Recording Requirements for Mobile Devices, Electronic Communications, and Videoconferencing

Key considerations paper

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1. Executive Summary

MiFID II introduced obligations to record telephone conversations and any electronic communications that are intended to lead to a transaction. Records must be kept for at least five years.

The COVID-19 pandemic, which began in 2020, saw the majority of AFME member firms move towards a predominantly home-based model of remote working. Firms also saw a significant increase in their use of electronic communications and videoconferencing tools for training and onboarding new staff, as well as for communicating with employees and certain clients.

European regulators acknowledged the disruptive effects of COVID-19 and introduced measures to alleviate some regulatory obligations. In particular, the European Securities and Markets Authority (ESMA) recognised that, considering the exceptional circumstances resulting from the COVID-19 pandemic and despite steps taken by firms, the recording of relevant conversations required by MiFID II may be impracticable in some scenarios.

However, many also maintained that firms should continue to meet regulatory requirements for recording telephone conversations or electronic communications. Notably, Julia Hoggett, Director of Market Oversight at the Financial Conduct Authority (FCA), clarified in her speech, "Market abuse in a time of coronavirus", that the FCA expects that, going forward, office and working-from-home arrangements should be equivalent.

Firms are expected to update their policies, refresh training, and issue reminders on their policies. Firms must also ensure adequate oversight and surveillance of their use of electronic communications and identify and mitigate any new risks the new remote working environment may create. Regulators are clear that use of privately owned devices if recording is not possible should be prevented. Firms must formally approve the use of new communication channels, ensuring that controls are in place to prevent market abuse and protect the firms' data.

With this in mind, members of AFME's Compliance Issues working group collaborated with Latham & Watkins to produce this key industry considerations paper. The paper focuses on the legal and regulatory framework, identifies the risks that firms are facing — including the impact of remote and hybrid working, which was amplified as a result of COVID-19 — and provides examples of good practice to manage and mitigate those risks. It also provides recommendations for industry and regulators in adapting to the changing environment, be that hybrid working or embracing innovation and new technology.

The paper is also intended to be used within firms to support discussions between legal, compliance, surveillance, and board level committees, to help firms to understand, and potentially harmonise, the industry's approaches towards mobile devices and e-comms. The paper will also be used to support discussions with European regulators.

This paper is intended for general informational purposes only, and does not provide, and does not constitute, investment, tax, regulatory, business, or legal advice to any individual or entity.

2. Introduction

AFME members have, for many years, retained recordings of telephone conversations[1] and electronic communications with clients. Practices initially varied, but certain common themes in the early stages of recording such communications can be identified. Often, the purpose of recording was to enable the parties to a transaction to understand and/or reaffirm the specifics of the conversation (which may have brought about the contract) and its terms. For instance, did a client say "buy" or "sell" during a telephone conversation about a transaction in particular financial instruments? A tape recording (to take an example) would give the bank involved a record of what had been said in order to clarify the position, if necessary, at a later date. Typically, the retention period for such recordings was relatively short, often three months, because any potential dispute as to the basis of a transaction would emerge quickly, given the settlement period, and thanks to the contract/trade matching process and other pre-settlement controls aimed at identifying potential disputes.

In addition, in the early stages of the recording and retention of such calls (again to use telephone conversations as an example) the costs of storage were considerable, and the retrieval of records was complex, both of which tended towards keeping fewer records for as short a period of time as seemed sensible. Longer periods may have existed in respect of written communications, when storage and retention were more straightforward and when the challenge of ensuring high quality recordings was absent. Over time, these challenges have evolved — remote working has led to an increased use of video calls, and issues have emerged over whether the audio alone or the video aspect should be recorded, with data and retrieval consequences.

Recording and retention practices have not been limited to client communications; in addition, some exchanges operated rules that requested or required members to keep records of telephone conversations between members for particular periods of time. Such rules varied between exchanges and over time.

