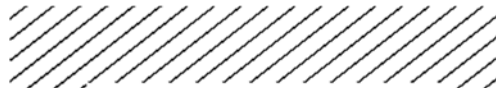




JULY 2020
**SUMMARY OF SPOT INSPECTIONS ON
RECORDING TELEPHONE
CONVERSATIONS AND ELECTRONIC
COMMUNICATIONS AND ON RETAINING
THOSE RECORDINGS**



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INTRODUCTION

As announced in the AMF's supervision priorities for 2019, a series of short thematic "SPOT"¹ inspections relating to recording telephone conversations and electronic communications and retaining them was carried out. The inspections were conducted under the provisions of Directive 2014/65/EU of 15 May 2014² on markets in financial instruments ("MiFID 2"), supplemented by Commission Delegated Regulation (EU) 2017/565 of 25 April 2016. The SPOT inspections involved a sample of five investment services providers ("ISPs").

The main objective of this series of SPOT inspections was to ensure the effectiveness, quality and usability of recordings made by ISPs in the course of their market activities. Particular attention was paid to the following topics:

- the scope of application of the recording measures;
- the tools and systems used;
- the procedures and controls implemented;
- the system for identifying incidents and the remediation measures implemented where necessary.

This overview therefore aims to provide an insight into the operational implementation of the obligations for ISPs to record and retain communications.

This document is neither a position nor a recommendation. The practices identified as either "good" or "poor" highlight approaches identified during the inspections that may facilitate, or complicate, compliance with regulations governing the recording of telephone conversations and electronic communications.

The inspections were conducted between November 2019 and February 2020, prior to the onset of the Covid-19 health crisis. The on-site inspections covered recordings from 2018 and 2019.

After the SPOT inspections, the ISPs involved informed AMF of changes related to this crisis. Thus, in these exceptional circumstances, four of the five ISPs inspected announced to AMF, that they authorised the use of mobile phones for business purposes, despite the fact that there were forbidden before, as it was observed during the SPOT inspections. They also announced having implemented recording and retention system related to this use.

¹ *Supervision des Pratiques Opérationnelle et Thématique* – operational and thematic supervision of practices.

² Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, transposed by Executive Order no. 2017-1107 of 22 June 2017 and effective as of 3 January 2018.

1. SUMMARY OF THE MAIN FINDINGS OF THE INSPECTIONS

In general, the investigations conducted by the inspection task force enabled to appreciate the level of operational implementation by the five institutions of the regulatory provisions relating to their obligations to record and retain communications. In particular, the task force was able to quickly access the recordings they had selected. It was also able to attend on-site demonstrations that enabled it to assess the effectiveness of the recording and retention tools and systems implemented by the five ISPs inspected. However, a certain number of shortcomings, relating to formalisation and monitoring, were noted at all five ISPs. These show the importance of reviewing the procedures, controls and incident monitoring put in place to ensure that they are being carried out effectively.

Firstly, with regard to the scope of recording, all ISPs inspected had correctly identified and defined the scope of their activities that require communications to be recorded. An analysis of the methods used to monitor and update the scope of recording revealed differences in practices, including setting up a dedicated committee and extending email recording to all employees operating in the markets, which is good practice. However, the use of a functional terminology to classify the job roles of those being recorded could make it difficult to verify compliance with this obligation and is poor practice. Lastly, the inspection task force identified two shortcomings, one relating to the lack of a record of those individuals who have equipment subject to be recorded, and the other relating to the lack of traceability of updates to the list of individuals being recorded. Both these practices may not comply with the regulations.

Secondly, in terms of tools and systems, all five ISPs inspected used a recorded fixed telephony system, standard "Outlook"-type email solutions and instant messaging "chat" systems. Communications were reliably recorded, and the procedures at all institutions stated that the recordings are unalterable (cannot be modified or deleted) for the entire period they are stored. Overall, the task force identified four good practices, mainly related to *(i) banning the use of mobile phones to carry out market transactions, (ii) making recordings more robust by duplicating them, and (iii) centralising and securing requests to access the recordings*. Concerning the ban on the use of business and personal mobile phones by the five ISPs inspected, this was justified by technical issues with recording and retaining mobile phone conversations. These issues could make compliance with the regulatory provisions more difficult.

