and security of the acts that are being proposed, they therefore examined the subject and worked in conjunction with Fondation Médéric Alzheimer, which has expertise in matters of loss of autonomy and cognitive decline. The approach was designed to be pragmatic, rooted in the reality of the situations encountered by notaries, and was based on campaigns to raise notaries' awareness of "cognitive disability".

Collaboration between the Conseil Supérieur du Notariat and Fondation Médéric Alzheimer

By Doctor Alain Bérard, Fondation Médéric Alzheimer

"When a person wants, for example, to perform a notary's deed (buy or sell property, make a will or a donation, or designate a future protection administrator), the notary, as a public officer, must check that the faculty of discernment is not impaired, that the deed is produced with the necessary lucidity, and that the enactment clearly expresses the will of the client and that the said client is not under the influence of a third party. Now, when the client is an elderly person with cognitive disorders, assessing capacity can be a complex matter. And when in doubt, it can be very tempting to refrain.

That is why in 2012 Fondation Médéric Alzheimer joined forces with the Conseil Supérieur du Notariat to help notaries in their everyday work and provide them with practical tools.

The first part of this collaboration led to the publication, in 2014, of a guide entitled "The notary faced with citizens with cognitive disabilities"⁸⁷ in order to help notaries communicate with persons with cognitive disabilities and determine, as rigorously as possible, whether a client is capable of validly expressing their will. In addition to answering questions such as "What are the signs of Alzheimer's disease? How to detect these signs in one's clients?", the aim was also to provide practical advice on how to receive people in the office and speak to a person suffering from memory disorders, speech disorders, etc., and how to obtain support from the skills and expertise of healthcare professionals: benefits of the medical certificate and how to apply for it, etc.

In addition to knowledge and know-how, it was also important to develop personal skills. The second part of the collaboration led to the organisation of a training seminar alternating theoretical contributions and practical situation simulations in the University of the Notarial Profession. Entitled "Elderly clients in cognitive distress" in 2015, this training course run by a notary, a doctor and a philosopher, all three specialists in vulnerabilities related to ageing, became in 2016 "Assessing the capacity of ageing persons: questions to ask yourself and pitfalls to avoid".

Finally, in 2016, the foundation, in partnership with the Conseil Supérieur du Notariat, launched a national survey of notaries to gain better knowledge of their practices, their difficulties, their resources and their solutions when they find themselves faced with an elderly person having Alzheimer's disease or a similar condition. This survey provided context elements to better pinpoint the Alzheimer approach in the notarial profession.

This Alzheimer approach defined with the notaries shows that faced with a person losing their bearings and having speech and calculation problems, it is possible to "not abstain".

More generally, a benevolent and inclusive society ought to ensure that everyone, whatever their characteristics, continues to be a fully active member of their district and their town, and to enjoy

⁸⁷ <https://www.fondation-mederic-alzheimer.org/nos-recherches>

access to the same services and rights, without stigmatisation or disqualification. For Alzheimer's disease, the idea is to go beyond the strict framework of the disease and medical care and take an interest in the other needs of everyday life and social life. In this respect, the principle of action worked out with the notaries can be fully adapted to other professions such as bankers or insurers..."

COMPLIANCE POLICIES

The fifth and final workshop of the market working group concerned the possible role of compliance policies and management bodies in relation to the problems posed by the marketing of financial products to vulnerable elderly people.

Context and issues

In accordance with the provisions of Article L. 354-1 of the French Insurance Code, insurance companies shall establish a governance system ensuring healthy and cautious management of their business, which undergoes regular internal review. This governance system comprises four key functions, the risk management function, the compliance verification function, the internal audit function and the actuarial function.