When it became clear that recordings were being made and retained, they then sometimes became relevant in a different context to that of proving the terms upon which a transaction had been undertaken. First, they might be evidence in litigation and subject to the usual rules around disclosure. Second, regulators began to request firms provide such records to assist regulators with their investigations. These demands grew over time.

Eventually, a body of formal rules emerged (analysed in more detail in section 3), which set out a legal basis upon which recordings of communications needed to be made and retained. This brought certainty to the regulatory expectation in this area, and also clarified the legitimacy of the making of such records given the possibility that other laws (such as personal data privacy) might be infringed by voluntary record creation and retention. Suffice to say, AFME members now work under a detailed legislative background (primarily set out in MiFID) and have done so without significant legislative change since MiFID II came into force on 3 January 2018.

However, AFME members have also spent a considerable period of time over 2020 and 2021 working (to a greater or lesser extent) in a remote environment. Persons whose activities fell within the recording obligation no longer sat at a desk, in an office, where recording infrastructure could be aligned within and more easily supported by the business telephony in a structured and organisational way. The extent of home-working involved was not typically envisaged by existing business continuity arrangements. Indeed, regulators made a number of pronouncements (which we highlight further in section 3 below) providing a limited degree of forbearance for firms adapting to home working environments.

Overlaying the legislative history in this area, and the challenges of a prolonged period of remote working, is the rapid evolution of the technology available to enable employees to communicate with each other and their clients. Increasingly, device-enabled applications (WhatsApp and Skype are typical examples) have become all-pervasive. The industry has grappled with the rapid adoption of new technology; the speed with which it can become a "new normal" as far as communicating goes, and the fact that, increasingly, the recording, storing, or monitoring of such applications in the way envisaged by the rules poses significant technological challenges and additional costs. As a recent example, the FCA published Market Watch 66, highlighting for firms the challenges of the use of applications such as WhatsApp and

[1] In this paper, we use the phrase "telephone conversation", and similar, to mean any audio stream of communication, no matter what system may be used in its production.

Skype (and we refer in more detail to Market Watch 66 in section 3 below). Further, it is not always apparent without significant analysis whether a given application, whose primary purpose may not in fact relate to communication, may nevertheless contain communication capabilities.

In November 2020, AFME conducted a survey of its Compliance Issues Working Group members, asking them to provide details of their respective approaches to the use and recording of various communication channels. Although firms had generally updated their policies on mobile devices and e-comms, the survey identified several key issues members wanted to consider further. In particular, respondents agreed that it would be helpful to reach a common definition and understanding of "business purposes" and "business communications". Firms also stressed the importance of considering how to monitor video calls effectively, and whether it would be acceptable to record only the audio component of video calls.

All of the above points make this a topical area for AFME members. This paper is intended to guide future practice by AFME members, without deconstructing in detail the rules around which communications need to be recorded (which was largely settled in dialogue between trade associations and regulators in the run up to the implementation of MiFID II). This paper describes the benefits of capturing in-scope communications on monitorable devices, and identifies some of the risks inherent in the rapid technological change in this area (although the focus of this paper is on the ability to capture such communications, rather than on the means by which subsequent risk-based monitoring may occur).This paper is intended to assist firms in making risk-based judgements on the types of platforms that may be used for certain types of communication, and highlights some of the risks that firms need to manage in making these judgements. Finally, the paper addresses the question of the demands of clients (who may be working in an unregulated environment) communicating with advisers working in a highly regulated environment.

This paper is not binding on members, and has not been blessed by any regulator, but is intended to provide a foundation for AFME members against which to consider the rules, the technology, and their interactions with clients.

3. The Legal Framework

3.1 The UK Requirements on the Recording of Devices and E-Communications

The current regulatory obligations in the UK are taken from MiFID II (albeit that the Financial Services Authority (FSA) and the FCA had recording requirements in place prior to this directive). These rules are therefore pan-European in origin, and the UK's approach has not been affected by Brexit.