Thirdly, **with regard to procedures, it appears that the majority of the institutions inspected had a relatively effective procedural corpus**. The procedures and internal regulations of four institutions refer to the obligation to provide prior notification to employees falling within the scope of the recordings. In addition, one institution informed its clients, through contractual documentation, of the recordings and the possibility of obtaining a copy of them. These two practices ensure that the information is available in formats that are easily accessible and enduring to the target population and are, in this sense, good practices. However, the fragmentation of the provisions relating to recordings and their retention across various procedures and the absence of any reference to the retention period obligations for recordings of electronic communications are likely to weaken the effectiveness of the system and are, in this sense, poor practices.

Fourthly, with regard to the control system, the task force observed shortcomings at all the institutions inspected in terms of both the scope of the controls and their formalisation and monitoring, which will need to be strengthened to make them more effective. However, the task force did identify a good practice relating to the implementation of a permanent control system (24 hours a day, 7 days a week) for recordings, which detects any malfunction and issues an immediate and systematic alert where necessary.

Fifthly, with regard to the process for identifying and managing incidents and, where appropriate, the associated remedial measures, a number of weaknesses and even shortcomings were observed by the inspection task force, with three poor practices and one good practice being identified. In particular, the task force's findings revealed that incident monitoring could be rather patchy and was not effective enough: *(i) a lack of dedicated*

monitoring of recording incidents, (ii) missing incident resolution dates, and (iii) inadequate responsiveness in recording incidents, which are poor practices. However, the task force noted that a dual process for reporting incidents to the institution's management bodies has been introduced: (i) on an ad hoc basis after each incident and (ii) on a monthly basis, which is good practice. Furthermore, the lack of responsiveness in identifying incidents because of an inadequate control system and missing resolution dates on incidents were also noted and could be considered as situations of non-compliance with the regulations.

Lastly, it should be noted that some of the above-mentioned findings have already been changed and corrected, in particular with regard to the lists of individuals being recorded, the procedures and the control plans of the institutions inspected. Other findings are subject to changes that were still in progress or forthcoming at the time this overview was written. In particular, many were pending internal validation within the institution.

It should also be noted, that the procedures described in this overview are attached to work conditions that are prior to the Covid-19 health crisis. This description should not prefigure the changes that might occur consequently to an enduring recourse to teleworking.

2. CONTEXT AND SCOPE

2.1. PRESENTATION OF THE SAMPLE OF ISPs INSPECTED

These SPOT inspections were carried out simultaneously in four credit institutions and one investment firm. The criteria used by the task force to select these five institutions were:

- the provision of investment services related to their market activities;
- the use of messaging systems, whether standard email (e.g. Outlook) or instant messaging (“chat”) systems, used in connection with their market activities.

2.2. TOPICS ADDRESSED AND METHODOLOGY USED

The following topics were addressed during these inspections:

- the scope involved (functional areas, duties, people, etc.);
- the tools and systems used;
- the procedures currently in effect;
- the control system;
- the process for identifying and managing incidents and, where appropriate, implementing remediation measures.

For each of the five institutions inspected, the task force analysed the following documents and information in particular:

- the lists of activities and employees whose telephone conversations and electronic communications (sent and received) are recorded;
- the inventory and/or mapping of tools and systems used;
- the procedures currently in effect for recording and retaining conversations and communications;
- the formalisation of the work and results of the first- and second-level controls carried out by the institution;
- the description of the process for identifying and managing incidents with the tools and for monitoring tables and any remediation measures implemented.

Furthermore, in order to complete its analyses and improve its understanding of the tools and systems implemented by the institutions, the task force also:

- attended, on-site at each institution, several demonstrations of how the systems used for recording and retaining recordings work;
- carried out, for each institution, sample-based testing to ensure the existence, availability and usability of the recordings. This testing covered all the communication tools used by the institutions inspected:
 - fixed telephony system;
 - Outlook email system;
 - Symphony instant messaging system;
 - Reuters/Refinitiv instant messaging system;
 - Bloomberg instant messaging system;

- Skype instant messaging system.