In accordance with the provisions of Article L. 511-55 of the Monetary and Financial Code, credit institutions shall set up a robust governance system including, in particular, a clear organisation ensuring precisely defined, transparent and consistent sharing of responsibilities, effective procedures for detection, management, monitoring and reporting of the risks to which they are or could be exposed, and a suitable internal control system. In this respect, one or more managers should be appointed to ensure the consistency and effectiveness of the permanent control, periodic control and non-compliance risk control tasks.⁸⁸

In accordance with Articles 321-1, 318-4 and 321-30 of the AMF General Regulation, ISPs, including asset management companies, should set up a compliance system to ensure compliance with their professional obligations. In particular, an Investment Services Compliance Manager (ISCM) should be appointed for ISPs and a Compliance and Internal Control Officer (CICO) for asset management companies (AMCs).

In conjunction with the institutions' senior management, these managers shall establish and maintain relevant operational policies, procedures and measures to detect any risk of non-compliance with their professional obligations, including the obligation to act in the best interests of the client, and the risks this entails.

Regarding, in particular, marketing to vulnerable elderly people, some participants in the working group considered that the department in charge of compliance could have a role to play in providing support for the sales networks and, where applicable, in developing specific internal procedures. However, there was a discussion in the working group regarding the advisability and feasibility for compliance policies and staff of defining a compliance policy for such a narrow and ill-defined client segment, when the compliance teams intervene for exceptional or atypical transactions irrespective of the client's age, and they are not organised by client type.

⁸⁸ Articles 16, 17 and 28 of the order of 3 November 2014 relating to internal control of companies in the banking, payment services and investment services sector subject to the control of the Autorité de Contrôle Prudentiel et de Résolution.

If the compliance function could establish procedures for this personalised management as part of its duties, then it would be faced with several complex issues:

- The need to inform advisers of the main characteristics of the target clients.⁸⁹ This holds for all clients, but especially for vulnerable elderly clients, whose needs, attitudes, risk perception, modes of interaction, and use of knowledge and experience may change over time. Now, it remains difficult to define an objective framework containing the main characteristics of vulnerable elderly clients.
- Compliance with the regulatory provisions relating to personal data protection. An adviser may, by observing signs or atypical transactions, have a doubt regarding the client's proper understanding of the information communicated, and hence regarding their informed consent. They might possibly want to record this doubt in the IT systems, and keep trace of it so that Compliance may, if necessary, undertake the relevant measures. However, this is governed strictly by personal data protection rules.
- Observance of professional secrecy and confidentiality. In certain specific situations, the adviser may be faced with a dilemma and want to inform one of the client's relatives of a highly problematic situation. However, the obligation of confidentiality prevents the adviser from contacting the client's family or those very close to a vulnerable elderly client in the event of a problem for investment in or management of a financial instrument.

Is the appointment of a "trusted person" possible and advisable?

By Catherine Mouaci, head of the social research and innovation support unit, Fondation M  d  ric Alzheimer

"We often know the role of the trusted person who supports us in the event of a health problem, but what is less known is the role of the person who supports an elderly or disabled person in their life in an institution. Two different realities for these simple systems which enable a person to be supported and represented. In the first case, in the event of hospitalisation,⁹⁰ the nominated trusted person takes part in the doctor-patient relationship to assist the latter during interviews or decision making related to their health, or even possibly to express their will in the event of an impediment. In the second case, when moving into a social or medico-social institution⁹¹ or being received in a family, this person helps the elderly or disabled person understand their environment. They can thus support them in managing formalities and ensure respect for their choices, rights and liberties. These two specific roles can be entrusted to the same person. The law encourages the use of a trusted person. It requires doctors and institution directors to explain this and suggest the nomination of a trusted person whenever necessary.

At present, the usefulness of such a measure is indisputable. The nomination of a trusted person is becoming increasingly frequent, especially in care homes for the elderly. In some homes, 30% of the residents have nominated one, while in others the proportion exceeds 70%. The opinion of this third party, close to the vulnerable person, is decisive. Usually, it is a member of the family that is chosen by the resident. The decision to nominate a trusted person is still taken too often on the day of settling in. Their role will be essential and facilitating, especially if the resident is gradually losing

⁸⁹ Cf. report by Eric Bonsang on "Financial decision making by elderly people" of 31 December 2018.