The FCA's requirements appear in rule SYSC 10A: Recording telephone conversations and electronic communications. The rules apply to a variety of firms (SYSC 10A.1.1), which would include the typical AFME member, and which notably applies to all MiFID investment firms and third-country investment firms.

It is worth reiterating that the market does not interpret the requirement to record as applicable to all client- and business-related conversations of MiFID- and third-country investment firms, and neither AFME members nor EEA regulators appear to see a basis for revisiting this, as a result of the changes to firms' use of technology brought about by COVID-19 or otherwise. Market practice is currently of view that corporate finance advisory services, in particular, do not require recording to be on the origination, rather than the execution, side of any dealing in investments. Thus, for reasons such as complying with competing legislation (e.g., that relating to data protection) and reducing the creation and maintenance of records that are not strictly required, the widely held view continues to be that firms are not required to record conversations relating to corporate finance activities, with very limited exceptions (e.g., MAR market soundings).

Rather, SYSC 10A applies when those firms are carrying out certain regulated activities, typically: arranging (bringing about) deals in investments (which in practice tends to capture public- rather than private-side activities, given the need for the transaction's execution to involve the firm, too), dealing in investments as agent, dealing in investments as principal, and managing investments (in MiFID's

terminology, this means reception and transmission of orders, dealing on behalf of clients, dealing on own account, and portfolio management).

Certain activities are also exempt, such as when the instrument is not traded on an EU venue (SYSC 10A.1.4(3)). The UK has previously gold-plated the MiFID requirement by also applying it to certain management activities that would fall outside MiFID. This extension is beyond the scope of this memorandum, other than to say that gold-plating makes it clear that this is an area in which authorities in the UK have given considerable and detailed thought to the scope, because gold-plating MiFID II is a complex process.

The actual obligation in SYSC 10A.1.6 states that the firm must take all reasonable steps to record telephone conversations and keep a copy of electronic communications that relate to the above investment activities ("recordable investment activities") and that are made with, sent from, or received on equipment provided by the firm to employees, or the use of which by an employee has been accepted or permitted by the firm. Under SYSC 10A.1.7, the firm must also take all reasonable steps to prevent employees from making, sending, or receiving communications on privately-owned equipment that relate to recordable investment activities and which the firm is unable to record or copy. The telephone conversations and electronic communications include those intended to bring about transactions, even if the transaction does not materialise (SYSC 10A.1.8).

Conversations with colleagues (not only with clients) can come within the scope of this obligation, in which they are intended to result in transactions or relate to orders. (See ESMA's Q&As on investor protection topics, answers A1 and A9.)

As a result, AFME members operate in accordance with internal rules that require communications caught by these requirements either to be undertaken on firm-owned equipment (which is automatically recorded in accordance with the requirements), or on personally-owned devices in which the firm is able to create records of the same quality. (for example, a personally-owned mobile with a particular application that enables conversations caught by the requirement to be recorded by the firm). Consequently, in general, AFME members also prohibit the undertaking of certain communications on non-firm equipment that cannot be recorded in accordance with SYSC 10A.1 requirements.

Whilst all AFME members operate procedures designed to achieve compliance with SYSC 10A.1, members may also in-scope certain other types of business activity that they wish to be recorded in the same way. For instance, firms may use an internal definition such as "business activity", which sets out a broader definition than the activities compulsorily caught in SYSC 10A.1 – of communications that firms expect to be undertaken on recorded devices, and not privately. Firms are entitled to do so, subject to obligations under the law, such as data protection requirements. Firms carry out different activities, and therefore business purposes may differ from one firm to another. Some firms also find it easier to capture all communications undertaken on systems in which some communications may be caught, rather than attempting to turn "on" and "off" the recording functionality.