For this testing, the inspection task force selected six different people (one person for each tool) and six different working days (one day for each person). The task force then randomly selected, for each person and each corresponding day, a work-related recording (telephone conversation or electronic communication). Lastly, the task force asked each institution to provide it with six recordings related to the six selected conversations and communications.

2.3. APPLICABLE REGULATIONS

The work of the inspection task force was based in particular on:

- The Monetary and Financial Code, in particular the articles resulting from the transposition of MiFID 2;³
- Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing MiFID 2;
- The AMF General Regulation and in particular the articles on recording and record keeping.

³ Executive Order no. 2017-1107 of 22 June 2017 and effective as of 3 January 2018.

Main legal sources:

- ✓ Article L. 533-10 II. 6) and III. of the Monetary and Financial Code relating to the provisions applicable to investment services providers with regard to recording any service provided and the retention of records.

Scope

- ✓ Article 76 of Delegated Regulation (EU) 2017/565 on the recording of telephone conversations or electronic communications, paragraph 1(a) (identification of the telephone conversations and electronic communications), paragraph 2 (effective oversight and control over the policies and procedures by the management body) and paragraph 4 (record of individuals).

Tools and systems used

- ✓ Article 72 of Delegated Regulation (EU) 2017/565 on the retention of records.
- ✓ Article 76 of Delegated Regulation (EU) 2017/565 on the recording of telephone conversations or electronic communications, paragraph 10 (storage on a durable medium).
- ✓ Articles 312-39, 312-40 and 312-41 of the AMF General Regulation on recording and record keeping.

Procedures currently in effect

- ✓ Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures).
- ✓ Article 72 of Delegated Regulation (EU) 2017/565 on the retention of records.
- ✓ Article 76 of Delegated Regulation (EU) 2017/565 on the recording of telephone conversations or electronic communications, paragraph 1 (recording policy) and paragraph 8 (information provided to the client).
- ✓ Articles 312-39, 312-40 and 312-41 of the AMF General Regulation on recording and record keeping.

Control system

- ✓ Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures).
- ✓ Article 76 of Delegated Regulation (EU) 2017/565 on the recording of telephone conversations or electronic communications, paragraph 6 (monitoring recordings).
- ✓ Articles 312-39, 312-40 and 312-41 of the AMF General Regulation on recording and record keeping.

Process for identifying and managing incidents

- ✓ Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures).

3. OBSERVATIONS AND ANALYSES

3.1. SCOPE INVOLVED (FUNCTIONAL AREAS, DUTIES, PEOPLE, ETC.)

In this section, the inspection task force focused on analysing the process for identifying the scope of recording defined in the recording policy of the institutions inspected, as referred to in Article 76(1)(a) of Delegated Regulation (EU) 2017/565 on the identification of telephone conversations and electronic communications. It also looked at how these institutions maintain the record of individuals being recorded, as required by Article 76(4) of the aforementioned Regulation.

In this respect, the task force found that all of the institutions inspected had clearly identified and defined the scope of their activities subject to these provisions in terms of functional areas, duties performed and individuals requiring their conversations and communications to be recorded. Monitoring was formally documented using Excel spreadsheets for all of the institutions inspected. However, the methods used to monitor and update the scope of recording proved to be very different from one institution to another. These differences in implementation resulted in both good and poor practices being identified, as described below:

- Among the good practices observed, one of the five institutions had set up a monitoring committee dedicated to the issues surrounding recording and retaining recordings of telephone conversations and electronic communications.

Going beyond the applicable regulatory requirements, another of the five institutions inspected had chosen to record and retain, by default and sensibly, the emails of all employees working in a role related to market activities, regardless of their role, even if they were not directly involved in providing an investment service. The aim of this approach was to avoid the operational risk of failing to update the list of individuals being recorded (e.g. as a result of new starters/leavers and changes in positions/transfers, etc.).