⁹⁰ Acts 2016-41 of 26 January 2016 on the modernisation of our health system, of 4 March 2002, and of 22 April 2005, Art. L. 1111-6 of the Public Health Code.

⁹¹ Act No. 2015-1776 of 28 December 2015 relating to society's adaptation to population ageing, Art. L. 311-5-1 of the Code of Social Welfare and the Family.

their capacity for understanding what is happening around them, has difficulty expressing themselves or develops cognitive disorders due to Alzheimer's disease, for example. It is not always easy to express one's will in a complex living environment, despite the competence of the staff and the customised procedures. The novelty of the environment, its technicality and the numerous professionals met with can be intimidating and destabilising, even for a person who is in possession of all their capacities. The trusted person is therefore a reassuring reference, a point of support, and a factor of balance in the resident/professionals and resident/family relationships. For the multi-disciplinary team, they will also constitute a real resource, because they reduce uncertainty, the risk of making mistakes when the decision-making capacity is no longer really present. Whether for co-construction of the personalised life plan, updating of the healthcare plan, or assessment of the benefit/risk of a situation, the trusted person is the spokesperson who prolongs a person's capacity for asserting their aspirations and rights. The decision to be supported by a trusted close relation is important. But this nomination is not yet a natural, prepared process and is still too belated given the disruption of their life history. For it to acquire all the importance that the legislator intended, it should be prepared well in advance. Knowing how to project oneself by preparing for the eventual occurrence of cognitive disorders would make it possible to remain an actor in one's life for as long as possible. On the front line for detecting signs of the loss of cognitive independence, homecare professionals, healthcare professionals or even civil society should be trained to know about and promote the use of the trusted person. This system has proved itself in the field of healthcare; however, it is essential to remain vigilant regarding the procedures for nomination of the trusted person in order to take suitable account of the personal choice of the patient. This system has managed to find a place in professional discussions while respecting the obligations related to medical secrecy. It could be interesting to use this as a basis for other sectors (such as the financial sector, the welfare sector, etc.) in which it is important to leave decision making up to the vulnerable person insofar as possible. In particular, this principle of having a single contact person, identified and chosen by the vulnerable person, is highly relevant for a context in which confidentiality is essential."

Report on the discussions

a) Discussion regarding the advisability of establishing specific bodies and procedures

i. Discussion regarding the possible appointment of a "vulnerable elderly clients" expert

The members of the working group were informed that there are already, in certain distribution networks, "protected adult" experts who know the regulations relating to legal protection measures. On this model, the idea of appointing an expert in charge of organising and monitoring the internal procedures relating to vulnerable elderly clients was discussed.

This expert would be appointed for their special expertise or knowledge regarding elderly clients and/or the consequences of ageing in financial matters, and would have a role of providing support and advice and explanations for the network. They would ensure that this aspect is taken into account in compliance checks.

For distributors with the status of insurance intermediaries, financial investment advisers, or again for intermediaries who operate without a formalised compliance structure, this expert could be positioned at the level of the industry associations. For the other distributors (insurance companies,

ISPs), this role could be entrusted to the internalised compliance function of these institutions, especially in charge of the management of exceptional or atypical transactions. This in-house expert would combine this specific function with their conventional roles.

An international example: the appointment of a vulnerability "champion" for financial institutions in the United Kingdom

In the United Kingdom, the Alzheimer's Society has drawn up a charter⁹² to improve the experience of clients suffering from Alzheimer's disease during their financial formalities. Among its recommendations is the appointment of a vulnerability "champion" in the institutions. This champion must, insofar as possible, both hold a line management position and have a direct relation with employees in contact with clients. Their identity must be known to all the members of the staff. Among their roles, the "champion" must regularly provide a situation report to the institution's board of directors (or a similar body) and highlight the progress to be made for the institution as a whole to move toward a more suitable organisation to allow properly for situations of vulnerability.