Each firm is free to take its own risk-based judgements in this area, as it may want to be able to investigate allegations of misconduct that fall outside the activities referred to in SYSC 10A.1. This does lead to somewhat differential approaches between firms (where the balance may also change over time), which the following examples will illustrate:

- Some firms only apply MiFID-standard recording obligations to transactions that fall within SYSC 10A.1;

- Some firms apply the requirements to all regulated activities (for instance, because recording all lines is easier than identifying persons who do, and do not, undertake business ontelephone lines that fall within SYSC 10A.1), or because a different risk judgement has been made as to the nature of the conversations that the firm wishes to ensure are recorded; and

- Some firms require any activity related to an employee's status as an employee of the firm to be undertaken in a recordable manner akin to that required by SYSC 10A.1 (such that any "business" relating to the firm, whether or not it amounts to a regulated activity, must be undertaken in the way required by SYSC 10A.1).

The approaches set out above are not so much the result of different interpretations of the obligations set out in MiFID, but different approaches to managing the practical challenges and risks in this evolving area.

3.2 Regulatory Focus

MiFID II's rules focused on the execution of transactions and conversations leading to such execution, rather than on regulated activities more generally. MiFID II also extended transaction reporting obligations from the execution of transactions to the reception and transmission of orders. There is a link to these areas of focus, as recording conversations will help regulators conduct investigations that may be triggered by transaction report surveillance. The FCA provided guidance on which communications it considered to be in scope of the recording obligation in PS17/14. ESMA also provided guidance on the scope of the MiFID II taping requirements in the run up to implementation in its Q&A on investor protection topics.

The FCA exercised a degree of forbearance regarding firms' ability to record relevant communications at the start of COVID-19. The FCA expected firms to continue to record calls and electronic communications within scope of the rules, irrespective of the fact that staff were not in their typical office. However, firms unable to record all relevant communications were permitted instead to take steps to mitigate the associated risks (e.g., enhanced monitoring and/or retrospective review). From the beginning of 2021, given the length of time that firms had to get used to home-working, the FCA began toexpect firms to record all relevant communications once again. ESMA provided similar forbearance in itsguidance on this topic, which noted the issue and encouraged firms to return to normal standards of telephone taping as soon as possible.

In Market Watch 66, the FCA set out its expectations for firms on recording telephone conversations and electronic communications when alternative working arrangements are in place. The FCA emphasised that, although there is no specific restriction on the technologies or applications firms can use for communications, firms must understand the recording obligations and have effective policies, controls, and oversight to ensure that these obligations are met. In particular, the FCA highlighted that risks from misconduct may be heightened or increased by home-working, including from increased use of unmonitored and/or encrypted communication applications, since firms are less able to monitor communications using these channels effectively. The FCA stated that firms need to ensure that, if such applications are used for in-scope activities on business devices, they are recorded and auditable. Further, the FCA expects firms proactively to review their recording policies and procedures every time the context and environment they operate in changes. Where new or amended recording policies are needed, these should be clearly set out in writing, documented, and signed off under appropriate governance arrangements. The FCA also expects firms to provide enhanced or refreshed training to staff covering the use of new technologies, and the conduct risks arising prior to the roll out of such new technologies. These observations were made during a period in which e-communication platforms proliferated during the early lockdown period.

In March 2017, the FCA fined an investment banker £37,198 for sharing confidential information via WhatsApp. The FCA found that he shared the information with two friends, one of whom was also a client of the firm. The information included the identity of clients, the details relating to client mandates, and the fee the bank would charge for its involvement in the transaction. The FCA found that the individual, who was an approved person, had breached Statement of Principle 2 for failing to act with due skill, care, and diligence. Notably, other actions have been taken in other jurisdictions in response to similar incidents.

3.3 Approaches to Different Communication Platforms

On the basis that all firms require recording and retention of certain conversations and communications (only the breadth of that requirement varies), all AFME members needed to develop an approach to identifying the communication platforms that are, and are not, permitted for use whenever the recording obligation applies. Firms can (of course) control the systems that are installed in the office environment and on firm-provided remote working devices (such as laptops). However, it is common for compliance teams to receive requests from business lines whose clients invite them to a video meeting with a link to an electronic platform that does not have recording functionality. Where such requests are made, firms need to consider them in accordance with the MiFID and SYSC recording obligations. Such factors include: i) whether the content of the meeting could fall within the recording requirements; ii) whether documents are likely to be screen shared; and iii) whether it is practical to create post-meeting minutes.