- With regard to poor practices, the task force found that three of the five institutions had drawn up lists of individuals being recorded that included their job titles, in French and/or English, corresponding to the job title naming convention used by their respective human resources departments. However, some job titles were not particularly explicit (e.g. manager, work-study employee, trainee, specialist, assistant, etc.) and did not provide a basis for deciding whether these employees should be recorded nor for ensuring accurate and adequate monitoring in terms of the procedures for recording conversations and communications.
- Lastly, the task force also observed shortcomings that could constitute non-compliance with the regulations (paragraph 4 of Article 76 of Delegated Regulation (EU) 2017/565: *“Investment firms shall keep and regularly update a record of those individuals who have firm devices or privately owned devices that have been approved for use by the firm”*).
 - ✓ One of the five institutions did not have a record of individuals being recorded, and another institution had not developed a record of individuals with a mobile phone provided or authorised by the institution;
 - ✓ Another of the five institutions had not clearly defined the scope of individuals to be recorded. However, this situation was subsequently rectified with the setting up of a dedicated monitoring committee;
 - ✓ For two of the five institutions, the list of persons being recorded did not include the date on which the list was last updated.

Good practices:

- Setting up a monitoring committee dedicated to the scope of recording and retaining communications.
- Recording and retaining by default the emails of all employees working in a role related to market activities, regardless of that role.

Poor practice:

- Drawing up a list of individuals being recorded and including their job titles, in French and/or English, corresponding to the job title naming convention used by the human resources department, some of which were not particularly explicit, and using this list to decide whether these employees should be recorded. Examples: manager, work-study employee, trainee, specialist, assistant.

3.2. TOOLS AND SYSTEMS USED

In this section, the task force focused on analysing the tools and systems used for telephone conversations and electronic communications and on analysing their use in accordance with the provisions of Article 72 of Delegated Regulation (EU) 2017/565 on the retention of records and Article 76 of the same Regulation on the recording of telephone conversations or electronic communications.

There are two main categories of conversation and communication tools and systems used by the institutions:

- fixed telephony tools (e.g. dealerboards, etc.) and mobile telephony tools;
 - standard email and instant messaging (chat) tools.
- With regard to telephony, it appears that for all five institutions inspected, only the fixed telephones provided by the institution are authorised for market conversations (processing stock market orders and conversations with customers). In accordance with the institutions' procedures, the use of business and personal mobile phones to carry out market transactions was prohibited without exception. In the absence of an effective technical solution for recording, retaining and using data, this is considered good practice.

In the exceptional circumstances arising from the health crisis, four of the five institutions indicated that they had authorised the use of mobile phones for business purposes, stated that the conversations were being accurately recorded and mentioned the technological solution used.

With regard to electronic messaging, the institutions have several (but not necessarily all) of the following tools at their disposal:

- Microsoft Outlook (email messaging);
- Symphony (instant messaging/chat);
- Bloomberg (instant messaging/chat);
- Reuters Messenger Eikon/Refinitiv (instant messaging/chat);
- Ice Chat (instant messaging/chat);
- Skype for Business (instant messaging/chat).

According to the procedures provided by these institutions, some of them use the data encryption functionality, others do not. However, the procedures at all institutions stated that the recordings are unalterable (cannot be modified or deleted) for the entire period they are stored.

The inspection task force noted only moderate use of Symphony instant messaging at the five institutions inspected. Several explanations were provided by the institutions:

- long-standing use of other messaging systems (e.g. Bloomberg, Reuters/Refinitiv);
- long-established practices by market operators;

- low deployment rate of Symphony instant messaging among corporate clients, making it impossible to communicate with them using this tool;
- lack of functionality and user-friendliness (at this stage), particularly in terms of the market information available, which is what the incumbent providers offer.

In this respect, some institutions have indicated their intention to pursue the development and deployment of Symphony instant messaging, while others have taken a neutral stance, leaving the choice of whether or not to use it to their operators.