Some members of the working group consider that this expert could, for example, work in the following ways:

- Including aspects relating to the marketing of financial products to vulnerable elderly clients in the internal control programme. The participants expressed the idea that a review of the actions carried out would be presented regularly to the relevant governance bodies, if possible among the highest levels in the institutions in question;
- Managing training support for client advisers, with initiatives such as the inclusion in existing training programmes of awareness raising for sales staff on subjects relating to the sale of financial products and services to vulnerable elderly clients, or the production and dissemination of practical guides for staff in direct contact with vulnerable elderly clients, containing information on the internal system defined by the institution;
- Answering questions from the networks relating to the marketing of financial products to vulnerable elderly clients.

ii. Discussion on the advisability of establishing an enhanced due diligence approach

The participants in the working group discussed the possibility of the compliance function defining an enhanced due diligence approach to prevent any non-compliance risks arising from the marketing of products to vulnerable elderly clients. Some participants were very much in favour of this idea. Others pointed out that compliance functions are not organised to take action based on the type of clients, as their action is focused on atypical and exceptional transactions whatever the client. They also considered that each institution should be able to put in place the procedures and means that seem to it best suited to its organisation and its range of clients.

This reflection regarding an enhanced due diligence approach is to be continued and could be organised around the following main lines:

⁹² https://www.alzheimers.org.uk/sites/default/files/migrate/downloads/dementia_friendly_financial_services_charter.pdf

- Advisability of establishing a systematic examination procedure for requests for investment, arbitrage and divestment operations regarding financial savings above a reference age to be defined internally, in order to check the advisability of the planned transaction for the client;
- Advisability of conducting check-up interviews with clients at certain key dates (e.g., on entering the "fourth age" age group). These moments generally go hand-in-hand with numerous changes in the client's personal life and could be an opportunity to check that the products they hold still meet the suitability requirements, and to discuss future needs, examining in particular investment and decumulation;
- Advisability of providing for or strengthening, if necessary, the supervision of transactions performed within the framework of proxies, e.g. by means of a regular review of a sufficiently significant sample, as part of second-level control.⁹³

Alerts already exist in the institutions, according to the replies to the questionnaire by members of the working group

Certain existing IT controls and alerts could contribute to enhanced due diligence concerning the transactions of vulnerable elderly clients given the legitimacy of protecting both the client's interests and the institution's security:

- Controls on sensitive operations, such as changes of beneficiary clause;
- Alerts related to financial security (combatting fraud, money laundering and the financing of terrorism, market abuse and embargoes), which make it possible to identify transactions that are atypical and/or exceptional due to their recurrence, their amount, their nature, their location, or the channel used;
- Alerts related to client identification requirements under the terms of the regulations on anti-money laundering and the financing of terrorism or for the collection of information stipulated by the IDD and MiFID II directives;
- Monitoring of commercial activities: sales reports can be a precious source of information on what has been proposed to clients in the institution. The rate of marketing of complex products to clients exceeding a given age could be monitored, for example.

⁹³ Permanent control is a task performed on two separate and complementary levels. Level-one control involves carrying out everyday activities while managing risks, and is performed on the field level by line personnel and their line management. It is supplemented by level-two control, performed by permanent control functions independent of the operational entities and devoted exclusively to this task.

Example of the Banking Buddy system

By Guy de Koninck, Supplier Relationship Manager, BNP Paribas Fortis

"The concern for protection can lead to an accelerated restriction of independence in financial management. In Belgium, this was one of the problems reported by the Flemish working group of persons suffering from dementia. As part of an intrapreneurship programme by BNP Paribas, a project explored the potential for extending the independence of vulnerable elderly people in time by using artificial intelligence to enhance due diligence.