3.4 Key Challenges for Firms

AFME members have identified the following key challenges in handling the issues discussed in this paper:

- The types of communication that fall within the requirements set out in SYSC 10A.1 (although members note each has had to develop a policy since 2018 in light of discussions between trade associations and regulators on the run up to implementation of MiFID II, and that these points are not the focus of this paper).
- Whether, to what extent, and with what definition, firms should expand on the obligations set out in SYSC 10A.1 and require additional communications made for business purposes also to be recorded;
- How to get compliance and senior management comfortable to allow recorded staff to use platforms with video functionality and trust them to use another recorded tool for business purposes, in the knowledge they may use non-recorded video calls for business purposes by error or with intention;
- How to define situations in which there is a regulatory risk;
- How to evaluate new and rapidly evolving communications systems for use (or not) in accordance with the recording requirements, including the resource required for the effective retrieval and review of such records, without which practical capability the recordings are, at best, redundant and, at worst, a significant additional liability to the firm;
- How to evaluate whether a system not primarily used for communications (for example, a post-trade affirmation system) might nonetheless contain a means of communication that could, in due course, be used in a pre-trade environment;
- How to interact with other regulated firms when recording obligations and permissions may be different, and there may be disagreement about whose IT "tenant" (version of the communications platform) should hold the master records. At present, many large communications software providers do not permit co-ownership of such records or allow complete copies of a multi-firm collaboration area to be made and shared with counterparties;
- How to explain the communication recording requirements to corporate clients who are not subject to the same financial regulatory requirements for communication recording. Those corporate clients may want to use communication means such as video calls for efficiency and perhaps for substituting a face-to-face meeting that could not be done during the COVID-19 lockdown or under travel restrictions. For them, the availability of recording functionality is not relevant, though it may be for regulated firms;
- The extent to which home-working has driven both further technical change and increased the extent to which alternative means of communication might be used. For instance, video-based systems (e.g., Webex) have become increasingly prevalent in a home-working environment. AFME members have needed rapidly to assess the extent to which the use of such systems is, or is not, capable of being recorded in accordance with the requirements. For instance, it may be possible to make a voice recording of a Webex call, however, the content of the call may refer to documents that are shared on screen at the same time, or the voice recording does not make sense without the video;

- How to navigate technological issues, such as distinguishing background noise;
- How to balance the cost and efficiency of the system of recording, storage, and retrieval against the recording requirements in a proportional manner;
- How to navigate requests from regulated clients to carry out business communications via video call;
- How to balance the challenges of using video conferencing applications against the human and psychological need for colleagues to "connect";
- How to manage challenges relating to security issues with some applications;
- How to collectively influence platform providers to ensure that relevant media are compatible with archiving tools;
- How to coordinate the business demands for access placed on technology departments;
- How to balance "critical" access to client calls with the firm's recording and surveillance obligations;
- How to define and police the limitations and exceptions that allow the use of unrecorded media;
- How to manage the pace of introducing new systems to accommodate new working arrangements while mitigating the increased risk from deploying exceptions or temporary solutions;
- How to ensure appropriate governance when considering new or alternative ways to communicate and the implications on existing controls;
- How to risk-assess systems or approaches to working arrangements in light of new communicationmethods driven by clients or business management;
- How to ensure appropriate business management validation and accountability for the development and deployment of new communication media; and
- How to ensure proactive collaboration among business management, technology, legal, and compliance departments on global changes to communication media, taking into account cross-border risks and diverging regulatory expectations.

4. Impact of Remote Working Experience Due to COVID-19

The increased prevalence of home-working has accelerated a number of factors set out in this paper.