- With regard to the tools used, the task force observed several good practices, including the following:
 - ✓ One of the five institutions has, in their Compliance Department, a central record of requests for access to recordings of conversations and communications. This is good practice as it ensures compliance with the provisions of Article 312-40 of the AMF General Regulation on “hearing the recording of a conversation”.
 - ✓ Another of the five institutions has implemented the following recording and retention procedures:
 - dual recording methods used for market-related telephone conversations made from the dealerboard: one recording per conversation and another recording per 30-minute period;
 - retention period for recordings of Symphony instant messaging extended to 7 years (instead of the 5-year period required under the regulations);
 - dual approval required from the Compliance Department and the IT/Cybersecurity Department for requests to access recordings.
- However, a practice was also observed that may not comply with the regulations (paragraph 1 of Article 76 of Delegated Regulation (EU) 2017/565: *“Investment firms shall establish, implement and maintain an effective recording of telephone conversations and electronic communications policy [...]”*).
 - ✓ One of the five institutions did not record telephone conversations made by one of its employees from their mobile phone, even though that employee held a position related to market activities and the firm’s internal procedures require the recording of conversations for this type of position.

Good practices:

- Detailing in the procedures the ban on using mobile phones to carry out market transactions if the appropriate recording and retention solutions have not been implemented.
- Having a central record, in the Compliance Department, of requests for access to recordings of conversations and communications.
- Making dual recordings of market-related telephone conversations made from the dealerboard: one recording per conversation and another recording per 30-minute period.
- Implementing dual approval, by the Compliance Department and the IT/Cybersecurity Department, for requests to access recordings.

3.3. THE PROCEDURES CURRENTLY IN EFFECT

In this section, the inspection task force focused on analysing the recording and retention procedures currently in effect with regard to the provisions of Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures) and the provisions of the above-mentioned Articles 72 and 76 paragraph 1 (recording policy) and paragraph 8 (information provided to the client) of the same regulation.

With regard to the recording and retention procedures currently in effect, it appears that all the institutions inspected had a relatively effective set of procedures aimed at drawing attention to and clarifying the applicable regulatory provisions (as mentioned in section 2.3 of this overview).

After analysing all this documentation, the task force identified several good and poor practices. However, there were no instances of non-compliance.

➤ The following good practices were identified:

- ✓ Four of the five institutions mentioned, in their procedures and also in their internal regulations, the legislative and regulatory provisions applicable to recording and retaining recordings of telephone conversations and electronic communications.

The same four institutions also specified in their procedures and internal regulations the methods used to notify employees in advance that their conversations and communications will be recorded.

- ✓ One of the five institutions mentioned, in a durable medium, and in this case in contractual documents with its clients (e.g. in the terms of business), the obligations to inform them prior to providing investment services and to provide them with a copy of the recordings at their request.

➤ However, the following poor practices were also identified:

- ✓ One of the five institutions dealt with the subject of recording and retaining recordings in a very disparate way, across various procedures not specific to the subject, to the point of increasing the complexity of accessing all the information.

The same institution did not specify, in its electronic communications procedures, the length of time recordings are retained.

- ✓ Another of the five institutions did not refer, neither in its procedures nor in its internal regulations, to the prior notification provided to its employees whose conversations and communications are recorded. It should be noted, however, that this institution informed the employees concerned by email when they joined the company or took up their duties and also sent a periodic reminder email.

Good practices:

- Referring in procedures and also in internal regulations to the provisions relating to the recording and retention of recordings of telephone conversations and electronic communications and in particular the prior notification to employees whose conversations and communications will be recorded.
- Using a durable medium, such as the contractual documentation with the client (e.g. the terms of business), to refer to the obligations to inform the client prior to providing investment services and to provide a copy of the recordings if the client so requests.

Poor practices:

- Dealing with the subject of recording and retaining recordings in a disparate way across various procedures not specific to the subject.
- Not mentioning in the procedures the length of time recordings of electronic communications are retained.

3.4. CONTROL SYSTEM

In this section, the inspection task force focused on analysing the recording and retention control system with regard to the provisions of Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures), and of Article 76 of Delegated Regulation (EU) 2017/565 on the recording of telephone conversations or electronic communications, paragraph 6 (monitoring recordings).