The Banking Buddy will monitor transactions on the account of the vulnerable person, the amounts, frequencies, payment channels, withdrawals, etc. If an unusual transaction is detected, the application will send an alert to the trusted third party nominated by the person themselves, who may contact them to see whether all is in order. This means, for clients and staff, paying attention to "thinking sooner of what comes later" and establishing an authorisation to share information. Therefore, the solution will also propose training, awareness raising and support measures.

This approach, based on the needs of the client and the care worker to be able to share the results of monitoring facilities with the trusted third parties, requires multidisciplinary cooperation. The Banking Buddy was developed through collaboration with an in-house "champion" of elderly people, data scientists and colleagues in the legal, compliance and fraud departments, and through discussions with care workers."

b) Discussion regarding risk detection and traceability

Detecting and reducing the risks of inappropriate marketing for vulnerable elderly clients relies on coordinated action of the sales networks and the compliance function.

This approach could permit a fuller response to the legitimate expectation of the associations involved in providing support for vulnerable elderly people, by preserving their autonomy for as long as possible, while reassuring professionals in the financial sector.

However, it is incumbent on each institution to define more precisely the roles of the actors in its distribution network and those of its compliance department (in particular the potential "vulnerable elderly clients" expert) with regard to the detection and monitoring of clients who might not be able to express an informed consent.

During the workshops of the market working group, it became apparent that one of the crucial issues for financial institutions is the detection and monitoring of clients who seem unable to express a fully informed consent. During an appointment, an adviser may observe in an elderly client certain signs (such as a difficulty of understanding, memory problems, an inability to express their needs, etc.) which might raise doubts regarding their ability to commit themselves on an informed basis. The client may need additional time for thinking or for more explanations. The adviser may need to be reassured by their institution. Expressing a doubt could trigger a procedure controlled by each institution: a second appointment, a "second pair of eyes" of their supervisors, etc. To clear the doubt it will undoubtedly be necessary to make use of observations already made by the compliance department during controls and alerts ("iteration") with a view to mitigating the risk of inappropriate marketing but also stabilising financial decision making.

In this context, the adviser may want to record this "doubt" in the institution's information systems and retain this information, in accordance with the requirements relating to personal data protection,⁹⁴ in order to ensure monitoring of their clients and the primacy of their interests.

Under what conditions is a system of enhanced due diligence for the marketing of financial products to vulnerable elderly people in compliance with the GDPR?

Recommendations of the French data protection agency CNIL

"The CNIL proposes an example of good practice for establishing this system in compliance with the GDPR; however, the entity remains responsible for its compliance, and may use a different process if it considers it to be also in compliance.

It is proposed including in the client file a check box preceded by a neutral indication ("additional opinion"), excluding the processing of any other data (principle of minimisation), after the client adviser has observed a set of clues. The observation should be multi-factor (client's characteristics, financial situation, data resulting from transactions, etc.).

As part of this good practice, there is therefore no processing of sensitive data within the meaning of the GDPR.

The objective of the system is to prevent the risk of mis-selling. This objective is in the interest of the client. Clients should be told if the adviser decides to implement a multi-factor evaluation, for loyal information of the person, who must be able to oppose the procedure.

In this good practice, the information collected for the multi-factor evaluation is neither retained nor even processed by the entity. Only the information in the check box is processed, during the marketing process and within the entity.

If the entity chooses not to retain this information following the marketing decision, it shall be able to justify the decision taken by means of the other data already available to it."

⁹⁴ In particular the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of these data, repealing the 95/46/EC directive (General Data Protection Regulation - GDPR) and Act No. 78-17 of 6 January 1978 on IT systems and private rights: "Informatique, Fichiers et Libertés".

CONCLUSION

This report is the result of discussions between stakeholders in finance, consumption protection and the ageing of the population. It contains paths for reflection, experiences, and viewpoints on the impact of the demographic transition on the financial decision making of vulnerable senior citizens. It will undoubtedly enable professionals in the financial and insurance sectors to examine the questions raised in greater detail and move forward with a view to developing homogeneous shared practices.