- The increased use of video calls rather than audio-only calls;
- Accelerating technological change in communication more generally (with new entrants taking advantage of the home working environment), leading to a need to evaluate additional communication methods;
- An increase in the demands of clients around the use (or indeed non-use) of favouredplatforms;
- The reaction of regulators to potential challenges around successful recording and monitoring of communications in a home-working environment;
- The lack of a controlled and protected working environment;
- The need to continue managing new platforms and technology and to develop additional monitoring capabilities;
- Enhancements to training sessions (frequency and content) and policies to highlight the increased risks and expectations on recorded staff.

In particular, these demands have required increased interaction between compliance, IT, legal, operations, and other control functions in order to provide both the platform support and technological evaluation needed to ensure compliance with pre-existing requirements.

5. Recommendations for Industry and Regulators in an Evolving Marketplace

The primary driver behind the mandatory obligation to record certain communications, both with clients and internally, is the regulators' desire to obtain contemporaneous records of conversations relating to transactions in financial instruments. In our view, this is clear from the content in section 1 of this paper, the legal framework in section 3, and in particular from the regulatory focus areas in section 3.2. In other words, we see the mandatory telephone taping requirement as a useful adjunct (to the regulators) of the obligations on firms to provide transaction reports. Transaction reports enable regulators to monitor for certain examples of insider dealing and market manipulation, for which telephone records assist in this regard. However, as the mandatory recording obligation is focused on the execution of transactions in financial instruments, and steps that are preliminary to such transactions potentially being executed, it is also clear that not all potential instances of behaviour prohibited under MAR are within scope of the mandatory recording requirement.

In an evolving marketplace and with faster technological developments, it is important to refocus the recording requirements. In AFME's view, members and regulators should focus their efforts in the following areas:

- **What**: ensuring that all transactions in financial instruments and preliminary conversations that fall within the mandatory recording obligation are undertaken on recorded applications, and that if there is any doubt about the scope of this obligation or the approach that firms should take, firms should consider this to be an obligation primarily aimed at transactions in which transaction reporting obligations apply (or if such an obligation would apply if the instrument involved was listed on an EU or UK venue);
- **How**: firms should take a pragmatic approach to the use of media that falls outside the approach outlined in the above bullet point. In those circumstances, firms may wish to record conversations for their own business purposes (section 3.1 above sets out reasons why this may be the case). However, in such circumstances, a sensible and prudent alternative to the recording of a conversation (for instance, because an application preferred by client is being used) should be taken, such as — where the conversation contains important information that ought to be captured by the firm — a written note of the conversation. As an example, when a corporate finance advisor is providing important advice to a client about a particular matter (for instance, whether a piece of information amounts to inside information that needs to be announced by a company), a written note ought to be sufficient; and
- **Why**: regulators are encouraged to be clear on the examples of circumstances in which the record-keeping obligation is mandatory, the main regulatory concerns for the requirements, and to provide some flexibility, if possible, to firms who attempt to capture communications beyond the mandatory requirement, but who face the issues set out in this paper. If the FCA intends to provide further commentary in this area, AFME members believe that examples of good and bad practice (as observed by the FCA) in respect of the existing rules and guidance would be helpful.

6. Limitations on Scope

Whilst the focus of this paper has been on the MiFID obligations, in particular as enforced in the UK by the FCA under its SYSC rules, the paper has also been considered by AFME members and/or Latham & Watkins lawyers based in EU jurisdictions.

The intention of this paper is to promote a technology- and application-neutral approach by the industry to the recording obligations.

This is an area in which the technology continues to evolve rapidly, and firms considering this paper in the future should do so in light of such developments.

Whilst this paper has been produced by AFME members, and is focused on the obligations that apply in the regulated community, it is understood that a particular challenge faced by such firms is the interaction that they have with unregulated clients (such as listed companies), and whilst those third parties are not necessarily subject to the same recording requirements, they are encouraged to consider the points set out in this paper that apply to their advisers.

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