With regard to the control system for recordings and their retention, the inspection task force observed only one good practice. It also noted shortcomings at all the institutions inspected in terms of both the scope of the controls and their formalisation and monitoring. Furthermore, one institution had taken into account the AMF's supervisory priorities and the SPOT inspection themes announced to the financial community. This institution had anticipated and carried out internal audits on the various themes announced even before the AMF informed it of the inspection.

- One good practice was observed:
 - ✓ One of the five institutions had implemented a solution that monitored the recording and retention systems 24 hours a day, seven days a week. This solution included an alert function that was triggered in the event of a problem.
- **However, the inspection task force also observed shortcomings that could constitute practices that do not comply with the regulations (paragraph 2 of Article 22 of Delegated Regulation (EU) 2017/565: “Investment firms shall establish and maintain a permanent and effective compliance function [...]”):**
 - ✓ **For the five institutions in the sample, the control system for recordings and their retention appears to be inadequate :**
 - **In particular, it was observed that the controls carried out in 2018 and 2019 in this regard often appeared incomplete (e.g. parts not covered) for 3 institutions. For example, the annual control plans include first- and second-level controls relating to records and their retention, but these are not carried out with sufficient frequency.**
 - **In addition, for four institutions, these controls lacked sufficient formal documentation (restraining the understanding of their scope, the associated methodology, their description, their conclusions, or any corrective actions implemented)**

Good practice:

- Implementing a control and alert system to monitor the recording and retention systems 24 hours a day, seven days a week.

3.5. PROCESS FOR IDENTIFYING AND MANAGING INCIDENTS

In this section, the inspection task force focused on analysing the process for identifying and managing recording and retention incidents with regard to the provisions of Article 22 of Delegated Regulation (EU) 2017/565 on organisational compliance requirements, paragraph 2(a) (monitoring and assessment of measures, policies and procedures).

With regard to the process of identifying and managing recording and retention incidents, and consequently the process of remediating these incidents, the task force observed only one good practice and several poor practices. It also identified situations of non-compliance with the regulations.

- Only one good practice was observed in relation to managing recording incidents:

- ✓ This practice observed at one of the five institutions relates to the implementation of a dual process for reporting incidents to the institution's senior management team *(i) on an ad hoc basis after each incident and (ii) on a monthly basis*.
- Several poor practices were also observed:
 - ✓ One of the five institutions did not have a file or a system for tracking and managing incidents involving the recording and retention of telephone conversations and electronic communications. Incidents were properly documented, but they were aggregated with all other types of incidents from all areas combined, which may have delayed the identification and processing of relevant incidents.
 - ✓ Another of the five institutions did not populate its incident tracking and management file as the incidents occurred, which may also have delayed the identification and processing of incidents.
 - ✓ Lastly, a third institution did not specify the incident resolution date in its incident tracking and management file.
- The inspection task force also observed several practices that may not comply with the regulations (paragraph 2 of Article 22 of Delegated Regulation (EU) 2017/565: *"Investment firms shall establish and maintain a permanent and effective compliance function [...]"*):
 - ✓ One of the five institutions detected at a very late stage a recording incident related to an instant messaging system used in market transactions. This delay in detection reflects the failure to implement an effective policy for recording electronic communications, but also the shortcomings of the compliance function in relation to the recording system. If the periodic checks had been effective, this recording incident could have been detected and managed earlier.
 - ✓ Another of the five institutions did not record the dates on which the incidents started and, as a result, were unable to provide details of them to the inspection task force.
 - ✓ Lastly, one institution was not sufficiently involved in tracking incidents because the control process relating to electronic communications had been outsourced.

Good practice:

- Implementing a dual process for reporting incidents to the institution's senior management team *(i) on an ad hoc basis after each incident and (ii) on a monthly basis*.

Poor practices:

- Not having a system for tracking and managing incidents related to recording and retaining recordings.
- Not specifying the incident resolution date in the incident tracking and management file.
- Not populating the incident tracking and management file as incidents occur.