Appendices

1 – List of participants in the market working group

Allianz
Anacofi
ASCD - CGP
Association française des Conseils en Gestion de Patrimoine Certifiés (CGPC)
Association France Tutelle
Association nationale de défense des consommateurs et usagers CLCV
Aurep
BforBank
Boursorama
BPE
CGT Banques Assurances
Chambre Nationale des Conseils en Gestion de Patrimoine (CNCGP)
Ministry of Justice
CNP Assurances
Financial Sector Advisory Committee (CCSF)
Crédit Mutuel Arkéa
Direction Générale du Trésor (French Treasury Department)
French Banking Federation (FBF)
French Insurance Federation (FFA)
Fondation Crésus
Fondation Médéric Alzheimer
GDP Conseil
La Compagnie des CGP-CIF
La Curatelaire
La Finance pour tous
Milleis Banque
Olifan Group
Planète CSCA
Rothschild Martin Maurel
Sciences-Po
UFC Que Choisir
Union Financière de France
Union Nationale des Associations Familiales (UNAF)

2 – Meetings of experts, hearings and additional meetings

October 2019: Marielle Cohen-Branche, AMF Ombudsman, and Marie-Christine Caffet, Ombudsman of the French Banking Federation (hearing)

March 2020: Maître Jean-Pierre Prohaszka, chairman of the 116th Congress of French Notaries (meeting of experts with the market working group)

April 2020: Thomas Dautieu, Head of Compliance, and Aymeric Pontvianne, Finance and Innovation consultant, Compliance Department – CNIL (hearing)

June 2020: Patrick Gohet, Deputy Defender of Rights in charge of combating discrimination and promoting equality, and Slimane Laoufi, Head of the employment arm/private goods and services, in relations with the Defender of Rights (hearing)

September 2020: "Financial Mistreatment" Commission of the Fédération Internationale des Associations de Personnes Âgées (FIAPA), chaired by Alain Koskas (presentation of work by ACPR-AMF and discussions)

September 2020: Commission de Lutte contre la Maltraitance et de Promotion de la Bienveillance⁹⁵ (participation in the meeting on the definition and classification of acts of mistreatment, especially financial acts)

October 2020: David Noguéro, Agrégé, Professor of the Law Faculties at Paris University, specialist in the protection of vulnerable adults and insurance law, chairman of the Consultative Commission on Commercial Practices of the ACPR (hearing)

January 2021: Aymeric Pontvianne, Finance and Innovation consultant, Compliance Department, and Erevan Malroux, legal expert in the Department of Economic Affairs – CNIL (meeting of experts with the market working group)

January 2021: George Pau-Langevin, Deputy Defender of Rights in charge of combating discrimination and promoting equality, and Claudine Jacob, "Protection of Rights – Legal Affairs" Director with the Defender of Rights (hearing)

⁹⁵ "The Commission pour la Lutte contre la Maltraitance et la Promotion de la Bienveillance is a joint body of the Haut Conseil de la Famille, de l'Enfance et de l'Âge (HCFEA) and the Comité National Consultatif des Personnes Handicapées (CNCPPH), set up on 19 March 2018 and chaired by Alice Casagrande. The commission is formed of members appointed by the HCFEA and CNCPPH, and also qualified persons (experts) and representatives of all the sectors concerned, notably the Ministries of Solidarity and Health, Justice, the Interior and Disabled Persons, regional health branches and departmental Councils. It is tasked with making proposals concerning the risk of mistreatment in all living environments, whether in the home or in an institution." (<https://solidarites-sante.gouv.fr/affaires-sociales/personnes-vulnerables/maltraitance-des-personnes-vulnerables/article/commission-lutte-contre-maltraitance-et-promotion-bienveillance>).